

FEDERAL COURT OF AUSTRALIA

Phyball on behalf of the Gumbaynggirr People v Attorney-General of New South Wales [2014] FCA 851

Citation: Phyball on behalf of the Gumbaynggirr People v Attorney-General of New South Wales [2014] FCA 851

Parties: **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 v ATTORNEY GENERAL OF NEW SOUTH WALES and UNKYA LOCAL ABORIGINAL LAND COUNCIL**

File number(s): NSD 6054 of 1998

Judge(s): **JAGOT J**

Date of judgment: 15 August 2014

Legislation: *Federal Court of Australia Act 1976 (Cth) s 37M*
Native Title Act 1993 (Cth) ss 55, 56, 57(1), 87(1), (5)
Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth)

Cases cited: *King (on behalf of the Eringa Native Title Claim Group) v South Australia* (2011) 285 ALR 454; [2011] FCA 1386
Lovett on behalf of the Gunditjmara People v Victoria [2007] FCA 474
Munn (for and on behalf of the Gunggari People) v Queensland (2001) 115 FCR 109; [2001] FCA 1229

Date of hearing: 15 August 2014

Place: Nambucca Heads, NSW

Division: GENERAL DIVISION

Category: No catchwords

Number of paragraphs: 20

Solicitor for the Applicant: Ms M Holt of NTSCORP Limited

Counsel for the First Respondent: Mr J Waters

Solicitor for the First Respondent: NSW Crown Solicitor's Office

Solicitor for the Second Respondent: Ms M Begg of Hinterland Legal

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 6054 of 1998

BETWEEN: **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: **ATTORNEY GENERAL OF NEW SOUTH WALES**
First Respondent

UNKYA LOCAL ABORIGINAL LAND COUNCIL
Second Respondent

JUDGE: **JAGOT J**

DATE OF ORDER: **15 AUGUST 2014**

WHERE MADE: **NAMBUCCA HEADS, NSW**

BEING SATISFIED that a determination of native title in the terms agreed by the parties, as recorded in the agreement between the parties made under s 87(1) of the *Native Title Act 1993* (Cth) (the **NTA**) and filed on 4 August 2014 (the **agreement**), is within the power of the Court, and it appearing appropriate to do so by consent of the parties, the Court:

1. Pursuant to ss 87(2) and (5) of the NTA gives effect to the agreement, a copy of which is annexed and marked “1”.
2. Pursuant to ss 87(1), (2) and 94A of the NTA:
 - (a) makes orders in accordance with paragraphs 1 to 6 of the proposed consent determination orders, a copy of which is Annexure “A” to the agreement (the **consent determination orders**) subject to the following:
 - (i) the consent determination orders are amended by deleting the words “Wangaan (Southern) Gumbaynggirr Nation Aboriginal Corporation” wherever they appear and in their place inserting

“Wanggaan (Southern) Gumbaynggirr Nation Aboriginal Corporation”;

- (ii) paragraph 2 of the consent determination orders is amended by inserting the words “On and from the registration of the Wanggaan (Southern) Gumbaynggirr Nation Aboriginal Corporation as a prescribed body corporate” before the words “the native title is to be held on trust” so that the paragraph reads:

2. *On and from the registration of the Wanggaan (Southern) Gumbaynggirr Nation Aboriginal Corporation as a prescribed body corporate, the native title is to be held on trust.*

and

- (iii) paragraph 3 is amended by inserting the words “On and from the registration of the Wanggaan (Southern) Gumbaynggirr Nation Aboriginal Corporation as a prescribed body corporate” before the words “The Wanggaan (Southern) Gumbaynggirr Nation Aboriginal Corporation is to”, so that the paragraph reads:

3. *On and from the registration of the Wanggaan (Southern) Gumbaynggirr Nation Aboriginal Corporation as a prescribed body corporate, the Wanggaan (Southern) Gumbaynggirr Nation Aboriginal Corporation is to:*

- (a) *be the prescribed body corporate for the purposes of section 57(1) of the Native Title Act 1993 (Cth); and*
- (b) *perform the functions set out in section 57(1) of the Native Title Act 1993 (Cth) and the Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth).*

- (b) accordingly and thereby makes a determination of native title in the terms set out in paragraphs 7 to 17 of the consent determination orders; and
- (c) notes the matters in paragraph 6 of the consent determination orders.

