

FEDERAL COURT OF AUSTRALIA

Smirke on behalf of the Jurruru People v State of Western Australia

[2015] FCA 939

Citation: Smirke on behalf of the Jurruru People v State of Western Australia [2015] FCA 939

Parties: **BRENDA SMIRKE, DAVID SMIRKE, IVAN SMIRKE, LINDA SMIRKE, LORRAINE SMIRKE, PEGGY SMIRKE AND TOBY SMIRKE v STATE OF WESTERN AUSTRALIA, BAMBI PTY LTD AND CHEELA PLAINS PASTORAL CO PTY LTD, ANDREW NICHOLAS GLENN, PETER ROBERT GREY, SUSAN JEAN GREY, DONALD RAYMOND HAMMARQUIST, WENDY RUTH HARVEY, DANIEL JOHN HASTIE, JASON GARY HASTIE, STAMCO BEEF PTY LTD and YAMATJI MARLPA ABORIGINAL CORPORATION**

File number: WAD 6007 of 2000

Judge: **MCKERRACHER J**

Date of judgment: 1 September 2015

Catchwords: **NATIVE TITLE** – consent determination of native title – whether proposed consent determination within power appropriate – requirements of s 87A *Native Title Act 1993* (Cth) satisfied

Legislation: *Native Title Act 1993* (Cth) ss 13(1), 56(2), 66, 68, 87, 87A, 94A, 225, 251B

Cases cited: *Billy Patch and Others on behalf of the Birriliburu People v State of Western Australia* [2008] FCA 944
Brown (on behalf of the Ngarla People) v State of Western Australia [2007] FCA 1025
Hughes (on behalf of the Eastern Guruma People) v Western Australia [2007] FCA 365
Lander v State of South Australia [2012] FCA 427
Lota Warriia (on behalf of the Poruma and Masig Peoples) v Queensland (2005) 223 ALR 62
Lovett on behalf of the Gunditjmarra People v State of Victoria [2007] FCA 474
Munn for and on behalf of the Gunggari People v State of Queensland (2001) 115 FCR 109
Ward v State of Western Australia [2006] FCA 1848

Watson v State of Western Australia (No 3) [2014] FCA
127

Date of hearing: 1 September 2015

Place: Perry Flats, Kooline Station, Western Australia

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 53

Counsel for the Applicant: Ms M Chilala with Dr C Tan

Solicitor for the Applicant: Yamatji Marlpa Aboriginal Corporation

Counsel for the First Respondent: Ms E Owen

Solicitor for the First Respondent: State Solicitors Office

Counsel for the Third Respondents: Ms M Watts

Solicitor for the Third Respondents : M Watts Legal

Counsel for the Fourth Respondent: The Fourth Respondent did not appear

**IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION**

WAD 6007 of 2000

**BETWEEN: BRENDA SMIRKE, DAVID SMIRKE, IVAN SMIRKE, LINDA
SMIRKE, LORRAINE SMIRKE, PEGGY SMIRKE AND
TOBY SMIRKE
Applicant**

**AND: STATE OF WESTERN AUSTRALIA
First Respondent**

**BAMBI PTY LTD, CHEELA PLAINS PASTORAL CO PTY
LTD, ANDREW NICHOLAS GLENN, PETER ROBERT
GREY, SUSAN JEAN GREY, DONALD RAYMOND
HAMMARQUIST, WENDY RUTH HARVEY, DANIEL JOHN
HASTIE, JASON GARY HASTIE and STAMCO BEEF PTY
LTD
Third Respondents**

**YAMATJI MARLPA ABORIGINAL CORPORATION
Fourth Respondent**

JUDGE: MCKERRACHER J

DATE OF ORDER: 1 SEPTEMBER 2015

**WHERE MADE: PERRY FLATS, KOOLINE STATION, WESTERN
AUSTRALIA**

THE COURT NOTES THAT:

- A. The Applicant in proceeding WAD 6007 of 2000 has made a native title determination application ("**Jurruru Application**").
- B. The Applicant in the Jurruru Application, the State of Western Australia and the other Respondents to the proceedings ("**the parties**") have reached an agreement as to the terms of the determination which is to be made in relation to part of the land and waters covered by the Jurruru Application ("**the Determination Area**"). The external boundaries of the Determination Area are described in Schedule One to the determination.
- C. The parties have agreed that, in respect of the balance of the land and waters of the Jurruru Application (namely those areas of the Jurruru Application which are

overlapped by native title determination application WAD 6173 of 1998 ("**Gobawarra Minduarra Yinhawanga Application**"), no determination be made at present.

- D. Each of the pastoral group number 3 respondents, with the exception of Bambi Pty Ltd, has agreed to the terms of the determination on the basis of having reached agreements with the Applicant in relation to those portions of their respective pastoral leases that are situated within the Determination Area. Following the making of the determination, those agreements will be executed and application will be made for the agreements to be registered as Indigenous Land Use Agreements on the Register of Indigenous Land Use Agreements as body corporate agreements pursuant to s 24BG of the *Native Title Act 1993* (Cth).
- E. Pursuant to s 87A(1) and s 87A(2) of the *Native Title Act 1993* (Cth) the parties have filed with this Court an agreement in writing setting out the terms of the agreement reached by the parties in relation to part of the Jurruru Application.
- F. The terms of the agreement involve the making of consent orders for a determination pursuant to s 87A and s 94A of the *Native Title Act 1993* (Cth) that native title exists in relation to the land and waters of the Determination Area.
- G. The parties acknowledge that the effect of the making of the determination is that the members of the native title claim group, in accordance with the traditional laws acknowledged and the traditional customs observed by them, should be recognised as the native title holders for the Determination Area as set out in the determination.
- H. Pursuant to s 87A(4) of the *Native Title Act 1993* (Cth), the parties have requested that the Court determine the proceedings that relate to the Determination Area without holding a hearing.
- I. The Applicant in the Jurruru Application has nominated the Jurruru Aboriginal Corporation pursuant to s 56(2)(a) of the *Native Title Act 1993* (Cth) to hold the determined native title in trust for the native title holders.

BEING SATISFIED that a determination of native title in the terms set out in Attachment A would be within the power of the Court and, it appearing to the Court appropriate to do so, pursuant to s 87A and s 94A of the *Native Title Act 1993* (Cth) and by the consent of the parties:

THE COURT ORDERS THAT:

1. In relation to the Determination Area, there be a determination of native title in WAD 6007 of 2000 in terms of the determination as provided for in Attachment A.
2. The Jurruru Aboriginal Corporation shall hold the determined native title in trust for the native title holders pursuant to s 56(2)(b) of the *Native Title Act 1993* (Cth).
3. In relation to the land and waters of application WAD 6007 of 2000 which are overlapped by application WAD 6173 of 1998, no determination be made and the matters be listed for directions on a date to be fixed to consider the future conduct of the proceedings.
4. There be no order as to costs.

Date that entry is stamped: 1 September 2015

The Honourable Justice McKerracher

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ATTACHMENT A
DETERMINATION

THE COURT ORDERS, DECLARES AND DETERMINES THAT:

Existence of native title (s 225 *Native Title Act*)

1. Subject to paragraph 2, native title exists in the Determination Area in the manner set out in paragraph 4 of this determination.
2. Native title does not exist in those parts of the Determination Area the subject of the interests identified in Schedule Three which are shown as generally shaded red on the maps at Schedule Two.

