

ORIGINAL

Federal Court of Australia
District Registry: New South Wales
Division: General



No. NSD 6054 of 1998

**BARRY PHYBALL, PETER GARY WILLIAMS, LARRY KELLY, COLIN JARRETT,
MICHELE DONOVAN, BRIDGET JARRETT, RICHARD PACEY, TREVOR
BALLANGARRY, ADEN RIDGEWAY AND CONWAY EDWARDS ON BEHALF OF THE
GUMBAYNGGIRR PEOPLE**

Applicant

AND:

THE NSW ATTORNEY GENERAL AS THE STATE MINISTER FOR NEW SOUTH WALES

First Respondent

UNKYA LOCAL ABORIGINAL LAND COUNCIL

Second Respondent

AGREEMENT UNDER SECTION 87 OF THE NATIVE TITLE ACT 1993 (CTH)

WHEREAS:

- A. Peter Gary Williams, Barry Phyball, Bridget Jarrett, Michele Donovan, Colin Jarrett, Aden Ridgeway, Conway Edwards, Larry Kelly, Richard Pacey and Trevor Ballangarry (the **Applicant**) have made a native title determination application (the **application**) on behalf of the Gumbaynggirr People (the **native title claim group**) in relation to: the land east of Warrell Creek, known as South Beach or Forster (Forrester's) Beach, south of Nambucca Heads (which has become part of the Gaagal Wanggaan (South Beach) National Park); and the Gumma Peninsula and the Gumma Islands (to the north west of the National Park) (the **claim area**).
- B. The native title claim group have recently authorised changes to the claim area, confirming that the Gumma Peninsula, being Lots 554, 555 and 556 in DP1072228, is outside the claim area, and removing the Gumma Islands, being Lots 557, 558 and 559 in DP1072228 from the claim area. The application will be amended by leave expected to be granted by the Court on 11 August 2014. The amended claim area comprises the **Proposed Consent Determination Area**.

Filed on behalf of	NSW Attorney General as the State Minister for New South Wales	
Prepared by	I V Knight	
Law firm	Crown Solicitor's Office	My Ref: Janet Moss
Tel	(02) 9224-5254	Fax (02) 9224-5255
Email	crownsol@csso.nsw.gov.au	
Address for service (include state and postcode)	Level 5, 60-70 Elizabeth Street SYDNEY NSW 2000 DX 19 SYDNEY	

- C. The Gumbaynggirr People maintain that they are the native title holders in respect of the Gumma Peninsula and the Gumma Islands, and contemplate a native title determination application being made in respect of these areas at a later time.
- D. Unkya Local Aboriginal Land Council (the **Second Respondent**) together with Nambucca Heads Local Aboriginal Land Council holds an estate in fee simple in relation to the Proposed Consent Determination Area pursuant to the *Aboriginal Land Rights Act 1983* (NSW) and the *National Parks and Wildlife Act 1974* (NSW).
- E. All the persons in the native title claim group have authorised the Applicant, in accordance with s 251B of the *Native Title Act 1993* (Cth) (**NTA**), to make the application and deal with matters arising in relation to it, including making this Agreement.
- F. Having had the opportunity to consider the connection evidence on behalf of the native title claim group, the State is satisfied that each of the elements in s 223(1) (a), (b) and (c) of the NTA are satisfied, such that it is prepared to give its consent to a determination of native title in favour of the Gumbaynggirr People in relation to the Proposed Consent Determination Area. The second respondent also wishes to acknowledge the Gumbaynggirr People as the holders of native title rights and interests in the Proposed Consent Determination Area.
- G. All the parties have had the benefit of independent and competent legal advice.
- H. All the parties to the proceeding have reached agreement on the terms of an order of the Federal Court (the **Agreement**), and request that the Court determine this proceeding by making orders in terms of the Agreement, pursuant to s 87(1), (1A) and (2) of the NTA, without holding a hearing.
- I. The Agreement represents a compromise as between the differing positions of the Applicant and each of the respondents, in relation to the issues the subject of this proceeding.

THE AGREEMENT:

Determination

1. The Parties agree that the Court make an order, under s 87(2) of the NTA, in the terms of annexure "A" to this Agreement, in which the Court makes a determination that native title exists in relation to the Proposed Consent Determination Area, and is held by the Gumbaynggirr People (the **Consent Determination**).