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

Annexure 1

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

ORIGINAL



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	
	Level 5, 60-70 Elizabeth Street	
Address for service	SYDNEY NSW 2000	
(include state and postcode)	DX 19 SYDNEY	

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- 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

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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: 4 AUGUST 2014

liverholt

Signed by

Solicitor for the Applicant

Date: 4 August 2014

I V Knight

Signed by
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

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Date:

Signed by

Solicitor for the Applicant

Date:

Signed by

Solicitor for the Second Respondent

Date:

Signed by

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.

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Annexure "A"

This and the following 15 pages are Annexure A to the Section 87 Agreement between Peter Gary Williams, Barry Phyball, Bridget Jarrett, Michele Donovan, Colin Jarrett, Aden Ridgeway, Conway Edwards, Larry Kelly, Richard Pacey and Trevor Ballangarry (the **Applicant**), the NSW Attorney General as the State Minister for New South Wales (the **First Respondent**) and Unkya Local Aboriginal Land Council (the **Second Respondent**).

No. NSD 6054 of 1998

Federal Court of Australia

District Registry: New South Wales

Division: General

**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

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

First Respondent

UNKYA LOCAL ABORIGINAL LAND COUNCIL

Second Respondent

CONSENT DETERMINATION ORDERS

Being satisfied that a determination of native title in the terms agreed by the parties, as recorded in the agreement between the parties made under s 87(1) of the *Native Title Act 1993* (Cth), and filed on 4 August 2014, is within the power of the Court, and it appearing appropriate to do so by consent of the parties and pursuant to ss. 87(2) and (5) and s 94A of the *Native Title Act 1993* (Cth).

THE COURT ORDERS THAT:

1. There be a determination of native title in terms set out below (the Determination)
2. The native title is to be held on trust.

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	crownsof@csso.nsw.gov.au		
	Level 5, 60-70 Elizabeth Street		
Address for service	SYDNEY NSW 2000		
(include state and postcode)	DX 19 SYDNEY		

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3. The Wangaan (Southern) Gumbaynggirr Nation Aboriginal Corporation is to:
 - (a) be the prescribed body corporate for the purposes of section 57(1) of the *Native Title Act 1993* (Cth); and
 - (b) perform the functions set out in section 57(1) of the *Native Title Act 1993* (Cth) and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).
4. The terms of agreement between the parties, in relation to matters other than the terms of the Determination, contained in the agreement under s 87(1) of the *Native Title Act 1993* signed by the parties and filed on 4 August 2014 shall have effect.
5. Each party to the proceeding is to bear its own costs.

THE COURT NOTES:

6. That it is the intention of the Applicant, the State of New South Wales and the Unkya Local Aboriginal Land Council to use their best endeavours to make and have registered one or more Indigenous Land Use Agreements by the end of December 2014.

THE COURT DETERMINES THAT:***Existence of native title***

7. Native title exists in relation to the land and waters described in Schedule A (the "Consent Determination Area") and depicted on the map comprising Schedule B. Schedule C represents the external boundaries of the amended native title determination application.

Native title holders

8. Native title is held by the Gumbaynggirr People who are Aboriginal persons who are:
 - (a) the biological descendants of
 - (i) King Ben Bennelong;
 - (ii) Maggie Buchanan and Davy Cowling;
 - (iii) Biddy, the mother of Lavina Duncan (Bina Whaddy);
 - (iv) Fanny Purrapine, the mother of Lily Kelly and Hilda Kelly Robinson;

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- (v) Darby Kelly;
- (vi) The father of Maggie Kelly's mother Biddy;
- (vii) William 'Old Bill' Dotti;
- (viii) John 'Jack' Dotti;
- (ix) Lucy Flanders;
- (x) Dave Ballangarry;
- (xi) Robert Walker and Louise Linwood;
- (xii) John 'Jack' Long;
- (xiii) Bridget 'Biddy' Briggs Needam;
- (xiv) Mary Briggs and Fred Briggs;
- (xv) Susan, mother of Charles Jarrett Snr;
- (xvi) Rose Taylor;
- (xvii) Charles Layton;
- (xviii) Mick McDougall;
- (xix) Clara Skinner;
- (xx) Sylvie Craig;
- (xxi) Elizabeth 'Kitty' Campbell/Cameron (known as Elizabeth Blakeney);
- (xxii) Emily Sutton;
- (xxiii) Fred Hookey;
- (xxiv) Nobby Neville;
- (xxv) Mary Jane Ferguson;
- (xxvi) Billy Lardner Jnr;
- (xxvii) King Bobby of Oban;
- (xxviii) The parent of Charlie Whitton and Lucy Larrigo (nee Whitton);
- (xxix) Walter Smith and Stella Jane Davis;
- (xxx) Jane Gard/Maskey; and
- (b) persons who have been adopted into the families of those persons (and the biological descendants of any such adopted persons); and
- (c) persons who have been otherwise incorporated, or who are direct descendants of a person who has been otherwise incorporated, as a member of the Gumbaynggirr People and who identify as and are