Native title holders (s 225(a) *Native Title Act*)

3. The native title in the Determination Area is held by the Jurruru People. The Jurruru People are the people referred to in Schedule Five.

The nature and extent of native title rights and interests and exclusiveness of native title (s 225(b) and s 225(e) *Native Title Act*)

4. Subject to paragraphs 2, 5, 6 and 9 the nature and extent of the native title rights and interests in relation to the Determination Area are that they confer the following non-exclusive rights on the Jurruru People, including the right to conduct activities necessary to give effect to them:
 - (a) the right to enter and remain on the land, camp, erect temporary shelters, and travel over and visit any part of the land and waters of the Determination Area;
 - (b) the right to hunt, fish, gather, take and use the traditional resources of the land;
 - (c) the right to take and use water;
 - (d) the right to engage in cultural activities on the Determination Area, including:
 - (i) visiting places of cultural or spiritual importance and maintaining, caring for, and protecting those places by carrying out activities to preserve their physical or spiritual integrity; and
 - (ii) conducting ceremony and ritual; and

- (e) the right to be accompanied by those people who, though not Jurruru people, are:
 - (i) spouses, parents or descendants of one or more Jurruru person; or
 - (ii) people required by traditional law and custom for the performance of ceremonies or cultural activities on the Determination Area.

Qualifications on the native title rights and interests

- 5. The native title rights and interests set out in paragraph 4:
 - (a) are subject to and exercisable in accordance with:
 - (i) the laws of the State and the Commonwealth, including the common law; and
 - (ii) the traditional laws and customs of the Jurruru People for personal, domestic and communal purposes (including social, cultural, religious, spiritual and ceremonial purposes) but not for commercial purposes; and
 - (b) do not confer any rights in relation to:
 - (i) minerals as defined in the *Mining Act 1904* (WA) (repealed) and in the *Mining Act 1978* (WA);
 - (ii) petroleum as defined in the *Petroleum Act 1936* (WA) (repealed) and in the *Petroleum and Geothermal Energy Resources Act 1967* (WA);
 - (iii) geothermal energy resources and geothermal energy as defined in the *Petroleum and Geothermal Energy Resources Act 1967* (WA); or
 - (iv) water captured by the holders of the Other Interests pursuant to those Other Interests.
- 6. The native title rights and interests set out in paragraph 4 do not confer:
 - (a) possession, occupation, use and enjoyment on the Jurruru People to the exclusion of all others; or
 - (b) a right to control the access to, or use of, the land and waters of the Determination Area or its resources.

Areas to which ss 47, 47A or 47B of the *Native Title Act* apply

7. Sections 47, 47A and 47B of the *Native Title Act* do not apply to disregard any prior extinguishment in relation to the Determination Area.

The nature and extent of any other interests

8. The nature and extent of the Other Interests are described in Schedule Four.

Relationship between native title rights and other interests

9. Except as otherwise provided for by law, the relationship between the native title rights and interests described in paragraph 4 and the Other Interests is that:
 - (a) to the extent that any of the Other Interests are inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title rights and interests continue to exist in their entirety, but the native title rights and interests have no effect in relation to the Other Interests to the extent of the inconsistency during the currency of the other interests; and otherwise,
 - (b) the existence and exercise of the native title rights and interests do not prevent the doing of any activity required or permitted to be done by or under the Other Interests, and the Other Interests, and the doing of any activity required or permitted to be done by or under the Other Interests, prevail over the native title rights and interests and any exercise of the native title rights and interests but do not extinguish them.

Liberty to Apply

10. The parties have liberty to apply to establish the precise location and boundaries of the public works and adjacent land and waters identified in relation to any part or parts of the Determination Area referred to in clause 2 of Schedule Three of this determination.

Definitions and Interpretation

11. In this determination, unless the contrary intention appears:

“**Determination Area**” means the land and waters described in Schedule One and depicted on the maps at Schedule Two;

“**land**” has the same meaning as in the *Native Title Act* and, for the avoidance of doubt, includes any natural collection of water found on the land which does not fall within the definition of “waters”;

“*Native Title Act*” means the *Native Title Act 1993* (Cth);

“**Other Interests**” means the legal or equitable estates or interests and other rights in relation to the Determination Area described in Schedule Four and referred to in paragraph 8;

“**resources**” means flora, fauna, and other natural resources such as charcoal, stone, soil, wood, resin and ochre (except, for the avoidance of doubt, ochres for use in the manufacture of porcelain, fine pottery or pigments which are minerals pursuant the *Mining Act 1904* (WA) (repealed));

“**use**” does not include use by way of trade;

“**underground water**” means water from and including an underground water source, including water that percolates from the ground; and

“**waters**” has the same meaning as in the *Native Title Act*.

12. In the event of any inconsistency between the written description of an area in Schedule One, Three, Four or Five and the area as depicted on the maps at Schedule Two, the written description prevails.

SCHEDULE ONE

DETERMINATION AREA

The **Determination Area**, generally shown as bordered in blue on the maps at Schedule Two, comprises all land and waters bounded by the following description:

All those lands and waters commencing at the intersection of the southern bank of the Hardy River with Longitude 116.123696 East and extending generally southeasterly along that river bank to Longitude 117.027727 East; Then southeasterly to Latitude 23.098797 South, Longitude 117.169463 East, being a point on the present boundary of Native Title Application WAD6173/1998 Gobawarra Minduarra Yinhawanga (WC1997/043); Then generally southerly, generally southeasterly and generally northeasterly along boundaries of that native title application to Latitude 23.952359 South; Then generally southwesterly through the following coordinate positions:

LATITUDE (SOUTH)	LONGITUDE (EAST)
23.970868	117.267179
23.971648	117.266289
23.998609	117.236780

Then southwesterly to Latitude 24.031719 South, Longitude 117.199411 East, being a point on the present boundary of Native Title Application WAD6033/1998 Wajarri Yamatji (WC2004/010); Then northwesterly along the boundary of that native title application to Latitude 24.903982 South; Then generally northwesterly through the following coordinate positions:

LATITUDE (SOUTH)	LONGITUDE (EAST)
23.532377	116.495492
23.118482	116.341184

Then northwesterly to the southeastern corner of Reserve 40991; Then northerly along the eastern boundary of that reserve to its northeastern corner; Then northerly back to the commencement point.

Note: **Geographic Coordinates provided in Decimal Degrees.**

Cadastral boundaries sourced from Landgate's Spatial Cadastral Database dated 30th April 2015.

The Hardy River sourced from 1:50,000 Department of Defence Digital verified data.

For the avoidance of doubt the application excludes any land and waters already claimed by:

Native Title Application WAD6173/1998 Gobawarra Minduarra Yinhawanga (WC1997/043) as accepted for registration on the 6th September 2010.

Native Title Application WAD6033/1998 Wajarri Yamatji (WC2004/010) as accepted for registration on the 17th October 2014.

