FEDERAL COURT OF AUSTRALIA

CG (Deceased) on behalf of the Badimia People v State of Western Australia (No 2) [2015] FCA 507

Citation: CG (Deceased) on behalf of the Badimia People v State of Western Australia (No 2) [2015] FCA 507

Parties: **CG (DECEASED), JOHN ASHWIN, GLORIA FOGARTY, PG (DECEASED), OLLIE GEORGE, OLIVE GIBSON, IH (DECEASED), AL (DECEASED), HL (DECEASED), RL (DECEASED), WL (DECEASED), DES LITTLE, DES THOMPSON, NANCY WALLAM, FRANK WALSH (JNR) and FRANK WALSH (SNR) v STATE OF WESTERN AUSTRALIA, THE COMMONWEALTH OF AUSTRALIA, SHIRE OF CUE, SHIRE OF MENZIES, SHIRE OF MOUNT MAGNET, ACVE HOLDINGS PTY LTD, BAGIRA PTY LTD (WYDGEE STATION), BERKSHIRE VALLEY NOMINEES PTY LTD, TANIA ROSLYN CHITTARA (BIMBIJY STATION), GREGORY JOHN COWLEY (OUDABUNNA), ROSLYN DOREEN COWLEY (OUDABUNNA), WILLIAM TERRENCE COWLEY (OUDABUNNA), CROWBAR CONTRACTORS PTY LTD, REBECCA MARY DAVIES (MARANALGO STATION), ROGER PAUL DAVIES (MARANALGO STATION), EDAH PASTORAL COMPANY PTY LTD (EDAH STATION), GREGORY SHAYNE FRENCH (BIMBIJY STATION), GUYMON PTY LTD, LAURENCE FREDERICK AND CATHERINE MARY JENSEN, ADRIAN JAMES MORRISSEY, PETER JOHN MORRISSEY, ANDREW JOHN AND JAQUELINE ANDREA MOSES, HE AND RG MOSES (HY BRAZIL STATION), MURRUM PASTORAL CO PTY LTD, GRAEME LAWRENCE NEWTON (PULLAGAROO STATION), PASTORAL EXPORTS PTY LTD (MOUROUBRA STATION), ELIZABETH ANN PILKINGTON (KIRKALOCKA STATION), GEOFFREY BRIAN PILKINGTON (KIRKALOCKA STATION), RANGELAND RED PTY LTD, CM AND GJ SCOTT (BOODANOO STATION), CM, GJ, LV, RW AND WJ SCOTT (WYNYANGOO STATION), E, W, C AND I SCOTT (NARNDEE STATION), GREGORY AND ROBERT SCOTT (WONDINONG STATION), LESLEY VALMA SCOTT, PAUL ALEXANDER AND KELLIE ANNE STARICK, WAGGA WAGGA STATION PTY LTD, JOHN**

THOMAS WAINWRIGHT (NALBARRA STATION), KAREN JOY WAINWRIGHT (NALBARRA STATION), WESTAG HOLDINGS PTY LTD (WINDIMURRA STATION), JANET GAYNOR WINTER (PULLAGAROO STATION), AUSTRALIAN WILDLIFE CONSERVANCY, YAMATJI MARLPA ABORIGINAL CORPORATION and TELSTRA CORPORATION LTD

JOHN ASHWIN, GLORIA FOGARTY, OLLIE GEORGE, OLIVE GIBSON, IH (DECEASED), LH (DECEASED), DES LITTLE, DES THOMPSON, NANCY WALLAM, FRANK WALSH (JNR), FRANK WALSH (SNR) v STATE OF WESTERN AUSTRALIA, THE COMMONWEALTH OF AUSTRALIA, SHIRE OF MOUNT MARSHALL, THE SOUTH WEST ABORIGINAL LAND AND SEA COUNCIL ABORIGINAL CORPORATION, ASHLEY WILLIAM DOWDEN, AUSTRALIAN WILDLIFE CONSERVANCY, BERKSHIRE VALLEY NOMINEES PTY LTD, GREGORY JOHN COWLEY, ROSLYN DOREEN COWLEY, WILLIAM TERRENCE COWLEY, CROWBAR CONTRACTORS PTY LTD, JOHN FORREST DUNNE, MARILYN DALE DUNNE, EDAH PASTORAL COMPANY PTY LTD, GUYMON PTY LTD, CATHERINE MARY JENSEN, LAURENCE FREDERICK JENSEN, ADRIAN JAMES MORRISSEY, KAREN DIANE MORRISSEY, PETER JOHN MORRISSEY, HEATHER ELIZABETH MOSES, PASTORAL EXPORTS PTY LTD, ELIZABETH ANN PILKINGTON, GEOFFREY BRIAN PILKINGTON, RANGELAND RED PTY LTD, GREGORY ROBERT SCOTT, LESLEY VALMA SCOTT, TANIA ROSLYN FRENCH AND GREGORY SHAYNE FRENCH, WAGGA WAGGA STATION PTY LTD, ABALONE (WA) PTY LTD, COVENTRY ENTERPRISES PTY LTD, JOHN CALEGARI, SILVER LAKE RESOURCES LIMITED

File numbers: WAD 6123 of 1998
WAD 100 of 2012

Judge: **BARKER J**

Date of judgment: 25 May 2015

Catchwords: **NATIVE TITLE** – whether the Court has the power under the *Native Title Act 1993* (Cth) to make a negative determination in the absence of a non-claimant application

– whether the Court should exercise the power to make a negative determination in relation to the claim area

Legislation: *Federal Court of Australia Act 1976* (Cth) s 22
Native Title Act 1993 (Cth) s 3, s 3(c), s 13(1), s 24FA, s 61, s 61(1), s 61(2), s 66, s 66(1)(a), s 66(3)(d), s 81, s 87, s 87(1)(c), s 87A, s 87A(4), s 94A, s 213(1), s 223, s 225, s 251B, s 253, Pt 3

