

FEDERAL COURT OF AUSTRALIA

Willis on behalf of the Pilki People v State of Western Australia (No 2) [2014]

FCA 1293

Citation: Willis on behalf of the Pilki People v State of Western Australia (No 2) [2014] FCA 1293

Parties: **VICTOR WILLIS, BETTY KENNEDY, DANIEL (STEVIE) SINCLAIR AND GW (DECEASED) ON BEHALF OF THE PILKI PEOPLE v STATE OF WESTERN AUSTRALIA, SHIRE OF MENZIES and NGAANYATJARRA COUNCIL (ABORIGINAL CORPORATION)**

File number: WAD 6002 of 2002

Judge: **MCKERRACHER J**

Date of judgment: 2 December 2014

Catchwords: **NATIVE TITLE** - determination of native title pursuant to s 225 of the *Native Title Act 1993* (Cth) – determination will not take effect until prescribed body corporate is nominated under s 56(1) or s 57(2) of the *Native Title Act 1993* (Cth)

Legislation: *Native Title Act 1993* (Cth)

Cases cited: *Willis on behalf of the Pilki People v State of Western Australia* [2014] FCA 714

Date of hearing: 2 December 2014

Place: Pilki Dam, Western Australia

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 10

Counsel for the Applicant: Mr P Ramsay

Solicitor for the Applicant: Central Desert Native Title Services

Counsel for the First Respondent: Mr J O'Halloran

Solicitor for the First
Respondent:

State Solicitors Office

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

WAD 6002 of 2002

**BETWEEN: VICTOR WILLIS, BETTY KENNEDY, DANIEL (STEVIE)
SINCLAIR AND GW (DECEASED) ON BEHALF OF THE
PILKI PEOPLE
Applicant**

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

**SHIRE OF MENZIES
Third Respondent**

**NGAANYATJARRA COUNCIL (ABORIGINAL
CORPORATION)
Fourth Respondent**

JUDGE: MCKERRACHER J

DATE OF ORDER: 2 DECEMBER 2014

WHERE MADE: PILKI DAM, WESTERN AUSTRALIA

THE COURT ORDERS THAT:

1. There be a determination of native title in WAD 6002 of 2002 in terms attached. The determination is to take effect immediately upon the making of a determination under s 56(1) or s 57(2) of the *Native Title Act 1993* (Cth) as the case may be.
2. Within twelve months of the date upon which these orders are made, a representative of the common law holders of the native title rights and interests shall indicate whether they intend to have the native title rights and interests held in trust and, if so, by whom. They are invited to do so by:
 - (a) nominating in writing to the Federal Court a prescribed body corporate to be trustee of the native title rights and interests; and
 - (b) including within the nomination the written consent of the body corporate.
3. If a prescribed body corporate is nominated in accordance with order 2, it will hold the native title rights and interests described in order 1 in trust for the common law holders of the native title rights and interests.

4. In the event that there is no nomination within the time specified in order 2, or such later time as the Court may order, the matter is to be listed for further directions.
5. 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 6002 of 2002

**BETWEEN: VICTOR WILLIS, BETTY KENNEDY, DANIEL (STEVIE)
SINCLAIR AND GW (DECEASED) ON BEHALF OF THE
PILKI PEOPLE
Applicant**

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

**SHIRE OF MENZIES
Third Respondent**

**NGAANYATJARRA COUNCIL (ABORIGINAL
CORPORATION)
Fourth Respondent**

JUDGE: MCKERRACHER J

DATE: 2 DECEMBER 2014

PLACE: PILKI DAM, WESTERN AUSTRALIA

REASONS FOR JUDGMENT

1 Today the Court sits for a determination of native title pursuant to s 225 of the *Native Title Act 1993* (Cth) (**Act**).

2 The application for native title was first filed with the Court on 12 August 2002 and, on 19 August 2002, it was referred to mediation in the National Native Title Tribunal (**Tribunal**). It was amended on 1 April 2005, and following acceptance for registration, was entered onto the Register of Native Title Claims on 18 April 2005. There were further amendments this year and last.

3 Various case management conferences were convened between June 2012 and March 2013 before a Registrar of the Court, and on 27 March 2013 orders were made for the filing of pleadings for the purpose of narrowing the issues in contention. As a result of the exchange of pleadings it was agreed between the applicant and the only active respondent, the State of Western Australia (**State**), that the claim group has native title in the application area and that there should be a determination of native title in respect of the area. An issue

which remained in contention between the applicant and the State related to the recognition and determination of the native title right to take and use resources of the land and waters for commercial purposes.

4 After a five day hearing during the period 29 August 2013 to 13 March 2014, reasons for judgment in all matters regarding the remaining issue in contention were delivered by Justice North on 4 July 2014: see *Willis on behalf of the Pilki People v State of Western Australia* [2014] FCA 714.