Datum: **Geocentric Datum of Australia 1994 (GDA94)**

Prepared By: **Native Title Spatial Services (Landgate) 15th June 2015**

Use of Coordinates:

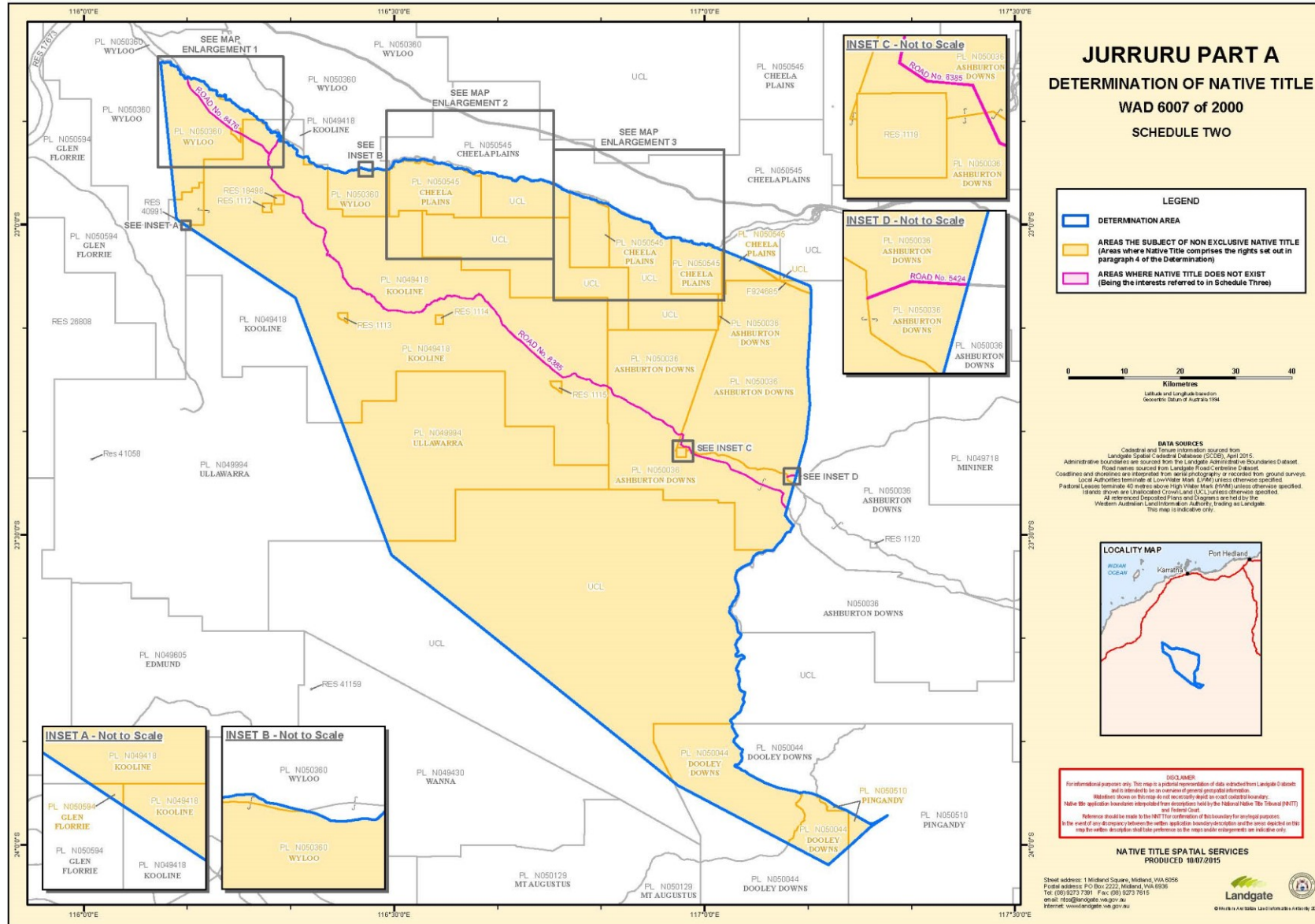
Where coordinates are used within the description to represent cadastral or topographical boundaries or the intersection with such, they are intended as a guide only. As an outcome to the custodians of cadastral and topographic data continuously recalculating the geographic position of their data based on improved survey and data maintenance procedures, it is not possible to accurately define such a position other than by detailed ground survey.

NTSS011 CM

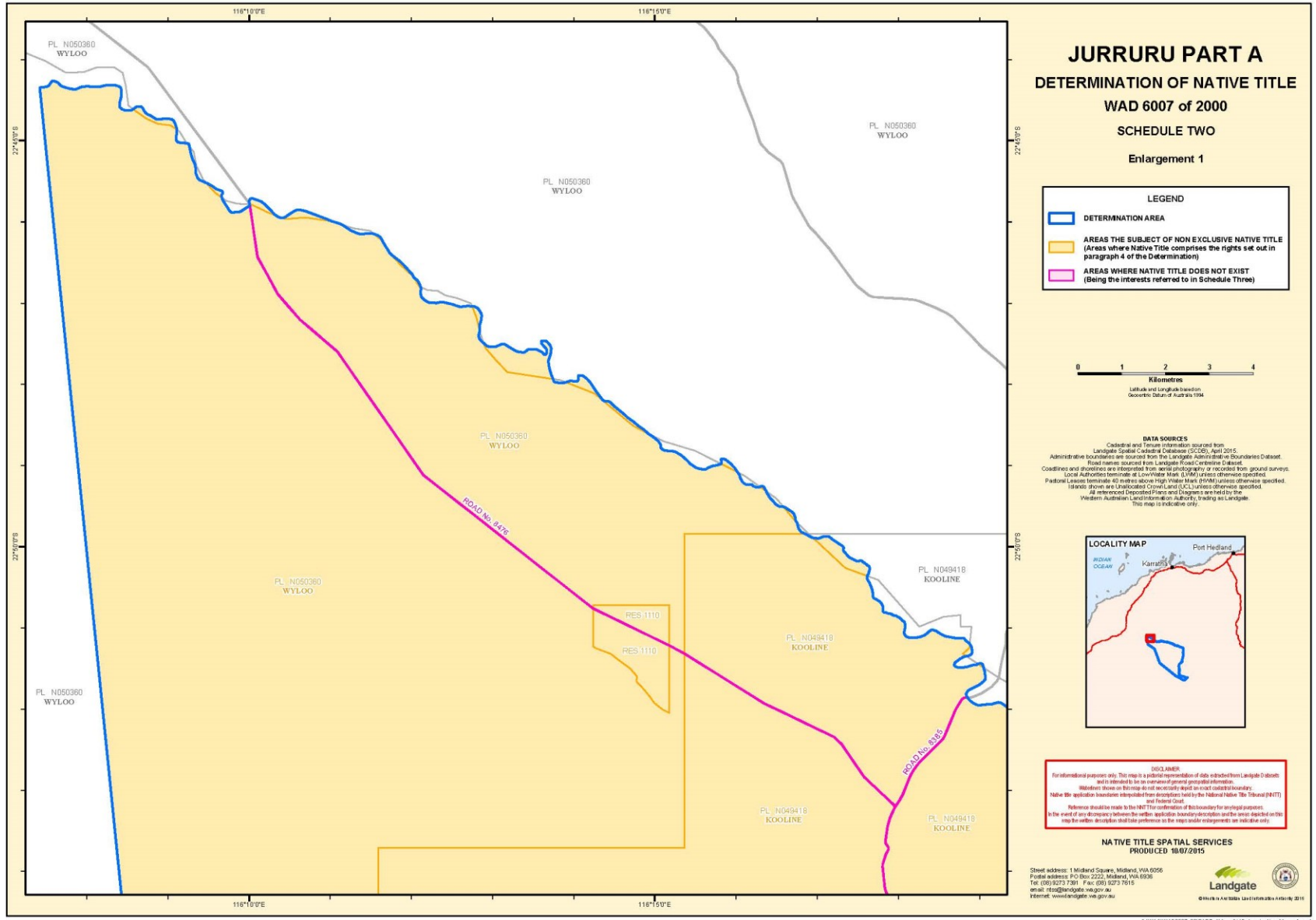
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SCHEDULE TWO