Cases cited: *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178; [2000] FCA 1609
CG (Deceased) on behalf of the Badimia People v State of Western Australia [2015] FCA 204
Commissioner of Taxation v Hornibrook (2006) 156 FCR 313; [2006] FCAFC 170
Commonwealth v Clifton (2007) 164 FCR 355; [2007] FCAFC 190
Deputy Commissioner of Taxation v Dick (2007) 226 FLR 388; [2007] NSWCA 190
Graham on behalf of the Nadju People v State of Western Australia [2014] FCA 516
Harrington-Smith on behalf of the Wongatha People (No 9) v State of Western Australia (2007) 238 ALR 1; [2007] FCA 31
Kokatha People v State of South Australia [2007] FCA 1057
Members of the Yorta Yorta Aboriginal Community v State of Victoria [1998] FCA 1606
Risk on behalf of the Larrakia People v Northern Territory [2006] FCA 404
Sandy on behalf of the Yugara People v State of Queensland (No 3) [2015] FCA 210
Strickland v Native Title Registrar (1999) 168 ALR 242; [1999] FCA 1530
Western Australia v Fazeldean (No 2) (2013) 211 FCR 150; [2013] FCAFC 58
Western Australia v Ward (2000) 99 FCR 316; [2000] FCA 191
Worimi v Worimi Local Aboriginal Land Council (2010) 181 FCR 320; [2010] FCAFC 3
Wyman on behalf of the Bidjara People v State Of Queensland (No 2) [2013] FCA 1229
Wyman on behalf of the Bidjara People v State of Queensland (No 4) [2014] FCA 93

Date of hearing: 10 April 2015

Date of last further submissions requested by the Court: 16 April 2015

Place:	Perth
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	89
Counsel for the Claimants:	Ms T Jowett
Solicitor for the Claimants:	Yamatji Marlpa Aboriginal Corporation
Counsel for the State of Western Australia:	Mr GJ Ranson, Ms AC Warren
Solicitor for the State of Western Australia:	State Solicitor's Office

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION **WAD 6123 of 1998**

BETWEEN: **CG (DECEASED), JOHN ASHWIN, GLORIA FOGARTY, PG (DECEASED), OLLIE GEORGE, OLIVE GIBSON, IH (DECEASED), AL (DECEASED), HL (DECEASED), RL (DECEASED), WL (DECEASED), DES LITTLE, DES THOMPSON, NANCY WALLAM, FRANK WALSH (JNR) and FRANK WALSH (SNR)**
Claimants

AND: **STATE OF WESTERN AUSTRALIA**
State

THE COMMONWEALTH OF AUSTRALIA
Second Respondent

SHIRE OF CUE, SHIRE OF MENZIES, SHIRE OF MOUNT MAGNET
Third Respondents

ACVE HOLDINGS PTY LTD, BAGIRA PTY LTD (WYDGEE STATION), BERKSHIRE VALLEY NOMINEES PTY LTD, TANIA ROSLYN CHITTARA (BIMBIJY STATION), GREGORY JOHN COWLEY (OUDABUNNA), ROSLYN DOREEN COWLEY (OUDABUNNA), WILLIAM TERRENCE COWLEY (OUDABUNNA), CROWBAR CONTRACTORS PTY LTD, REBECCA MARY DAVIES (MARANALGO STATION), ROGER PAUL DAVIES (MARANALGO STATION), EDAH PASTORAL COMPANY PTY LTD (EDAH STATION), GREGORY SHAYNE FRENCH (BIMBIJY STATION), GUYMON PTY LTD, LAURENCE FREDERICK AND CATHERINE MARY JENSEN, ADRIAN JAMES MORRISSEY, PETER JOHN MORRISSEY, ANDREW JOHN AND JAQUELINE ANDREA MOSES, HE AND RG MOSES (HY BRAZIL STATION), MURRUM PASTORAL CO PTY LTD, GRAEME LAWRENCE NEWTON (PULLAGAROO STATION), PASTORAL EXPORTS PTY LTD (MOUROUBRA STATION), ELIZABETH ANN PILKINGTON (KIRKALOCKA STATION), GEOFFREY BRIAN PILKINGTON (KIRKALOCKA STATION), RANGELAND RED PTY LTD, CM AND GJ SCOTT (BOODANOO STATION), CM, GJ, LV, RW AND WJ SCOTT (WYNYANGOO STATION), E, W, C AND I SCOTT (NARNDEE STATION), GREGORY AND ROBERT SCOTT (WONDINONG STATION), LESLEY VALMA SCOTT, PAUL ALEXANDER AND KELLIE ANNE STARICK, WAGGA WAGGA STATION PTY LTD, JOHN THOMAS WAINWRIGHT (NALBARRA STATION), KAREN JOY WAINWRIGHT (NALBARRA STATION), WESTAG HOLDINGS PTY LTD (WINDIMURRA STATION), JANET GAYNOR WINTER (PULLAGAROO STATION)
Fourth Respondents

AUSTRALIAN WILDLIFE CONSERVANCY
Fifth Respondent

YAMATJI MARLPA ABORIGINAL CORPORATION
Sixth Respondent

TELSTRA CORPORATION LTD
Seventh Respondent

JUDGE: **BARKER J**

DATE OF ORDER: **25 MAY 2015**

WHERE MADE: **PERTH**

THE COURT ORDERS THAT:

1. Native title does not exist in relation to any part of the land or waters within the external boundary of proceeding WAD 6123 of 1998, as described in the Schedule.
2. There be no order as to costs.

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

SCHEDULE

Native title does not exist in relation to any part of the land or waters within the external boundary of proceeding WAD 6123 of 1998 which, for the avoidance of doubt, is as described below:

External Boundary

Commencing at Latitude 27.579253 South, Longitude 117.685671 East and extending generally southeasterly, generally southerly, generally westerly and generally northerly through the following coordinate positions back to the commencement point.

