



Extract from the National Native Title Register

Determination Information:

Determination Reference: Federal Court Number(s): WAD6236/1998
NNTT Number: WCD2018/012

Determination Name: [Oxenham on behalf of the Malgana People v State of Western Australia](#)

Date(s) of Effect: 4/12/2018

Determination Outcome: Native title exists in parts of the determination area

Register Extract (pursuant to s. 193 of the *Native Title Act 1993*)

Determination Date: 04/12/2018

Determining Body: Federal Court of Australia

ADDITIONAL INFORMATION:

On 4 December 2018, the Federal Court of Australia made a determination in relation to part of the land and waters covered by WAD 6236 of 1998 Malgana People application. No determination is made at present in relation to the balance of the land and waters which overlaps with native title determination application WAD 402 of 2018 Malgana #3 - see [Oxenham on behalf of the Malgana People v State of Western Australia \[2018\] FCA 1929](#).

REGISTERED NATIVE TITLE BODY CORPORATE:

Malgana Aboriginal Corporation
Trustee Body Corporate
Level 8, 12-14 The Esplanade
Perth Western Australia 6000

Note: current contact details for the Registered Native Title Body Corporate are available from the Office of the Registrar of Indigenous Corporations www.oric.gov.au

COMMON LAW HOLDER(S) OF NATIVE TITLE:

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

3. The native title in the Determination Area is held by the Malgana People. These are the people described in Schedule Seven.

SCHEDULE SEVEN

NATIVE TITLE HOLDERS (PARAGRAPH 3)

The Malgana People are those Aboriginal persons who:

(a) are descended from one or more of the following ancestors:

(i) Julia Sappie O'Dene (also known as Julia Thompson);

(ii) Hookey (also known as Angelick);

(iii) Withia; or

(iv) Nellie Peters;

where descent can be by birth or adoption under traditional laws acknowledged and traditional customs observed by the Malgana People, and

(b) identify themselves as Malgana and are accepted as Malgana by other Malgana People in accordance with the traditional laws acknowledged and the traditional customs observed by the Malgana People; 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 Malgana People.

MATTERS DETERMINED:

THE COURT ORDERS THAT:

1. In relation to the Determination Area, there be a determination of native title in WAD 6236 of 1998 in the terms provided for in Attachment A.

2. Except to the extent that WAD 6236 of 1998 overlaps with WAD 402 of 2018, in so far as WAD 6236 of 1998 relates to land and waters outside the Determination Area, WAD 6236 of 1998 is dismissed. For the avoidance of doubt, to the extent that WAD 6236 of 1998 overlaps with WAD 402 of 2018 no determination is to be made at present.

3. The Malgana 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).

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 paragraphs 4 and 5 of this determination.

2. Native title does not exist in those parts of the Determination Area that are identified in Schedule Four.

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

3. The native title in the Determination Area is held by the Malgana People. These are the people described in Schedule Seven.

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

Exclusive rights and interests

4. Subject to paragraphs 2, 6, 7, 8 and 11, the nature and extent of the native title rights and interests in relation to the Exclusive Area identified in Schedule Three is:

(a) except in relation to flowing and underground water, the right to possession, occupation, use and enjoyment to the exclusion of all others; and

(b) in relation to flowing and underground water, the right to use and enjoy the flowing and underground water, including:

- (i) the right to hunt on, fish from, take and use the traditional resources of the flowing and underground water; and
- (ii) the right to take and use the flowing and underground water.