5 Those reasons for judgment included an order that the applicant and the State file a draft determination of native title reflecting the reasons for judgment. That occurred on 12 September 2014.

6 The draft determination includes the making of an order that the determination of native title will not take effect until a Prescribed Body Corporate (**PBC**) is nominated under s 56 or s 57 of the Act. This is because at the date of the determination of native title, a PBC will not have been established and consequently the applicant does not request the Court to make a determination regarding a PBC in accordance with ss 55, 56, and 57 of the Act.

7 Although not every aspect of this outcome has been reached by agreement, there has still been much cooperation involved in finally reaching this important point. The applicant and the State, the non-State respondent parties, the legal representatives and all those involved in reaching this point are congratulated.

8 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.

9 Accordingly, I now make the determination of native title pursuant to the *Native Title Act 1993* (Cth) in the terms proposed in the draft determination filed 12 September 2014 which has been agreed between the parties.

10 The determination of native title so made is attached to these reasons.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein

of the Honourable Justice
McKerracher.

Associate:

Dated: 2 December 2014

DETERMINATION OF NATIVE TITLE

THE COURT ORDERS AND DETERMINES THAT:

Existence of native title (s 225)

1 Native title exists in relation to the whole of the Determination Area identified in Schedule 1.

Native title holders (s 225(a))

2 The native title is held by the persons described in Schedule 2 (**native title holders**).

The nature and extent of native title rights and interests (s 225(b); s 225(e))

3 Subject to Orders 4, 5 and 6 the nature and extent of the native title rights and interests is the right of possession, occupation, use and enjoyment of the Determination Area as against the whole world including the right to access and take for any purpose the resources of the land and waters.

Qualifications on native title rights and interests (s 225 (b); s 225(e))

4 The native title rights and interests are exercisable in accordance with, and subject to, the:

- (a) traditional laws and customs of the native title holders; and
- (b) laws of the State and the Commonwealth, including the common law.

5 For the avoidance of doubt the nature and extent of native title rights and interests in relation to water in any watercourse, wetland or underground water source as defined in the *Rights in Water and Irrigation Act 1914* (WA) as at the date of this determination is the non-exclusive right to take, use and enjoy that water.

6 Notwithstanding anything in this determination, there are no native title rights and interests in the Determination Area in or in relation to:

- (a) minerals as defined in the *Mining Act 1904* (WA) (repealed) and the *Mining Act 1978* (WA); or
- (b) petroleum as defined in the *Petroleum Act 1936* (WA) (repealed) and in the *Petroleum and Geothermal Resources Energy Act 1967* (WA); or

- (c) geothermal energy resources and geothermal energy as defined in the *Petroleum and Geothermal Energy Resources Act 1967* (WA).

The nature and extent of any other interests (s 225(c))

7 The nature and extent of other rights and interests in relation to the Determination Area are those set out in Schedule 3 (**other interests**).

Relationship between native title rights and other interests (s 225(d))

8 Except as otherwise provided for by law, the relationship between the native title rights and interests and the other interests is as follows:

- (a) the determination does not affect the validity of those other interests;
- (b) to the extent of any inconsistency between the other interests and 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
- (c) otherwise the other interests co-exist with the native title rights and interests. To avoid doubt, the doing of an activity required or permitted under those interests prevails over the native title rights and interests and their exercise, but does not extinguish them.

Areas where s 47B of the *Native Title Act* applies

9 Section 47B of the *Native Title Act* applies to disregard any extinguishment by the creation of a prior interest in relation to the whole of the Determination Area, including those prior interests described in Schedule 5.

Definitions

10 In this determination, unless the contrary intention appears:

‘Determination Area’ means the land and waters within the external perimeter described in Schedule 1. In the event of an inconsistency between the written descriptions of areas in the Schedules and the areas depicted on the Map in Schedule 4, the written descriptions shall prevail;

‘land’ and **‘waters’** respectively have the same meanings as in the *Native Title Act* to the extent that they refer to an area of land or waters;

‘Native Title Act’ means the *Native Title Act 1993* (Cth);

‘State’ means the State of Western Australia.

SCHEDULE 1 – DETERMINATION AREA

[See Order 1]

The Determination Area generally shown on the Map in Schedule 4 comprises all those lands and waters commencing at Latitude 27.998634 South, Longitude 125.691386 East and extending easterly and southerly through the following coordinate positions.

LATITUDE (SOUTH)	LONGITUDE (EAST)
27.998622	127.001374
29.719112	127.001397

Then westerly to a point at the intersection of a line joining coordinate positions Latitude 29.719112 South, Longitude 127.001397 East and Latitude 29.717984 South, Longitude 125.419239 East with a line joining coordinate positions Latitude 29.998650 South, Longitude 125.691409 East and Latitude 27.998634 South, Longitude 125.691386 East; Then northerly back to the commencement point.