Latitude (South)	Longitude (East)
27.632424	117.877668
27.680289	118.050510
27.806339	118.393296
27.821897	118.502926
27.878925	118.941345
27.882735	118.939405
27.886605	118.938105
27.889135	118.935795
27.890325	118.934545
27.890065	118.932685
27.889225	118.930175
27.890565	118.928145
27.892225	118.927796
27.894144	118.926086
27.894604	118.923036
27.894914	118.920776
27.894525	118.917816
27.895455	118.915346
27.896654	118.911126
27.897544	118.905936
27.998686	118.856109

Latitude (South)	Longitude (East)
28.007166	118.852289
28.007165	118.852473
28.007096	118.859469
28.061286	118.830311
28.078627	118.809701
28.083736	118.806771
28.156006	118.765733
28.158826	118.767113
28.161146	118.765063
28.226498	118.728681
28.333945	118.682820
28.344285	118.670060
28.472808	118.608191
28.502118	118.585881
28.510879	118.575512
28.519409	118.568142
28.523079	118.561312
28.543449	118.546692
28.625901	118.501603
28.627601	118.501863
28.732873	118.447695
28.999257	118.449641
29.078156	118.449292
29.104906	118.436733
29.279577	118.436654
29.605079	118.501707
29.611182	118.503051
29.623469	118.505757
29.626949	118.501997
29.627799	118.500437
29.844563	118.412691
29.936890	117.876785
29.937603	117.654356

Latitude (South)	Longitude (East)
29.936689	117.382627
29.935729	117.096919
29.883029	117.002788
29.847889	116.939398
29.609658	116.877584
28.997532	116.969936
28.966262	116.972496
28.797012	116.952101
28.622419	117.002968
28.524238	117.036717
28.218863	117.226411
27.997268	117.308478
27.700825	117.417588
27.684915	117.419178
27.624055	117.489396

Note: Geographic Coordinates provided in Decimal Degrees.

Datum: Geocentric Datum of Australia 1994 (GDA94)

Prepared By: Native Title Spatial Services (Landgate) 24th March 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.

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION **WAD 100 of 2012**

BETWEEN: **JOHN ASHWIN, GLORIA FOGARTY, OLLIE GEORGE, OLIVE GIBSON, IH (DECEASED), LH (DECEASED), DES LITTLE, DES THOMPSON, NANCY WALLAM, FRANK WALSH (JNR), FRANK WALSH (SNR)**
Claimants

AND: **STATE OF WESTERN AUSTRALIA**
State

THE COMMONWEALTH OF AUSTRALIA
Second Respondent

SHIRE OF MOUNT MARSHALL
Third Respondent

SOUTH WEST ABORIGINAL LAND AND SEA COUNCIL ABORIGINAL CORPORATION
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Fifth Respondents

ABALONE (WA) PTY LTD, COVENTRY ENTERPRISES PTY LTD, JOHN CALEGARI, SILVER LAKE RESOURCES LIMITED
Sixth Respondents

JUDGE: **BARKER J**
DATE OF ORDER: **25 MAY 2015**
WHERE MADE: **PERTH**

THE COURT ORDERS THAT:

1. Proceeding WAD 100 of 2012 be dismissed.
2. There be no order as to costs.

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

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION **WAD 6123 of 1998**

BETWEEN: **CG (DECEASED), JOHN ASHWIN, GLORIA FOGARTY, PG (DECEASED), OLLIE GEORGE, OLIVE GIBSON, IH (DECEASED), AL (DECEASED), HL (DECEASED), RL (DECEASED), WL (DECEASED), DES LITTLE, DES THOMPSON, NANCY WALLAM, FRANK WALSH (JNR) and FRANK WALSH (SNR)**
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Seventh Respondent

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION **WAD 100 of 2012**

BETWEEN: **JOHN ASHWIN, GLORIA FOGARTY, OLLIE GEORGE, OLIVE GIBSON, IH (DECEASED), LH (DECEASED), DES LITTLE, DES THOMPSON, NANCY WALLAM, FRANK WALSH (JNR), FRANK WALSH (SNR)**
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PASTORAL EXPORTS PTY LTD, ELIZABETH ANN PILKINGTON, GEOFFREY BRIAN PILKINGTON, RANGELAND RED PTY LTD, GREGORY ROBERT SCOTT, LESLEY VALMA SCOTT, TANIA ROSLYN FRENCH AND GREGORY SHAYNE FRENCH, WAGGA WAGGA STATION PTY LTD
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Sixth Respondents

JUDGE: **BARKER J**

DATE: **25 MAY 2015**

PLACE: **PERTH**

REASONS FOR DECISION

1 Following the trial in this proceeding, the Court concluded it was unable to find, despite the current evidence of connection relied on by the claimants, that the claimants are connected to the claim area by traditional laws and customs of the Badimia people as required by the *Native Title Act 1993* (Cth) (***NTA***). See *CG (Deceased) on behalf of the **Badimia** People v State of Western Australia* [2015] FCA 204.

2 The Court, at [495] of its reasons, provided the following summary of its reasons for coming to that conclusion:

> In summary, while there is no doubt that, at sovereignty in 1829 in Western Australia, there was a group of Badimia people who were governed by their own laws and customs, the claimants have failed to discharge the onus that they bear to satisfy the Court, on the balance of probabilities, that:
> (1) the claim area falls within the traditional country of the Badimia people at sovereignty;
> (2) the claimants are, in the case of the claimed apical ancestors (save for three or four) descended from persons who were Badimia people; or that
> (3) the laws and customs that the claimants currently assert, under which they say native title is currently possessed, are the 'traditional' laws and customs of the pre-sovereignty Badimia people; and in particular,
> (4) the claimants have not proved that the Badimia people, since sovereignty, and in each generation, have continued to acknowledge traditional laws and observe traditional customs to the present day in respect of the claim area.

3 The question that now arises is what order or other determination should be made in light of these reasons.

4 The ***State*** of Western Australia submits that, pursuant to s 225 of the NTA, the Court should make a negative determination that native title does *not* exist in the claim area in relation to the claim CG (Deceased) & Ors on behalf of the Badimia People v State of Western Australia & Ors, WAD 6123 of 1998 (***Badimia claim***).

5 The State seeks an order merely dismissing the claim in Ollie George & Ors v State of Western Australia & Ors, WAD 100 of 2012 (***Badimia #2 claim***).