accepted as a Gumbaynggirr person, in accordance with Gumbaynggirr laws and customs.

Nature and extent of native title rights and interests

9. Subject to paragraphs 10 and 11 the nature and extent of the native title rights and interests held by the Gumbaynggirr People in the Consent Determination Area are the non-exclusive rights to use and enjoy the land and waters of the Consent Determination Area in accordance with Gumbaynggirr traditional laws and customs being:
 - (a) the right to have access to and camp on the Consent Determination Area;
 - (b) the right to take and use waters on or in the Consent Determination Area;
 - (c) the right to hunt and gather natural resources of the Consent Determination Area for personal, domestic and non-commercial communal use;
 - (d) the right to take fish in the temporary waters occurring above the mean high water mark in the Consent Determination Area;
 - (e) the right to do the following activities on the land:
 - (i) conduct ceremonies;
 - (ii) teach the physical, cultural and spiritual attributes of places and areas of importance on or in the land and waters; and
 - (iii) to have access to, maintain and protect from physical harm, sites in the Consent Determination Area which are of significance to Gumbaynggirr People under their traditional laws and customs.
10. The native title rights and interests referred to in paragraph 9 are exercised for personal, domestic and non-commercial communal purposes and do not confer on the native title holders possession, occupation, use or enjoyment to the exclusion of all others. The native title rights and interests do not confer any right to control public access or public use of the land and waters of the Consent Determination Area.
11. The native title rights and interests in the Consent Determination Area are subject to and exercisable in accordance with:

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- (a) the laws of the State of New South Wales and the Commonwealth including the common law; and
- (b) the traditional laws acknowledged and traditional customs observed by the Gumbaynggirr People.

Other matters

12. There are no native title rights and interests in:
 - (a) Minerals as defined in the *Mining Act 1992* (NSW) and the *Mining Regulation 2010* (NSW); and
 - (b) Petroleum as defined in the *Petroleum (Onshore) Act 1991* (NSW) and the *Petroleum (Submerged Lands) Act 1982* (NSW).
13. Native title rights do not exist in any part of the land and waters comprising the Consent Determination Area upon which any public work, as defined in s 253 of the *Native Title Act 1993* (Cth), is or was constructed, established, or situated, and to which ss 23B(7) and 23C(2) of the *Native Title Act 1993* (Cth) and / or s 20(2) of the *Native Title (New South Wales) Act 1993* (NSW) applies, together with any adjacent land or waters in accordance with s 251D of the *Native Title Act 1993* (Cth).

Relationship between native title rights and interests and other rights and interests:

14. The relationship between native title rights and interests and other rights and interests in the Consent Determination Area is:
 - (a) To the extent that the native title rights and interests and the other rights and interests are not inconsistent, both the native title rights and interests and the other rights and interests continue to have effect and to be exercisable by the respective holders of those rights and interests and the native title rights and interests are not extinguished or impaired;
 - (b) The other rights and interests referred to in paragraphs 15(e) to (h) are, in accordance with the *Aboriginal Land Rights Act 1983* (NSW) and the *National Parks and Wildlife Act 1974* (NSW), subject to the native title rights and interests herein recognised and do not extinguish or impair the native title rights and interests. To avoid doubt, the other

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rights and interests referred to in paragraphs 15(e) to (h) do not prevent the exercise of the native title rights and interests recognised herein, consistent with paragraphs 10 and 11 above; and

- (c) Where any other rights or interests not being of the kind referred to in (b) above and any activity done in accordance with or incidental to the exercise of any such right or interest is inconsistent with the existence, exercise or enjoyment of the native title rights and interests, then the other right or interest and any exercise of the other right or interest prevails over the native title rights and interests but does not extinguish the native title rights and interests.