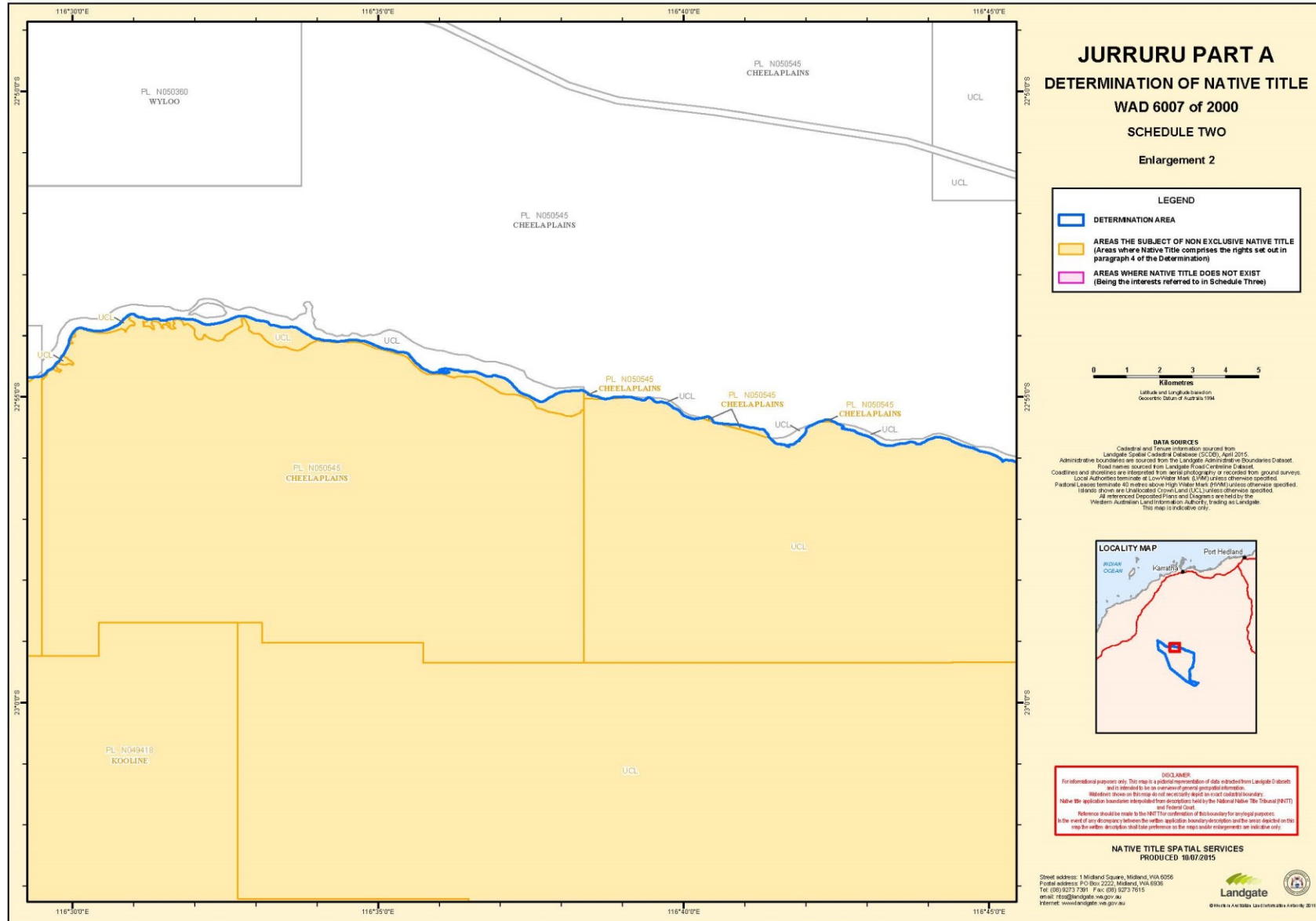
MAPS OF THE DETERMINATION AREA

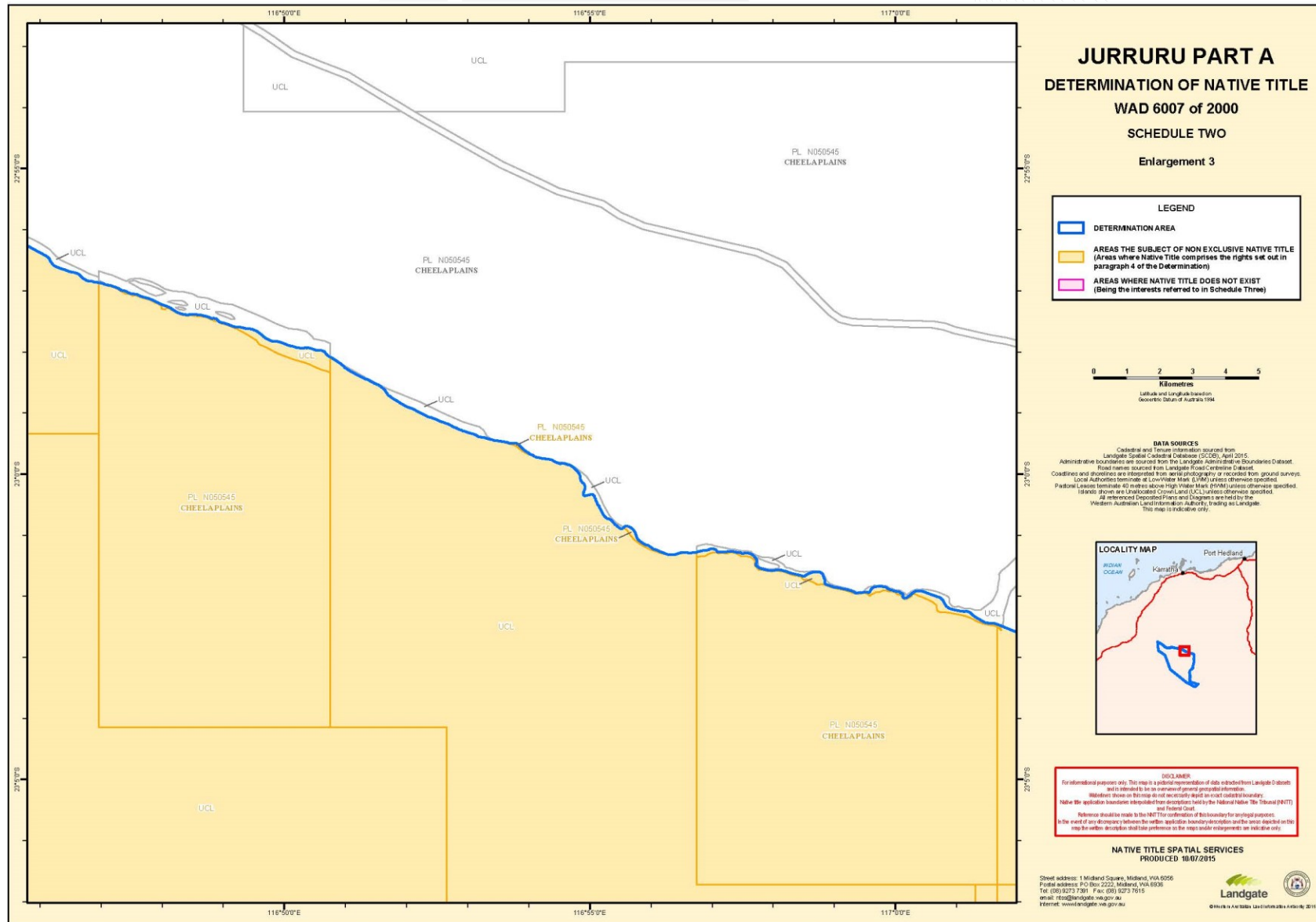


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SCHEDULE THREE**AREAS WHERE NATIVE TITLE DOES NOT EXIST (PARAGRAPH 2)**

Native title does not exist in relation to land and waters the subject of the following interests within the Determination Area which, with the exception of public works (as described in clause 2 of this Schedule), are generally shown as shaded in red on the maps at Schedule Two:

1. Dedicated roads and roads set aside, taken or resumed

Dedicated roads, roads set aside, taken or resumed or roads which are to be considered public works (as that expression is defined in the *Native Title Act* and the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA)), including the following:

- (a) Road 5424, one chain wide, which road is depicted on Cancelled Public Plan 503 115;
- (b) Road 8385, which road is depicted on Cancelled Public Plans 503 115 and 503 121, opened by notice published in the government gazette on 21 March 1930, and extended by notices published in the government gazette on 4 April 1930 and 11 April 1930;
- (c) Road 8476, which road is depicted on Cancelled Published Plan 503 121 and described by notice published in the government gazette on 4 April 1930.

2. Public Works

Any other public works as that expression is defined in the *Native Title Act* and the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (including the land and waters on which a public work is constructed, established or situated as described in section 251D of the *Native Title Act*) and to which section 12J of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) or section 23C(2) of the *Native Title Act* applies.

SCHEDULE FOUR**OTHER INTERESTS (PARAGRAPH 8)**

The nature and extent of the Other Interests in relation to the Determination Area as at the date of this determination are:

1. Reserves

(a) The following reserves:

Reserve No.	Current Purpose
1110	Watering place
1112	Watering place
1113	Watering place
1114	Watering place
1115	Watering place
1119	Watering place
18498	Water

(b) The rights and interests of persons who have the care, control and management of the reserves identified in subclause (a) above; and

(c) The rights and interests of persons entitled to access and use the reserves identified in subclause (a) above for the respective purposes for which they are reserved, subject to any statutory limitations upon those rights.

2. Pastoral Leases

The following pastoral leases and the rights and interests of the holders from time to time of those pastoral leases:

Pastoral Lease	Station Name
PL N050360 (formerly 3114/0647)	Wyloo
PL N050044 (formerly 3114/0773)	Dooley Downs
PL N050594 (formerly 3114/1014)	Glenflorrie
PL N050036 (formerly 3114/1218)	Ashburton Downs
PL N049418 (formerly 3114/1236)	Kooline
PL N050510 (formerly 3114/1241)	Pingandy
PL N050545 (formerly 398/782)	Cheela Plains
PL N049994 (formerly K981339)	Ullawarra

3. Easements

The following easement and the rights and interests of the holders from time to time of that easement:

Easement No.	Purpose
F 924685	For the purpose described in the government gazette on 4 July 1995, commencing on page 2799 at "LA 801 Goldfields Gas Pipeline Agreement Act 1994 Public Works Act 1902 Land Acquisition".

4. Mining Tenements

(a) The rights and interests of the holders of the following mining tenements under the *Mining Act 1904* (WA) (repealed) and the *Mining Act 1978* (WA):

(i) Mining Leases

Tenement ID	Tenement ID	Tenement ID
M 0800011	M 0800012	M 0800027
M 0800066	M 0800071	M 0800098
M 0800105	M 0800192	M 0800197

(ii) Exploration Licences

Tenement ID	Tenement ID	Tenement ID
E 0801628	E 0801629	E 0801630
E 0801631	E 0801632	E 0801633