6 The claimants resist the State's proposed form of determination in relation to the Badimia claim, doubting the power of the Court to make a negative determination in the circumstances of this proceeding and, in any event, submitting it is inappropriate.

7 In short, two questions arise for consideration:

(1) whether the Court has the power to make a determination that native title does not exist in the claim area in the circumstances of this proceeding; and

(2) if so, whether such a determination should be made.

DOES THE COURT HAVE THE POWER TO MAKE A DETERMINATION IN THIS PROCEEDING THAT NATIVE TITLE DOES NOT EXIST?

Statutory context

8 Section 61(1) of the NTA deals with native title and compensation applications. One kind of application that may be made is a native title determination application, as mentioned in subs 13(1) of the NTA.

9 In the "Applications" table in s 61(1) under "Native title determination application", items (1) to (4) identify the persons who may make a native title determination application. They include a native title claim group (item 1), a person who holds a non-native title interest in relation to the whole of the area in relation to which the determination is sought (item 2), the Commonwealth Minister (as defined) (item 3), and the State Minister or the Territory Minister (as relevant and as defined) (item 4).

10 By s 253 a "claimant application" is a native title determination application that a native title claim group has authorised to be made.

11 A "non-claimant application" is defined in s 253 as a native title determination application that is not a claimant application.

12 In this case, the native title determination application before the Court is a claimant application.

13 So far as the reference to s 13(1) of the NTA is concerned, that provision provides that an application may be made to the Federal Court under Pt 3 (which includes s 61) for a determination of native title in relation to an area for which there is no approved determination of native title, or to revoke or vary an approved determination of native title. In this case, the claimant application was for a determination of native title in relation to an area for which there is no approved determination of native title. Accordingly, the claimant application before the Court met the requirements of s 61(1).

14 Section 225 of the NTA defines a "determination of native title" in the following way:

> A ***determination of native title*** is a determination whether or not native title exists in relation to a particular area (the ***determination area***) of land or waters and, if it does exist, a determination of:
>
> (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
>
> (b) the nature and extent of the native title rights and interests in relation to the determination area; and
>
> (c) the nature and extent of any other interests in relation to the determination area; and
>
> (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
>
> (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease—whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.
>
> Note: The determination may deal with the matters in paragraphs (c) and (d) by referring to a particular kind or particular kinds of non−native title interests.

15 On the face of this definition, the Court has the power, if not the obligation, to determine, including on a claimant application, "whether or not native title exists" in relation to a particular area. If it determines that it does exist, then the determination must deal with the matters in paras (a) to (e) of s 225.

16 However, the claimants submit that no application has been properly brought by the State for a determination of no native title. The claimants say that the NTA in fact requires the State to bring a non-claimant application for a determination of no native title.

Claimants' submissions

17 The claimants first note that a determination of native title must be determined under s 225 of the NTA, and that s 213(1) of the NTA provides:

> If, for the purpose of any matter or proceeding before the Federal Court, it is necessary to make a determination of native title, that determination must be made in accordance with the procedures in this Act.

18 The claimants submit that the "Applications" table in s 61(1) of the NTA distinguishes between native title determination applications that are "claimant applications" and "non-claimant applications", as defined in s 253. A person making a "claimant application", or an application on behalf of a native title claim group, or compensation claim group, must be authorised by such a group pursuant to s 61(1) and (2) and s 251B.

19 It is submitted s 61(1) provides for the making of an application made by a native title claim group, as well as by non-indigenous persons. Therefore, when it comes to the making of a determination under s 225 of the NTA as to "whether or not native title exists", there can only be a determination that native title does *not* exist where there has been an application for determination of native title made seeking such a determination – which will necessarily be an application made by one of the non-indigenous persons mentioned in the "Applications" table in s 61(1) in items (2), (3) or (4) under "Native title determination applications".

20 The claimants note that, while an application other than on behalf of a native title claim group or compensation claim group need not be authorised, it must satisfy statutory requirements. In particular, a notification requirement exists for non-claimant applications. When notifying a non-claimant application, the Native Title Registrar must include a statement of the kind set out in s 66(10)(a), namely that s 24FA protection will apply to the area covered by the non-claimant application unless the area is covered by a relevant native title claim at the end of three months from the notification day.

21 The claimants submit that the status of an application as a non-claimant application therefore alerts notified persons that a determination that native title does not exist is being sought. They submit it is intended that the orders open to be made on an application under s 61, in the form of a determination of native title, are those sought in applications as notified, and say that if the public is not alerted to the prospect of a negative determination of native title, the notification requirements of s 66 of the NTA will not be fulfilled and a person

receiving notification will not be aware of information that may affect the notified person's decision as to how to respond to the application.

22 It is the claimants' argument that the notification requirements in s 66 of the NTA demonstrate the intention of the NTA that a non-claimant application be brought where there is an application for a negative determination of native title, and that the public must be notified of this prospect.

23 It follows, it is submitted, that the Court's jurisdiction under s 225 to determine whether or not native title exists depends on there being an application which complies with the NTA for either a positive determination, where that is sought, or a negative determination, where that is sought. They say that here, a non-claimant application was not positively advanced by the State and this should preclude the State from an entitlement to a negative determination as a remedy.

24 The claimants contend that the native determination sought by the State in the present proceeding is effectively a counterclaim, which should have been positively propounded by the making of a non-claimant application. They submit that in a non-claimant application/counterclaim, the State would have borne the onus of proof of the negative proposition that native title did not exist: *Worimi v Worimi Local Aboriginal Land Council* (2010) 181 FCR 320 at [74]; [2010] FCAFC 3. In the claimants' submission, it is unlikely that the NTA permits a respondent to avoid that onus and not make a formal counterclaim: compare *Commonwealth v* ***Clifton*** (2007) 164 FCR 355 at [52]; [2007] FCAFC 190.

25 Finally, the claimants refer to the application of s 22 of the *Federal Court of Australia Act 1976* (Cth) (***FCA Act***). Section 22 of the FCA Act is directed to promoting finality of proceedings, and provides:

> The Court shall, in every matter before the Court, grant, either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him or her in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided.