EXCLUSIONS

All that land comprising Reserve 30490 and Reserve 34720.

Note: Geographic Coordinates provided in Decimal Degrees.

Cadastral boundaries sourced from Landgate's Spatial Cadastral Database dated May 2014.

Datum: Geocentric Datum of Australia 1994 (GDA94)

Prepared By: Native Title Spatial Services (Landgate) 29th August 2014

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.

SCHEDULE 2 – NATIVE TITLE HOLDERS

The persons referred to in Order 2 are:

- 1 The Pilki Native Title Holders are persons who:
 - (a) have rights in part or all of the Determination Area through: descent from an ancestor born within the area; conception and/or being born within the area; having ritual authority to make decisions about religious locations and land within the area; and
 - (b) are recognised under their traditional laws and customs by other Pilki native title holders as having rights in the Determination Area.
- 2 At the date of this Determination the persons referred to in (1) includes the following:
 - (a) the descendants of the following people:
 - (i) Tjiru (Kennedy family)
 - (ii) Tarrpi (Willis family)
 - (iii) Ulan (West family)
 - (iv) Palapala (Barton family)
 - (v) Wiltjawarra (Sinclair, Gordon family links with Scott, Felton, Willis)
 - (vi) Ngunimpi (Scott, Winter and Hogan family)
 - (vii) Nganawarra (Scott family)
 - (viii) Utjil (Graham family)
 - (ix) Kukukuku (Scott family)
 - (x) Nakarra (Scott family - links to Brown, Macarthur, Laidlaw)
 - (xi) Pipin (Stokes, Forrest, Tucker, Wesley, McCarthy family)
 - (xii) Ninakata (Bilsen family)
 - (xiii) Kuruyilinya (Macathur, Laidlaw family)
 - (xiv) Angkatji (Currie family)
 - (xv) Minimimpi (Dimer family)
 - (xvi) Jimmy Kangaroo (Flynn family)
 - (xvii) Dean and Ruby (Walker and Nudding family)

- (xviii) Tjartjanya and lame Charlie (Carmody and Edwards family)
 - (xix) Lily, Hedley and Robbie (Robinson/Franks family)
 - (xx) Felton (Rice, Anderson family)
 - (xxi) Wimpana (Lynch family)
 - (xxii) Nunayi (Ridley family); and
 - (xxiii) Ruby and Adana (Dodd family)
- (b) the following people:
- (i) Roy Underwood
 - (ii) Ned Grant
 - (iii) Fred Grant
 - (iv) Lawrence Pennington
 - (v) Leonard Walker
 - (vi) Ian Rictor
 - (vii) Debbie Hansen
 - (viii) Elaine Thomas
 - (ix) Angelina Woods