E 0801650	E 0801741	E 0801746
E 0801841	E 0801915	E 0801916
E 0801949	E 0801950	E 0801954
E 0802033	E 0802038	E 0802232
E 0802237	E 0802240	E 0802250
E 0802258	E 0802280	E 0802281
E 0802282	E 0802296	E 0802372
E 0802373	E 0802472	E 0802474
E 0802487	E 0802494	E 0802550
E 0802557	E 0802562	E 0802567
E 0802613	E 0802614	

(iii) Prospecting Licences

Tenement ID	Tenement ID	Tenement ID
P 0800540	P 0800616	P 0800648
P 0800670	P 0800675	P 0800676

- (b) The agreement as amended and ratified by the *Goldfields Gas Pipeline Agreement Act 1994* (WA) and rights and interests comprised in, conferred under or in accordance with, or pursuant to that agreement, including the following tenements:

Tenement ID	Tenement Type
PL24	Pipeline Licence

5. Access to Mining and Petroleum Areas

- (a) Without limiting the operation of any other clause in Schedule Four, but subject to clause (5)(b) below, the rights of the holders from time to time of a mining tenement or petroleum interest referred to in clauses 4 of Schedule Four to use (including by servants, agents and contractors) such portions of existing roads and tracks in the Determination Area as necessary to have access to the area the subject of the mining tenement or petroleum interest for the purposes of exercising the rights granted by that tenement or interest.
- (b) Nothing in clause (5)(a) above allows any upgrade, extension, widening or other improvement to the road or track other than work done to maintain it in reasonable repair and in order to leave it in substantially the same condition as it was prior to its use pursuant to clause (5)(a).

6. Other

The following rights and interests:

- (a) Rights and interests, including licences and permits, granted by the Crown in right of the State or of the Commonwealth pursuant to statute or otherwise in the exercise of its executive power and any regulations made pursuant to such legislation;
- (b) Rights or interests held by reason of the force and operation of the laws of the State or of the Commonwealth, including but not limited to, the force and operation of the *Rights in Water and Irrigation Act 1914* (WA);
- (c) Rights and interests of members of the public arising under common law, including but not limited to:
- (i) the public right to fish;
 - (ii) the public right to navigate; and

- (iii) the right of any person to use and enjoy any roads in the Determination Area (subject to the laws of the State) over which, as at the date of this determination, members of the public have a right of access under the common law;
- (d) The right to access the Determination Area by:
 - (i) an employee, agent or instrumentality of the State;
 - (ii) an employee, agent or instrumentality of the Commonwealth;
 - (iii) an employee, agent or instrumentality of any local government authority,
as required in the performance of his or her statutory or common law duty;
- (e) So far as confirmed pursuant to section 212(2) of the *Native Title Act* and section 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA)* as at the date of this determination, any existing public access to, and enjoyment of, the following places in the Determination Area:
 - (i) waterways;
 - (ii) beds and banks or foreshores of waterways;
 - (iii) coastal waters;
 - (iv) beaches;
 - (v) stock routes; and
 - (vi) areas that were public places at the end of 31 December 1993;
- (f) Any other:
 - (i) legal or equitable estate or interest in the land or waters; or
 - (ii) any other right (including a right under an option and a right of redemption), charge, power or privilege over, or in connection with:
 - (A) the land or waters; or
 - (B) an estate or interest in the land or waters; or
 - (iii) restriction on the use of the land or waters, whether or not annexed to other land or waters.