26 The claimants submit that a statute containing special procedures for dealing with native title, as provided by s 225 of the NTA, should displace a general provision such as s 22: *Commissioner of Taxation v Hornibrook* (2006) 156 FCR 313 at [28]; [2006] FCAFC

170; *Deputy Commissioner of Taxation v Dick* (2007) 226 FLR 388 at 411; [2007] NSWCA 190.

27 The claimants submit that, given the *in rem* nature of a determination of native title coupled with the remedial character of the NTA, s 22 is not an appropriate power to allow the making of a negative determination of native title consequent upon the dismissal of a native title determination application. The procedures of the NTA must be followed in relation to a determination under s 225 following an application under s 61.

State's submissions

28 The State says the claimants' assertion, that the Court does not have the power to make a determination that native title does not exist pursuant to a claimant application, is incorrect as a matter of statutory construction. The State contends that there are no procedures under the NTA which prevent a determination that native title does not exist in respect of a claimant application or positively require a non-claimant application for such a determination. It suggests the logical outcome of the claimants' interpretation of the NTA would be to require the lodgement of a non-claimant application, mirroring every claimant application, in order to found a determination of no native title.

29 The State notes that, relevantly, s 225 of the NTA defines a "determination of native title" as a "determination *whether or not* native title exists in relation to a particular area … and, *if it does exist*, a determination of [various matters set out in subparas (a) to (d)]" (emphasis added). Therefore, in the State's submission it is readily apparent from the opening words of s 225 of the NTA that a determination of native title may be either a positive determination (that is, that native title does exist) or a negative determination (that is, that native title does not exist). Only if the determination is a positive one must the orders making the determination also include the matters referred to in subparas (a) to (d) of s 225.

30 The State submits s 13(1) of the NTA provides that an application may be made to the Federal Court under Pt 3 of the NTA for a "determination of native title". Section 61 sets out the applications that may be made under the NTA. Relevantly, it provides for the making of a "native title determination application". A "native title determination application" is described in s 61 as an "[a]pplication, as mentioned in subsection 13(1), for a determination of native title". Section 61 further provides that a "native title determination application" may be brought by: persons who claim to hold native title; persons who hold non-native title interests; the Commonwealth; or the relevant State or Territory.

31 Therefore, in the State's submission, it is clear and unambiguous from the words of s 61 that any applicant (claimant or otherwise) who makes a "native title determination application" is applying for the same thing, namely "a determination of native title", which, as explained above, is defined in s 225 as a "determination *whether or not* native title exists" (emphasis added). Accordingly, a "native title determination application" brought on behalf of a native title claim group is an application for a "determination whether or not native title exists".

32 In contending for this construction of the Court's power under s 225, the State relies on *Sandy on behalf of the **Yugara** People v State of Queensland (No 3)* [2015] FCA 210, in which Jessup J notes, at [16] and [18], that the fact that a claimant application "might result in a determination that native title does not exist strikes me as an inescapable possibility under the statutory scheme … the Act contemplates the making of such a determination as within the range of possible outcomes," and that "[b]y the terms of s 225, it is also a matter of public record that [a claimant application] may result in the making of a determination that native title does not exist in relation to the land concerned."

33 Jessup J rejected the submission that a negative determination could only be made in circumstances where a non-claimant application had been filed, and considered that the Court had the power to make a negative determination in respect of a claimant application which had been unsuccessful following a contested hearing.

34 The State submits it is apparent from Jessup J's reasons that his Honour was addressing substantively identical submissions to those made by the claimants in the present case, and unless this Court is convinced the decision is clearly wrong, the Court should follow it: *Graham on behalf of the Nadju People v State of Western Australia* [2014] FCA 516 at [24].

35 The State notes that the claimants cite no relevant authority for their assertion that the Court does not have the power to make a determination that native title does not exist pursuant to a claimant application, apart from *Clifton* at [43], which is said to stand for the proposition that there are procedures of the NTA which require a non-claimant application before a determination that native title does not exist can be made, and that those asserted procedures are critical to a valid exercise of the jurisdiction of the Federal Court.

36 In the State's submission, *Clifton* does not assist the claimants in the present case as it concerned the different question of whether an indigenous respondent, not having made an application for a determination, nor having complied with the relevant authorisation requirements, was entitled to a determination in its favour. The Full Court in *Clifton*, at [37], acknowledged that the question before the Court in that case was "quite different" from the situation faced by the Court when it was required to determine, amongst other things, "the nature and extent of the native title, rights and interests held by the claim group". The resolution of disputes of this kind was, according to the Full Court "an inherent aspect of the determination of an application made under s 13(1)".

37 In further support of its interpretation of the NTA, the State notes that the Court's power to make a negative determination pursuant to a claimant application, either in whole or in part has been, and is, routinely exercised. It says the effect of the claimants' proposition, in the State's submission, is that the Court has been, and is, therefore, routinely in error in this respect.

38 It points to the number of instances in which the Court has made a negative determination following a contested hearing: *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [1998] FCA 1606; *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178; [2000] FCA 1609; *Risk on behalf of the Larrakia People v Northern Territory* [2006] FCA 404; ***Wyman*** *on behalf of the Bidjara People v State of Queensland (No 4)* [2014] FCA 93; and, most recently, *Yugara*.

39 The State further notes that many positive determinations include a determination that native title does not exist in relation to some areas (due, for example, to extinguishment, or failure to make out the elements of proof of native title in respect of certain areas). The State concludes that many, if not most, determinations are mixed "positive" and "negative" determinations. Each is, as s 225 requires it to be, "a determination whether or not native title exists". Therefore, in the State's submission, the claimants' distinction between "positive" and "negative" determinations is not reflected in the NTA or in the decided cases.