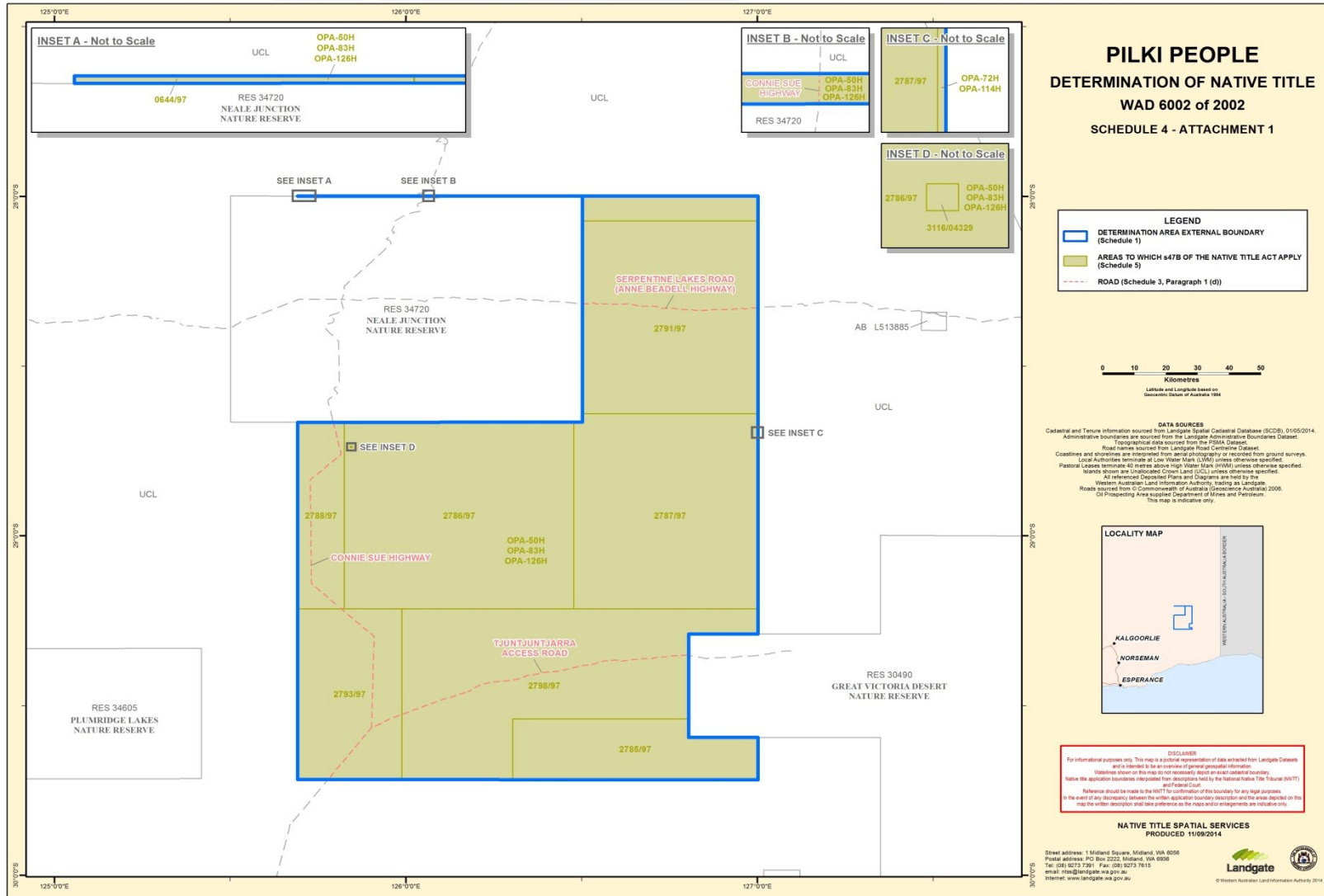
SCHEDULE 3 – OTHER INTERESTS

[Other interests referred to in Order 7]

The nature and extent of other interests in relation to the Determination Area are the following as they exist as at the date of this determination:

- 1 The following rights and interests:
 - (a) rights and interests held under grants from the Crown in right of the State or of the Commonwealth pursuant to statute or in the exercise of its executive power or otherwise conferred by statute;
 - (b) rights and interests held by reason of the force and operation of the laws of the State or of the Commonwealth including the force and operation of the *Rights in Water and Irrigation Act 1914* (WA);
 - (c) the right to access the Determination Area by an employee or agent or instrumentality of:
 - (i) the State;
 - (ii) the Commonwealth;
 - (iii) any local government authority,as required in the performance of his or her statutory or common law duty where such access would be permitted to private land;
 - (d) the right of a member of the public to use the alignment, as at the date of this determination, of the Connie Sue Highway, the Serpentine Lakes Road (also known as Anne Beadell Highway) and the Tjuntjuntjara Access Road; and
 - (e) so far as confirmed pursuant to s 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:
 - (i) waterways;
 - (ii) beds and banks or foreshores of waterways; or
 - (iii) areas that were public places as at 31 December 1993.

SCHEDULE 4 – THE MAP



SCHEDULE 5 – AREAS TO WHICH S 47B APPLIES

[Areas referred to in Order 9]

Prior interests in relation to the Determination Area whose extinguishing effect is disregarded by operation of s.47B of the *Native Title Act* include:-

Description	Name	Purpose	s 47A or s 47B
Pastoral Lease 0644/97	Daniel Ryan	Pastoral purposes	s 47B
Pastoral Lease 2792/97	James Cox	Pastoral purposes	s 47B
Pastoral Lease 2791/97	George Martin	Pastoral purposes	s 47B
Pastoral Lease 2786/97	Frederick Lowther	Pastoral purposes	s 47B
Pastoral Lease 2787/97	Leslie Peel Iredale	Pastoral purposes	s 47B
Pastoral Lease 2788/97	Charles Myers	Pastoral purposes	s 47B
Pastoral Lease 2798/97	Alfred Soman	Pastoral purposes	s 47B
Pastoral Lease 2793/97	Jack Campbell	Pastoral purposes	s 47B
Pastoral Lease 2785/97	Andrew Macauley	Pastoral purposes	s 47B
Special Lease 3116/04329	Maxwell Rex Elliot	Tourist camp - depot	s 47B
OPA-50H	G.Scholl	Oil prospecting area	s 47B
OPA-72H	J.S Cordy	Oil prospecting area	s 47B
OPA-83H	Central Oil Prospecting Syndicate Ltd	Oil prospecting area	s 47B
OPA-114H	C.J.R Le Mesurier	Oil prospecting area	s 47B
OPA-126H	Frederick Thompson	Oil prospecting area	s 47B