SCHEDULE FIVE

NATIVE TITLE HOLDERS (PARAGRAPH 3)

The Jurruru People are those persons who:

- (a) are descended from Kantitharra or Punartu or are adopted by such biological descendants in accordance with traditional laws acknowledged and the traditional customs observed by the Jurruru People;
- (b) identify themselves as Jurruru under traditional law and custom and are so identified by other Jurruru People as Jurruru; and
- (c) have a connection with the land and waters in the Determination Area, in accordance with the traditional laws acknowledged and the traditional customs observed by the Jurruru People.

**IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION**

WAD 6007 of 2000

**BETWEEN: BRENDA SMIRKE, DAVID SMIRKE, IVAN SMIRKE, LINDA
SMIRKE, LORRAINE SMIRKE, PEGGY SMIRKE AND
TOBY SMIRKE
Applicant**

**AND: STATE OF WESTERN AUSTRALIA
First Respondent**

**BAMBIPTY LTD, CHEELA PLAINS PASTORAL CO PTY
LTD, ANDREW NICHOLAS GLENN, PETER ROBERT
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HASTIE, JASON GARY HASTIE and STAMCO BEEF PTY
LTD
Third Respondents**

**YAMATJI MARLPA ABORIGINAL CORPORATION
Fourth Respondent**

JUDGE: MCKERRACHER J

DATE: 1 SEPTEMBER 2015

**PLACE: PERRY FLATS, KOOLINE STATION, WESTERN
AUSTRALIA**

REASONS FOR JUDGMENT

INTRODUCTION

1 The Jurruru People's application (**Jurruru application**) is before the Court for
determination pursuant to s 225 of the *Native Title Act 1993* (Cth) (**Native Title Act**). The
application covers an area of approximately 10,066 square kilometres of land and waters in
the Ashburton area north east of Carnarvon.

2 The application was filed on 14 July 2000 and was substantially amended twice
pursuant to s 64 of the Native Title Act on 19 February 2001 and 6 July 2006, and amended
pursuant to s 66B of the Native Title Act, to replace the applicant, on 16 January 2012.

3 Mediation has been conducted by the National Native Title Tribunal and
subsequently, by this Court, through case management in accordance with the Native Title
Act.

4 Preservation evidence was heard by Barker J between 23-25 July 2013, at various on-
country locations in the claim area, from David Smirke, Toby Smirke and Peggy Smirke.

Agreement to resolve the application

5 The parties to the application have reached an agreement as to the terms of a
determination and form of orders (**Jurruru Part A Determination**) that is appropriate to
provide recognition of the native title rights and interests held by members of the Jurruru
People in relation to part of the land and waters covered by the Jurruru application (**Jurruru
Part A Determination Area**).

6 Pursuant to s 87A(4) of the Native Title Act, the parties have requested that the Court
determine the proceedings that relate to the Jurruru Part A Determination Area without
holding a hearing and that in respect of the balance of the Jurruru application no
determination be made at present and the matter remain in case management with the Court.

7 Each of the pastoral group third respondents, with the exception of Bambi Pty Ltd,
has agreed to the terms of the determination on the basis of having reached agreements with
the applicant in relation to those portions of their respective pastoral leases that are situated
within the Jurruru Part A Determination Area. Following the making of the determination,
those agreements will be executed and application will be made for the agreements to be
registered as Indigenous Land Use Agreements on the Register of Indigenous Land Use
Agreements as body corporate agreements pursuant to s 24BG of the Native Title Act.

8 In support of the agreement reached, the State of Western Australia has filed a Minute
of Proposed Consent Determination of Native Title (**Minute**) which has been signed by each
of the parties to the application.

9 In support of the agreement reached and the nomination of the prescribed body
corporate (**PBC**) the applicant has filed the following documents:

- (a) an affidavit of Ms Maimbo Chilala sworn 18 August 2015 deposing to the
process undertaken by the applicant to authorise the agreement reached and
regarding the description of the native title holders;

- (b) an affidavit of Ms Chilala sworn 13 August 2015 in support of the PBC nomination process;
- (c) a notice of nomination of the Jurruru Aboriginal Corporation ICN 8251 (**JAC**) to be the PBC for the proposed Jurruru Part A Determination pursuant to s 56(2)(a)(i) of the Native Title Act; and
- (d) the written consent of JAC to be the PBC for the Jurruru Part A Determination pursuant to s 56(2)(a)(ii) of the Native Title Act.

10 In addition, the applicant and the State have filed joint submissions in support of the Minute (**joint submissions**).

11 The parties agree that the Jurruru People are persons who:

- (a) are descended from Kantitharra or Punartu or are adopted by such biological descendants in accordance with traditional laws acknowledged and the traditional customs observed by the Jurruru People;
- (b) identify themselves as Jurruru under traditional law and custom and are so identified by other Jurruru People as Jurruru; and
- (c) have a connection with the land and waters in the Jurruru Part A Determination Area, in accordance with the traditional laws acknowledged and the traditional customs observed by the Jurruru People.

12 The external boundary of the Jurruru Part A Determination Area is described in Schedule One to the Minute, which corresponds with the area of the Jurruru application but excludes the area of the application overlapped by application WAD 6173/1998 (**Gobawarrah Minduarra Yinhawanga Application**). The parties agree that native title should be recognised in relation to the Jurruru Part A Determination Area, except in those parts the subject of interests identified in Schedule Three of the Minute which are shown as generally shaded red on the maps in Schedule Two of the Minute.

13 The Minute provides that the applicant in the Jurruru application has nominated the Jurruru Aboriginal Corporation (ICN 8251) pursuant to s 56(2)(a) of the Native Title Act to hold the determined native title in trust for the native title holders.

Assessment of connection material

14 It is apparent from the joint submissions that the Jurruru applicant provided the State with the following written material (**connection material**) in support of the Jurruru People's connection with the claim area:

- (a) Jurruru connection report and appendices, authored by Dr Kingsley Palmer, November 2007 (**Palmer 2007 Report**); Jurruru supplementary report, authored by Dr Kingsley Palmer, July 2008 (**Palmer 2008 Report**); and
- (b) Jurruru: overlap and triangle area, authored by Dr Anna Kenny, May 2011 (**Kenny Report**).

15 The connection material was assessed by the State in accordance with its *Guidelines for the Provision of Information in Support of Applications for a Determination of Native Title* dated October 2004, with the State's response being informed by independent anthropological advice from Dr Katie Glaskin and Professor Peter Sutton, and legal advice from the State Solicitor's Office

The Jurruru People's connection to country

16 The joint submissions provide the following information regarding the Jurruru People's connection to country:

- (a) European The country of the Jurruru People is located in the southern Pilbara region of Western Australia and comprises central portions of the Ashburton River valley. Jurruru traditional laws and customs connect the Jurruru people to their country. The Jurruru traditional laws and customs are believed to have been put in place by the ancestral beings when the world was created. The Jurruru believe that a long time ago this land was soft and malleable. It was at that time that the ancestral beings created the current physical features of the land including the claim area. The ancestral beings also laid down the laws to govern the Jurruru People and how they behave. These laws are binding on the Jurruru people and country and have been handed down from the old people as well as set out in rock engravings which in turn came from the ancestral beings. It is these laws and customs of the ancestral beings that connect the Jurruru people to their country.