40 The State accepts that a number of determinations where native title has been found not to exist were consent determinations, but submits that the Court's power is relation to litigated determinations and consent determinations is not separate or different. The State says the NTA expressly provides that a consent determination under ss 87 or 87A must be made in compliance with the same provisions of the NTA as a litigated determination,

namely ss 94A and 225 of the NTA. Sections 87(1)(c) and 87A(4) of the NTA require the Court to be satisfied that an order in, or consistent with, the terms of the proposed determination would be within the power of the Court before making any determination, and the Court receives submissions from the parties in this respect prior to making consent determinations in Western Australia.

41 Finally, the State submits that by s 81 of the NTA the Federal Court has the jurisdiction to "hear and determine" applications that relate to native title, including claimant applications. The State says it would be a perverse result, one contrary to both the object of the NTA referred to in s 3(c) and to the principles of finality and the avoidance of multiplicity of proceedings, including those contained in s 22 of the FCA Act, if the Court, having heard a claimant application and decided the merits of that application, is without power to "determine" the application merely because the result is a finding that native title does not exist.

42 The State contests the claimants' submission that the provisions of the NTA displace s 22 of the FCA Act in this respect. It says that, to the contrary, the Full Court in *Clifton* observed at [41] that while s 22 of the FCA Act does not expand the jurisdiction of the Court (and consequently a determination of native title must be made in accordance with the procedures of the NTA) s 22 of the FCA Act "is concerned with the way in which the Court is to exercise that jurisdiction". Therefore, in the State's submission, in making a determination of native title in accordance with the procedures of the NTA, s 22 provides that the Court shall "as far as possible" resolve all matters in controversy between the parties "completely and finally" and avoid "all multiplicity of proceedings" which may result.

Discussion

43 In *Yugara*, the Queensland South Native Title Services similarly submitted that a negative determination could only be made in circumstances where a non-claimant application had been filed. The argument put on behalf of the claimants was substantially the same as that put here on behalf of the claimants. Jessup J rejected that submission, observing that there was "neither inconvenience nor injustice in taking the view … that such a holding would be wrong", and confirmed that the Court had the power to make a negative determination in respect of a claimant application which had been unsuccessful following a contested hearing.

44 In doing so, his Honour stated at [16]:

> That is to say, the court has before it applications for determinations of *whether or not* native title exists. Those applications have been duly made conformably with item (1) in s 61(1), and have been through the statutory procedures to which their Honours referred in *Clifton*. That either or both of those applications might result in a determination that native title does not exist strikes me as an inescapable possibility under the statutory scheme. Even without the submission of any respondent, the Act contemplates the making of such a determination as within the range of possible outcomes.

45 His Honour further observed at [18]:

> when any application for a determination of native title is made, it is a matter of public record that the person or group concerned may, at the end of the proceeding, be recognised as the holder or holders of native title. By the terms of s 225, it is also a matter of public record that the proceeding may result in the making of a determination that native title does not exist in relation to the land concerned.

46 In my view, the Court should follow the ruling and reasoning of Jessup J in *Yugara*, which I consider, with respect, to be correct.

47 While the claimants submit that such a ruling results in public notification procedures for native title claims being circumvented, I am satisfied s 225 confers on the Court power to make a negative order that native title does not exist and so do not accept that s 225 should be construed in a manner that limits the power of the Court to make a determination of one sort or the other.

48 If a claimant application fails, the unsuccessful claimants must necessarily appreciate that, in its discretion, the Court may either simply dismiss the proceeding or make a negative determination.

49 The reality is, particularly in a proceeding like this, that the claimant application of the claim group has followed the procedures of the NTA, and has been notified so that any other indigenous persons who wished to become respondents in the proceeding could become respondents to assert any competing native title claims. None did so, although at the hearing indigenous witnesses, belonging to groups who considered they were neighbours of the Badimia, gave evidence.

50 While I recognise the arguable basis of submissions made on behalf of the claimants concerning the limited powers of the Court as to what determinations it can make now in this

proceeding, I prefer the construction of s 225 and the other provisions of the Act arrived at in *Yugara* and contended for by the State, which submissions, set out above, I generally accept.

51 Thus, the question then becomes whether a negative determination should be made in the circumstances of this case.

SHOULD A NEGATIVE DETERMINATION BE MADE?

Discretionary power

52 The Court notes, at the outset, that the State accepts that while the Court has the jurisdiction to make a negative determination in respect of a claimant application, the Court has a discretion to decline to exercise that jurisdiction. This is properly conceded. The Court is not obliged by s 225, or any other provision of the NTA, to make one determination or the other. It is open to the Court simply to dismiss a claimant application where it is not satisfied native title exists: see *Western Australia v Ward* (2000) 99 FCR 316 at [219]; [2000] FCA 191 (***Ward***); *Harrington-Smith on behalf of the* ***Wongatha*** *People (No 9) v State of Western Australia* (2007) 238 ALR 1 at [4007]; [2007] FCA 31; and *Kokatha People v State of South Australia* [2007] FCA 1057 at [31].

53 In *Ward* the Full Court noted, at [219], that:

> Whilst s 225 provides that a determination of native title is a 'determination whether or not native title exists in relation to a particular area …', it does not mandate that a negative determination must be made in respect of part of an area covered by an application where the evidence fails to satisfactorily disclose the position one way or the other … Whilst it may have been technically open on the evidence for his Honour to consider whether a negative determination should be made … it was also open to the Court to decide that it should decline to exercise that jurisdiction, if the interests of justice required.

54 In *Wongatha*, Lindgren J noted that ultimately, the kind of order to be made in a failure of proof native title case is one of discretion, citing *Ward* at [219].

55 In *Wongatha,* although it was submitted, in particular by the Commonwealth, that a determination that native title does not exist in relation to the Wongatha claim area should be made, Lindgren J found at [4004] the appropriate order to be one of dismissal. His Honour found, at [4006], the various claim groups failed to establish their claims in relation to the claim area, and in all but one claim, the applications were not authorised, and the Court lacked jurisdiction to make a determination of native title in relation to those claims.

56 Here, having regard to the Court's discretion, the State submits the appropriate order to be made in relation to the Badimia claim is a negative determination that native title does not exist in the claim area.

57 The claimants submit that the Court should exercise its discretion to dismiss both the Badimia claims.

58 In the State's submission, none of the considerations which may favour dismissal over the making of a negative determination are present in this proceeding.