Non-exclusive rights and interests

5. Subject to paragraphs 2, 6, 7, 8 and 11 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 Malgana People, including the right to conduct activities necessary to give effect to them:

- (a) the right to enter and remain on the Determination Area, camp, erect shelters and other structures for that purpose, and to travel over and visit any part of the Determination Area;
- (b) the right to hunt, fish, gather, and use the traditional resources of the Determination Area;
- (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 protecting those places by carrying out lawful activities to preserve their physical or spiritual integrity; and
 - (ii) conducting ceremony and ritual, including burial rites; and
- (e) the right to be accompanied on the Non-Exclusive Area by those people who, though not native title holders and who (for the avoidance of doubt) cannot themselves exercise any native title right in the Determination Area, are:
 - (i) spouses, parents or children of the native title holders; or
 - (ii) people required by or entering in connection with traditional law and custom for the performance of ceremonies or cultural activities on the Non-Exclusive Area.

Qualifications on the native title rights and interests

6. The native title rights and interests are subject to and exercisable in accordance with:

- (a) the laws of the State and the Commonwealth, including the common law; and
- (b) the traditional laws and customs of the Malgana People for personal, domestic and communal purposes (including social, cultural, religious, spiritual and ceremonial purposes).

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

- (a) minerals as defined in the *Mining Act 1904 (WA)* (repealed) and in the *Mining Act 1978 (WA)*, except to the extent that ochre is not a mineral pursuant to the *Mining Act 1904 (WA)*;
- (b) petroleum as defined in the *Petroleum Act 1936 (WA)* (repealed) and in the *Petroleum and Geothermal Energy Resources Act 1967 (WA)*;
- (c) geothermal energy resources and geothermal energy as defined in the *Petroleum and Geothermal Energy Resources Act 1967 (WA)*; or
- (d) water lawfully captured by the holders of the Other Interests.

8. The native title rights and interests set out in paragraph 4(b) and 5 do not confer:

- (a) possession, occupation, use and enjoyment on the Malgana 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

9. Sections 47, 47A and 47B of the *Native Title Act* apply to disregard any prior extinguishment in relation to those parts of the Determination Area identified in Schedule Six.

The nature and extent of any Other Interests

10. The nature and extent of the Other Interests are described in Schedule Five.

Relationship between native title rights and other interests

11. Except as otherwise provided for by law, the relationship between the native title rights and interests described in paragraphs 4 and 5 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, subject to s 24JB(2) of the *Native Title Act*, do not extinguish them.

Definitions and Interpretation

12. 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;

“**Exclusive Area**” means those lands and waters of the Determination Area described in Schedule Three (which areas are generally shown as shaded green on the maps in Schedule Two);

“**Flowing water**” means the following water within the Determination Area:

(a) water which flows, whether permanently, intermittently or occasionally, within any river, creek, stream or brook; and

(b) any natural collection of water into, through, or out of which a river, creek, stream or brook flows;

“**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”;

“**Malgana People**” means the people described in Schedule Seven and referred to in paragraph 3;

“**Non-Exclusive Area**” means those lands and waters of the Determination Area which are not Exclusive Areas or described in paragraph 2 as an area where native title does not exist (which areas are generally shown as shaded yellow on the maps at Schedule Two);

“**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 Five and referred to in paragraph 10;

“**resources**” means flora, fauna, and other natural resources such as charcoal, stone, soil, sand, clay, gravel, timber, 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));

“**Titles Validation Act**” means the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA);

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

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

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

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

REGISTER ATTACHMENTS:

1. Schedule One - Determination Area, 4 pages - A4, 04/12/2018
2. Schedule Three - Exclusive Area (Paragraph 4), 2 pages - A4, 04/12/2018

3. Schedule Four - Areas Where Native Title Does Not Exist (Paragraph 2), 35 pages - A4, 04/12/2018

4. Schedule Five - Other Interests (Paragraph 11), 8 pages - A4, 04/12/2018

5. Schedule Two - Maps Of The Determination Area, 18 pages - A4, 04/12/2018

6. Schedule Six - Areas To Which Sections 47, 47A Or 47B Of The Native Title Act Apply (Paragraph 9), 1 page - A4, 04/12/2018

Note: The National Native Title Register may, in accordance with s. 195 of the Native Title Act 1993, contain confidential information that will not appear on the Extract.