- (b) Under the traditional laws and customs of the Jurruru people, Jurruru country is, and has been since prior to sovereignty, the traditional country of the Jurruru people who occupied and used the claim area prior to sovereignty. They comprised a single society who identified as Jurruru, who spoke a common Jurruru language, and who acknowledged and observed the same body of laws and customs relating to rights and interests in land and waters.
- (c) Members of the Jurruru community are those who can trace their lineage to a Jurruru ancestor, observe the traditional laws and customs of the Jurruru People and assert a Jurruru language identity. Under the Jurruru traditional laws and customs, Jurruru people must be descended from a Jurruru person. Those persons are in turn descended from Jurruru people who, along with other Jurruru people at the time who may not have any Jurruru descendants today. In this way, the Jurruru people today believe, and their laws and customs provide, that they are descendants of the Jurruru people who belonged to Jurruru country when it was created in the dreaming time.

Description of the proposed native title holders

17 An issue identified in the joint submissions is that the description of the proposed native title holding group in Schedule Five of the Minute differs slightly from the description of the native title claim groups in the Jurruru application (as amended).

18 The Jurruru application states that the Jurruru native title claim group is comprised of a closed list of 19 people.

19 The joint submission states that during the course of negotiations, the applicant and the State agreed that the description of the native title claim group in the Jurruru application by reference to 19 named individuals was problematic, principally because of the absence of any reference to the descendants of those named individuals. That description wrongly implies, firstly, that the claim was made by the applicant on behalf of individuals holding individual rights and, secondly, that native title will cease to exist on the death of the last surviving individual.

20 The parties settled on a description of native title holders in the Minute, having satisfied themselves that the description accurately reflects the position as described in the connection materials and captures all native title holders. The amendment to the description

is explained in the affidavit of Ms Chilala sworn on 18 August 2015 (at [9]). Ms Chilala confirms that the description of the native title holding group outlined in Schedule Five of the Minute is consistent with Dr Palmer's findings and the traditional laws and customs of the Jurruru People.

21 The applicant has also provided evidence in the 18 August 2015 affidavit of Ms Chilala that an authorisation meeting was held on 27 May 2015 for the purpose of authorising the agreement reached including the terms of the Minute.

22 Ms Chilala deposes that at the meeting on 27 May 2015, she went through the draft Minute in comprehensive detail and explained the meaning of each clause in the draft Minute.

23 Following discussions between the Jurruru claim group, and various Yamatji Marlpa Aboriginal Corporation staff and particularly Ms Chilala, the Jurruru claim group passed a number of resolutions including the following by consensus:

- to accept and authorise the negotiated consent determination minute as presented here today.
- do all things necessary to ensure the determination of the Jurruru un-overlapped claim area including to amend the drafting of the Consent Minute for proper drafting, to satisfy the Court, the State and the pastoralists if required.

24 The authorisation decision was made by the claim group in accordance with the decision-making process agreed and adopted by the Jurruru People.

25 The affidavit of Ms Chilala sworn 18 August 2015 states that the May 2015 meeting was well attended by members of the Jurruru claim group and an attendance list was taken. Ms Chilala states that she is not aware of any complaints from members of the Jurruru claim group that they were not aware of the May meeting or that the May meeting was not representative of the Jurruru claim group.

26 The Court is not limited to making a determination in the form sought in the application and may proceed to make a determination in such form as it sees fit based on the evidence, provided the application is valid: *Billy Patch and Others on behalf of the Birriliburu People v State of Western Australia* [2008] FCA 944 (at [18]). Having considered

the material it appears appropriate for the Court to make the determination sought in the Minute for the following reasons:

- (a) the group of proposed native title holders is, in substance, the same group as the native title claimant group described in the Jurruru application;
- (b) the description accurately reflects the position as described in the connection materials;
- (c) the description captures all proposed native title holders;
- (d) the claimant group authorised the terms of the Minute including the proposed native title holders in Schedule Five at an authorisation meeting which was sufficiently notified and representative of the Jurruru People; and
- (e) the State is satisfied that the proposed native title holders are the persons described in Schedule Five of the Minute.

Nomination of PBC

27 As noted above, the Minute provides that the applicant in the Jurruru application has nominated the JAC pursuant to s 56(2)(a) of the Native Title Act to hold the determined native title in trust for the native title holders. That nomination is in writing and the JAC has given its consent to the nomination. I am satisfied that the requirements of the Native Title Act and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) have been met.

Requirements of s 87A of the Native Title Act

28 The Minute relates only to part of the land and waters the subject of the Jurruru application. All the parties to the Jurruru application have reached the agreement the subject of the Minute in relation to the Jurruru Part A Determination. As such, the relevant order might be made under either s 87 (see ss 87(1)(a)(ii) and (3)) or s 87A of the Native Title Act: see *Brown (on behalf of the Ngarla People) v State of Western Australia* [2007] FCA 1025 (at [14]) per Bennett J. With the repeal of s 87(1)(d) of the Native Title Act, the Court no longer has to first consider whether the order should be made under s 87A rather than s 87 of the Native Title Act. However where, such as here, it is possible for an order to be made under both s 87 and s 87A, it is preferable to use s 87A.

29 This is because the balance of the Jurruru Application (i.e. the portion overlapped by the Gobawarra Minduarra Yinhawangka Application) will then be deemed to be amended to

remove the area covered by the proposed determination (s 64(1B) of the Native Title Act) and will also be exempt from the re-application of the registration test (s 190A(1A) of the Native Title Act). The application will remain registered following the amendment, and the Native Title Registrar will be obliged to amend the Register of Native Title Claims even though the registration test has not been re-applied (s 190(3)(a) of the Native Title Act).

30 The Explanatory Memorandum to the *Native Title Amendment Act 2007* (Cth) notes (at [2.62]):

If an order can be made under s 87A, the order should be made under that provision rather than s 87. This is because an order under s 87A will give rise to other measures which will assist in promoting expeditious resolution of claims, including automatic amendment of the claim and exemption from the registration test being reapplied to the amended claim.

31 Section 87A of the Native Title Act provides, in effect, that the Court may make a determination of native title by consent over part of an application area without holding a hearing where:

- (a) the period specified in the notice given under s 66 of the Native Title Act has ended (s 87A(1)(b));
- (b) there is an agreement for a proposed determination of native title in relation to part of an area covered by the native title application (s 87A(1)(b));
- (c) the terms of the proposed determination are in writing, signed by or on behalf of all of the parties required to be parties to the agreement pursuant to s 87A(1)(c) and are filed with the Court (ss 87A(1)(c), 87A(1)(d) and 87A(2));
- (d) the Registrar of the Federal Court has given notice to the other parties to the proceeding who have not become, or are not required to be, parties to the agreement that the proposed determination of native title has been filed with the Court (s 87A(3));
- (e) the Court has taken into account any objection made by the other parties to the proceeding (s 87A(8));
- (f) the Court is satisfied that an order in, or consistent with, those terms would be within the power of the Court (s 87A(4)(a)); and
- (g) it appears appropriate to the Court to make the orders sought (s 87A(4)(b)).