State's submissions

59 First, in the State's submission, the evidence in this case did not fail to disclose "one way or the other" whether or not native title existed. Rather, the State submits the claimants positively failed to establish the existence of native title on multiple bases (any one of which would, itself, have been fatal to the existence of native title). The State points to the Court's findings that the claimants had failed to establish that:

(1) the claim area was traditionally Badimia at sovereignty;

(2) the contemporary claimants were descended from persons who were Badimia people;

(3) the contemporary laws and customs were the traditional laws and customs of the pre-sovereignty Badimia people;

(4) the Badimia people, since sovereignty, and in each generation, had continued to acknowledge traditional laws and observe traditional customs to the present day; and

(5) the Badimia people were connected to the claim area by traditional laws and customs.

60 In particular, the State submits that the evidence does not suggest any possibility that, if the claimants had conducted its case differently, at least some members of the claimant group may have been able to establish native title rights and interests. The State says the nature of the Court's findings and the multiple bases upon which the claimants' case failed demonstrate that no member of the claim group could have established the existence of native title rights and interests in the Badimia claim area.

61 The State further notes these findings resulted from a completed trial on the merits, which involved a comprehensive examination of whether the requirements of s 223 of the NTA had been met. The claimants had the assistance of highly skilled and experienced legal

representation in putting forward its case. There is no suggestion that any relevant material or argument was not presented to the Court for its consideration.

62 Secondly, the State submits the Court can have particular confidence in this case that there are no other persons who claim to hold native title rights and interests in the claim area, such that a negative determination would be against the interests of justice or would prejudice any other party. The contemporary claimant evidence was that the entirety of the claim area was Badimia territory. This claimant evidence was also supported (unusually, in the State's experience) by evidence from a representative of each of the neighbouring Aboriginal groups, who expressly confirmed that the contemporary understanding of those groups was that the claim area was not their territory.

63 The State notes the comments of Jessup J in *Yugara* at [25]:

> Of course the court did not embark upon a consideration of who, other than the claimants, might be entitled to the benefit of a positive native title determination. The claimants were the only parties before the court who claimed the making of such a determination. If there were, at the appropriate stage in the proceeding, others who had an interest in having a determination made in their favour, they must be taken to have known that the proceeding was on foot, and to have had the opportunity to bring their claims forward.

64 Notice of this claim has been given to the public by the Native Title Registrar pursuant to s 66(3)(d) of the NTA. The State submits any other persons who may potentially have a claim for native title in the claim area have had ample opportunity to make their own claim, or at least make their presence known as a respondent to the application, given the application was made in 1991 and has been in active litigation since 2010.

65 Thirdly, the State notes the requirement for finality of litigation, reflected in s 22 of the FCA Act. The State contends that to merely dismiss the Badimia application would fall short of giving effect to this principle of finality. It says a dismissal would leave uncertain, insofar as the public record is concerned, the question of whether or not native title exists in the claim area, notwithstanding the fact that, as a matter of fact and evidence, that question has been resolved before the Court, and would invite or at least leave open precisely the kind of "multiplicity of proceedings" which s 22 of the FCA Act provides should be avoided.

66 In the State's submission, the scheme of the NTA, taken as a whole, clearly anticipates that the Court, in the present circumstances, should make a determination that native title does not exist.

67 In this respect, the State adopts the view expressed by Jessup J in *Yugara* at [41]:

> For more than 16 years now, there has been, in the files of the court, an application for a native title determination in relation to the claim area. Those who resist the outcome proposed by the State implicitly contend that this proceeding should be concluded without the making of any determination of native title. That is not a situation which a court exercising the judicial power of the Commonwealth should find attractive.

Claimants' submissions

68 However, in the claimants' submission, an order dismissing the current claims, rather than a negative determination, is appropriate in this case.

69 The claimants submit that the findings in *Badimia* go no higher than a lack of satisfaction that the claimants had proved the necessary elements of their case. They say the judgment includes positive findings about the situation at sovereignty, the identity of some parts of the claim area as Badimia (without identifying those areas), the Badimia identity of three (or four) of the apical ancestors and the authenticity of current practices. Significantly, the claimants note there is a possibility, given these findings in *Badimia*, that a fresh claim by a differently constituted group over some of the claim area may arise in the future.

70 The claimants refer to the following findings in *Badimia*:

(1) that Timothy Benjamin, Yilayajambin and Bilygwi, Lizzie aka Juumbi were Badimia people or were traditionally associated with the claim area at the time of sovereignty: [336]-[337];

(2) that there is no doubt that, at sovereignty in 1829 in Western Australia, there was a group of Badimia people who were governed by their own laws and customs: [495];

(3) that it appeared that parts of the claim area correlated with some of the older ethnographic data, although it would be speculating if the Court found that the whole of the claim area was within traditional Badimia country: [206]-[207]; and

(4) that there was evidence from claimants today of stories that speak to the Dreaming, spirit creatures, cultural practices that respect the Bimara, hunting, gathering, land and water protection, none of which the Court doubted was authentic, although the Court was not satisfied that these stories and practices arose from a normative system of Badimia law and custom that had continued since sovereignty: [431].

71 The claimants say the findings of the Court in relation to the apical ancestors, that Badimia country lay somewhere in the claim area and the evidence of continuing beliefs must

also be seen in the context of there being no overlapping claim and that evidence was provided by individual members of neighbouring groups as to the claim area being Badimia country.

72 They say that while the State points to the recent decision of Jessup J in *Yugara,* this case related to two overlapping claims in Brisbane. Similarly they say the determination of no native title made by Jagot J in *Wyman* was made in the context of three overlapping claim groups and five claims (see *Wyman on behalf of the Bidjara People v State Of Queensland (No 2)* [2013] FCA 1229), and in *Risk* there were two overlapping claims (and an earlier third claim). The claimants say the findings in *Risk*, *Wyman* and *Yugara* did not decide the claims on the basis of insufficient proof that left open a further claim as discussed below in relation to *Wongatha* and is relevant to *Badimia*.