Limitation on the use of firearms

2. The Applicant, on behalf of the native title holders as they are described in the Consent Determination, agrees that the native title holders will not use firearms, if otherwise entitled to do so, other than in accordance with a licence pursuant to sections 45(3)(a) and 120 of the *National Parks and Wildlife Act 1974* (NSW) or a consent contemplated by regulation 20(2) of the *National Parks and Wildlife Regulation 2009* (NSW) until an Indigenous Land Use Agreement (**ILUA**) is made (which deals with the exercise of the native title right to hunt in the Proposed Consent Determination Area) or 29 February 2016 whichever is the earlier. If an ILUA is not made by 29 February 2016, the Prescribed Body Corporate (PBC) (or the Applicant if the PBC is not yet in place) will use their best endeavours to develop

with the Board of Management for the Gaagal Wanggaan (South Beach) National Park ("the Board") and the land owners, a regime (to apply until such time as an ILUA is agreed) to manage the risks and address the safety issues. The PBC (or Applicant) will use its best endeavours to ensure that as part of their risk assessment and risk management process, the PBC (or applicant), the Board and the land owners give consideration to their respective duties of care to the public, to native title holders and National Parks and Wildlife Service staff. The Applicant on behalf of the native title holders agree that they will not use firearms except as referred to above until such a regime is agreed and executed by the PBC, the Board and the land owners.

3. The parties confirm that the agreement in paragraph 2 is limited to this proceeding.

No precedent

4. The Agreement represents a compromise as between the differing positions of the Applicant and each of the respondents, in relation to the factual and legal issues the subject of this proceeding. The Parties agree it is their intention that the making of the Consent Determination should not be regarded as setting any legal precedent in relation to any issue of law, including whether native title rights may exist in relation to land transferred to an Aboriginal Land Council under section 36 or section 36A of the *Aboriginal Land Rights Act 1983* (NSW) pursuant to an Aboriginal land claim made under that Act before 28 November 1994.

Further Agreement

5. The Parties all agree that practical issues are raised in this proceeding and by the Consent Determination that, in order to give the Parties greater certainty and confidence in relation to the exercise of their respective rights and obligations, ought to be addressed by further agreement between them. To this end, the Parties will use their best endeavours to make an agreement or more than one agreement, and have it or them registered as an ILUA or as ILUAs under Part 2, division 3, subdivision B of the NTA, in relation to the Proposed Consent Determination Area, dealing at least with the following matters:
 - (a) Communication and consultation processes;
 - (b) The interaction between the rights and responsibilities of the land owners and the native title holders;
 - (c) The exercise of native title rights and interests;
 - (d) The Future Act Regime; and
 - (e) The management of Gaagal Wanggaan (South Beach) National Park in accordance with the principles set out in clause 5.2 of the Part 4A lease currently in effect over the National Park.
6. The Parties will use their best endeavours to agree upon the terms of such agreement or agreements, before 31 December 2014.

7. The Parties intend that clauses 5 and 6 will be binding upon the PBC for the proposed Consent Determination Area.

Plan of Management

8. The Parties will use their best endeavours to work with the Board for the Gaagal Wanggaan (South Beach) National Park to finalise the terms of a Plan of Management for the Park for review and approval in accordance with the *National Parks and Wildlife Act 1974 (NSW)*.

Native title determination application over the Gumma Peninsula and Islands

9. The Parties acknowledge that, in the interests of reaching a timely resolution to this proceeding, the Applicant has agreed to amend the claim boundaries to confirm the exclusion and/ or remove Gumma Peninsula Lots 554, 555 and 556 in DP1072228 and the Gumma Islands Lots 557, 558 and 559 in DP1072228.
10. The Parties acknowledge that the Gumbaynggirr People assert that they hold native title rights and interests in relation to the Gumma Peninsula Lots 554, 555 and 556 in DP1072228 and the Gumma Islands Lots 557, 558 and 559 in DP1072228 and that they reserve their right to file a native title determination application in respect of those areas within 2 years of the date of this agreement.
11. The First and Second Respondents agree that they will not oppose the making of such an application on the basis of any estoppel or abuse of process based on prior proceedings.
12. Further, the First and Second Respondents agree that, in the event of a native title determination application being made in relation to the Gumma Peninsula and/or the Gumma Islands by the Gumbaynggirr People (that is over part or all of Lots 554 to 559 in DP1072228), they will not require any further connection evidence than that which was provided in NSD6054/1998 to show connection to that land, provided that:
 - (a) any such application is made within 2 years of the date of the Consent Determination; and
 - (b) the native title rights and interests claimed are in the same form as the Consent Determination.

Date:

Date:

Signed by

Signed by

Solicitor for the Applicant

I V Knight

Crown Solicitor

Solicitor for the First Respondent

Signed in my capacity as a solicitor

in the employ of the said I V Knight.

Date:



Signed by

Solicitor for the Second Respondent