32 The focus of the Court in considering whether the orders sought are appropriate is on the making of the agreement by the parties: *Lander v State of South Australia* [2012] FCA 427 (at [11]).

Section 66 notice period expired (s 87A(1)(b))

33 This condition is satisfied. The notification period referred to in s 66(8) and s 66(10)(c) of the Native Title Act ended on 29 August 2001.

Agreement for a proposed determination in relation to part of the area covered by the Jurruru Application (s 87A(1)(b))

34 This condition is satisfied. The proposed determination is in respect of only part of the land and waters the subject of the Jurruru application.

The terms of an agreement between required parties are filed with the Court (ss 87A(1)(c), 87A(1)(d) and 87A(2))

35 This condition is satisfied. All parties to the Jurruru application have signed the filed Minute with the Court, which represents an agreement between all the parties on the terms of an order of the Court in relation to the proceeding.

The Registrar of the Federal Court has given notice to the other parties to the proceeding (s 87A(3))

36 All parties to the Jurruru application are parties to the agreement the subject of the Minute and therefore the Registrar need not give notice to any party under s 87A(3) of the Native Title Act.

The Court has taken into account any objection made by the other parties to the proceeding (s 87A(8))

37 All parties to the Jurruru application are parties to the agreement the subject of the Minute and therefore there are no objections for the Court to take into account under s 87A(8) of the Native Title Act.

Orders consistent with the terms of the agreement are within the Court's power (s 87A(4)(a))

38 The Court is satisfied that an order consistent with the terms of the agreement referred to in the Minute is within the power of the Court because:

- (a) the form of the proposed determination complies with s 94A and s 225 of the Native Title Act;

- (b) the Jurruru application is validly made, having been authorised by the claim group members according to a decision-making process that, under the traditional laws and customs of the claim group, authorised the applicant to make the amended native title determination application (as required by s 251B of the Native Title Act); and
- (c) the Jurruru application is for a determination of native title in relation to an area for which there is no approved determination of native title (s 13(1)(a) of the Native Title Act) and there remains no approved determination in relation to the area the subject of the proposed determination (s 68 of the Native Title Act).

39 Finally, the Court must consider whether it is appropriate to make the orders sought. The exercise of the Court's discretion pursuant to s 87A of the Native Title Act imports the same principles as those applying to the making of a consent determination of native title under s 87. As noted by Bennett J in *Brown* (at [22]):

The discretion conferred by s 87A and by s 87 must be exercised judicially and within the broad boundaries ascertained by reference to the subject matter, scope and purpose of the Act.

This includes the resolution of native title disputes by mediation and agreement: see *Hughes (on behalf of the Eastern Guruma People) v Western Australia* [2007] FCA 365 (at [8]) and Black CJ in *Lota Warri (on behalf of the Poruma and Masig Peoples) v Queensland* (2005) 223 ALR 62 (both cited by Bennett J in *Brown* at [22]).

40 As the terms of s 87A(4) of the Native Title Act suggest, this does not necessarily require the Court to receive evidence, make findings, embark on its own inquiry on the merits of the claim made in the application or even to form a concluded view as to whether the legal requirements for proving native title have been met. Indeed, it may be appropriate to make orders under s 87A where the Court has received no evidence of the primary facts substantiating native title where the Court is satisfied that the parties have freely and on an informed basis come to an agreement: see *Brown* per Bennett J (at [23] – [24]) (in respect of s 87A) and *Hughes* per Bennett J (at [9]) and *Ward v State of Western Australia* [2006] FCA 1848 per North J (at [8]) (in respect of s 87).

41 The requirements of s 87A(4) may, and will likely, be met where the Court is satisfied that a relevant government respondent (including the State), through competent legal representation, is satisfied as to the cogency of the evidence upon which the applicant relies.

Generally this will not involve the Court making findings on the evidence on which the State relies, but it might consider that evidence for the limited purpose of being satisfied that the State is acting in good faith and rationally: see *Munn for and on behalf of the Gunggari People v State of Queensland* (2001) 115 FCR 109 per Emmett J (at [29]-[30]) and *Lovett on behalf of the Gunditjmarra People v State of Victoria* [2007] FCA 474 per North J (at [37]).

42 In relation to this proceeding, the Jurruru applicant and the State have been legally represented throughout the mediation process. All other respondent parties have also had the benefit of legal representation.

43 Further, the State has played an active role in the negotiation of the proposed consent determination (*Watson v State of Western Australia (No 3)* [2014] FCA 127 (at [54] and [60]), an important factor referred to by Emmett J in *Munn* (at [29]). In doing so, the State (acting on behalf of the community generally), having regard to the requirements of the Native Title Act and through a rigorous and detailed assessment process, has satisfied itself that the determination is justified in all the circumstances.

44 The connection material, combined with the preservation evidence of three of the Jurruru claimants, is in the State's view, sufficient to demonstrate that the Jurruru application has a credible basis and that the Jurruru People have maintained some physical presence in the Jurruru Part A Determination Area since the acquisition of British sovereignty. In addition, evidence of their continuing physical or spiritual involvement in the Jurruru Part A Determination Area was sufficient to enable the State to conclude that this connection had not been severed. Taken together, the State was satisfied that the material presented was sufficient to evidence the maintenance of connection according to traditional laws and customs in the Jurruru Part A Determination Area.

45 The State has also conducted searches of land tenure, mining and petroleum registries to determine the extent of 'other interests' within the proposed determination area, and those interests are included in the proposed determination, as outlined in Schedule Four to the Minute.

46 There are no other proceedings before the Court relating to native title determination applications that cover any part of the proposed determination which would otherwise require orders to be made under s 67(1) of the Native Title Act.

47 Finally, no objection has been made that must be considered under s 87A(8) of the
Native Title Act.

48 In all the circumstances I am satisfied that it would be appropriate and within power
to make orders under s 87A and s 94A of the Native Title Act. That includes an order that
the JAC is to hold the rights and interests from time to time comprising the native title in trust
for the native title holders pursuant to s 56(2) of the Native Title Act.

49 The effect is that the native title claim group, being the Jurruru People, in accordance
with the traditional laws acknowledged and the traditional customs observed by them, are to
be recognised as the native title holders for the Jurruru Part A Determination Area.

CONCLUSION

50 By signing the Minute all of the parties to the proceeding have indicated their
agreement and the applicant, the State, the non-State respondent parties, the legal
representatives and all those involved are to be congratulated.

51 There are two important points to make before concluding. The first is that in making
a determination of native title, the Court is not creating it as such but rather recognising what
has always existed. Secondly, the nature of the determination recognises not just the rights of
the applicant but also how the applicant's rights operate in relation to other interests,
including those of the respondents.

52 In the circumstances the Court considers it appropriate to make the determination of
native title in the terms proposed.

53 For these reasons I make the orders in the terms of the Minute submitted to the Court
being satisfied that the proposed determination is both within power and appropriate.

I certify that the preceding fifty-
three (53) numbered paragraphs are
a true copy of the Reasons for
Judgment herein of the Honourable
Justice McKerracher.

Associate:

Dated: 1 September 2015