73 The claimants refer to other occasions where the Court has not been satisfied that native title continues to exist and dismissed the applications. In particular, they point to the reasons of Lindgren J in *Wongatha* at [4005] to [4007]:

> I have declined an invitation of the non-indigenous respondents to make a determination that there is no native title in the Wongatha Claim area. Where, as here, claimants fail to prove their case, the usual order is simply one of dismissal. It is conceivable that an individual may wish to make an application for a determination of native title, or that a small group of individuals, each of whom has rights and interests in a constellation of Tjukurr sites or a Tjukurr track, may wish to do so. I say nothing, one way or the other, as to the prospects of success of any such application, but I decline, in these present proceedings, to preclude the bringing of it.

74 It is submitted by the claimants that Lindgren J in *Wongatha* took the correct approach in relation to the interpretation of s 225 of the NTA in circumstances where the claimants had failed to prove their case yet there was a possibility of individuals or a small group of individuals making an application for a determination of native title.

75 It is the claimants' contention that the findings made by the Court in *Badimia* indicate further research could be undertaken and the descendants of Timothy Benjamin, Yilayajambin and Bilygwi and Lizzie aka Juumbi could form part of a society, for the purposes of the *Yorta Yorta* requirements, and a different societal claim could be made, a possibility contemplated by Lindgren J in *Wongatha* at [4008]. The claimants submit a determination of no native title might therefore affect other people and other groups and have serious consequences for the current and future descendants of Timothy Benjamin,

Yilayajambin and Bilygwi and Lizzie aka Juumbi who were found to be Badimia people or were traditionally associated with the claim area at the time of sovereignty.

76 Finally, the claimants point to the remedial nature of the NTA, to be construed in a way that renders it workable in advancement of its main objects as set out in s 3, which provide for the recognition and protection of native title: *Strickland v Native Title Registrar* (1999) 168 ALR 242 at [55]; [1999] FCA 1530 per French J. The claimants cite the Full Court's comments in *Western Australia v Fazeldean (No 2)* (2013) 211 FCR 150 at [34]; [2013] FCAFC 58:

> [L]itigation under the Native Title Act is not ordinary private inter partes litigation. Sought to be vindicated are rights of a communal nature based on occupation and a physical and spiritual connection between land and people that has endured for possibly millennia. The vindication is not only for the living in the claim group, but for their ancestors and for generations to come. How that context affects the operation of principles such as res judicata under or in the context of the Native Title Act is a large question, and is one of great importance.

77 It is submitted by the claimants that, in the same way, an order determining that native title does not exist is one of great importance to the claim group, their ancestors and for generations to come. It is submitted that if the NTA is to be construed so as to recognise, support and protect native title, and the Court's findings on connection in this proceeding are taken into consideration, then the Court cannot conclusively make a determination of no native title.

Discussion

78 Principally for the reasons advanced on behalf of the State, the Court considers that the negative determination in relation to the Badimia claim, and other orders proposed by the State, should be made in these proceedings.

79 While, as submitted on behalf of the claimants, a determination that native title does not exist may be considered to have serious consequences for the current and future descendants of those persons who the Court found to be Badimia people or to have been traditionally associated with the claim area at sovereignty, the circumstances of this claim adverted to by the State mean that there has been a full and complete trial of relevant connection issues in the area the subject of claim.

80 The trial was conducted following the lodgement of a considered claimant application by the claimants. No other indigenous persons sought to challenge the claimants' alleged interests. The native title claim group was identified and formulated by the claimants having regard to their indigenous knowledge and with the assistance of the relevant native title representative body. The matter proceeded to trial with the advice and representation of experienced solicitors and counsel. An experienced anthropologist was called on behalf of the claimants at trial.

81 While it is suggested by the claimants that, as a result of the Court's decision, thought might now be given to the identification of a new claim group comprising only the descendants of the Badimia apical ancestors identified by the Court, and the prospect of a new claimant application should be considered a possibility, merely to state that proposal is to identify its artificiality. The claim group would then be identified by reference to the finding of the Court for the purpose of trying to advance a case that was not advanced at the earlier trial; not by the evidence alleging a society defined by the traditional laws and customs of Badimia people.

82 All of the difficulties identified by the Court and summarised above, as to why the present claim failed, would remain. In particular, the Court's finding that the relevant contemporary laws and customs identified in the evidence, including by claimant witnesses who were descendants of ancestors identified by the Court as Badimia people, were not traditional, in the *Yorta Yorta* sense, and that the claimants had failed to show that there had been acknowledgment of and adherence to traditional laws and customs by each generation of Badimia people since sovereignty, would be fatal to any reformulated claim that can be imagined.

83 This is not a case, such as that of *Wongatha*, upon which the claimants particularly rely in making their submissions, where the trial judge, in effect, found that the formulated claims not only were not authorised under the NTA, and principally failed for that reason, but also were relevantly misconceived. His Honour recognised that, within a very large claim group, there were families or groups who may well, on their own, be able to advance separate claims for native title – although his Honour made no comment as to whether such claims would succeed if they were made. In those circumstances, his Honour exercised his discretion to dismiss the proceeding rather than determine native title did not exist.

84 Here, the findings of the Court, as intimated, do not comprehend such a possibility.

85 In those circumstances, it is appropriate for the finality reasons identified in *Yugara*, that there should be a negative determination in respect of the Badimia claim.

86 The Badimia #2 claim, which was dependent on the success of the Badimia claim, should be dismissed.

CONCLUSION AND ORDER

87 For the reasons given above, the orders proposed on behalf of the State should be made as follows.

88 In WAD 6123 of 1998 the Court orders that:

(1) Native title does not exist in relation to any part of the land or waters within the external boundary of proceeding WAD 6123 of 1998, as described in the Schedule.

(2) There be no order as to costs.

89 In WAD 100 of 2012 the Court orders that:

(1) Proceeding WAD 100 of 2012 be dismissed.

(2) There be no order as to costs.

I certify that the preceding eighty-nine (89) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker.

Associate:

Dated: 25 May 2015