Nature and extent of other rights and interests

15. The nature and extent of the other rights and interests in relation to the Consent Determination Area are the current interests created or recognised at the date of this determination by the Crown, statute or common law as follows:

- (a) The rights and interests of an energy services corporation within the meaning of the *Energy Services Corporations Act 1995* (NSW) to exercise functions, powers or rights in accordance with the laws of the State of New South Wales or Commonwealth and as owner and operator of electricity transmission facilities and associated infrastructure situated on the Consent Determination Area including but not limited to the right to enter the Consent Determination Area in order to access, use, install, maintain, repair, replace, upgrade or otherwise deal with facilities and infrastructure;
- (b) The rights and interests of Essential Energy as the holder of a registered easement 20 metres wide shown on transfer AF413714D;
- (c) The rights and interests of the Nambucca Shire Council under its local government jurisdiction and as an entity exercising statutory powers in respect of the land and waters in its local government area;
- (d) The rights and interests granted by the Commonwealth pursuant to statute or otherwise in the exercise of its executive power and under any regulations made pursuant to such legislation;

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- (e) The rights and interests of the Nambucca Heads Local Aboriginal Land Council and the Unkya Local Aboriginal Land Council in the land and waters within the Consent Determination Area, as the holders of an estate in fee simple pursuant to the *Aboriginal Land Rights Act 1983* (NSW) and the *National Parks and Wildlife Act 1974* (NSW);
- (f) The rights and interests of the Nambucca Heads Local Aboriginal Land Council and the Unkya Local Aboriginal Land Council (as lessors) and the Minister administering the *National Parks and Wildlife Act 1974* (NSW) (as lessee), under the Gaagal Wanggaan (South Beach) National Park Lease established pursuant to Part 4A of the *National Parks and Wildlife Act 1974* (NSW) on 22 April 2010;
- (g) The rights, interests, powers, authorities, duties and functions of the Director General and the National Parks and Wildlife Service under the *National Parks and Wildlife Act 1974* (NSW), in relation to the management of the Gaagal Wanggaan (South Beach) National Park;
- (h) The rights and interests of the Board of Management established pursuant to the *National Parks and Wildlife Act 1974* (NSW) relating to the management of the Gaagal Wanggaan (South Beach) National Park, under the *National Parks and Wildlife Act 1974* (NSW) and the Gaagal Wanggaan (South Beach) National Park Lease between the Nambucca Heads Local Aboriginal Land Council and the Unkya Local Aboriginal Land Council (as lessor) and the Minister administering the *National Parks and Wildlife Act 1974* (NSW) (as lessee) dated 22 April 2010;
- (i) The rights and interests of members of the public arising under the common law including but not limited to the public right to fish;
- (j) So far as confirmed pursuant to section 16 and 18 of the *Native Title (New South Wales) Act 1994*, any other existing public access to and enjoyment of
 - (i) waterways;
 - (ii) the beds and banks or foreshores of waterways;
 - (iii) coastal waters;
 - (iv) beaches;

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- (v) stock routes;
- (vi) areas that were public places at the end of 31 December 1993;
- (k) ~~18.~~ Any other rights and interests of the Crown in right of the State of New South Wales;
- (l) ~~17.~~ Any other rights and interests granted or recognised by the State of New South Wales pursuant to statute or otherwise in the exercise of its executive power and under any regulations made pursuant to such legislation;
- (m) ~~18.~~ Any other right to access land by an employee or agent or instrumentality of the State, Commonwealth or other statutory authority as required in the performance of his or her statutory or common law duties; and
- (n) ~~19.~~ Any other:
 - (a) legal or equitable estate or interest in the land or waters of the Consent Determination Area; or
 - (b) right (including a right under an option and a right of redemption), charge, power or privilege over, or in connection with:
 - (i) the land or waters of the Consent Determination Area; or
 - (ii) an estate or interest in the land or waters of the Consent Determination Area.

Definitions

1b ~~20.~~ In these orders, unless the contrary intention appears:

"Camp" means to stay on the Consent Determination Area for temporary periods. Tents or other like structures are permitted. It does not include the right to permanently reside or build permanent structures or fixtures.

"Consent Determination Area" means the land and waters described in Schedule A and mapped in Schedule B.

"Gumbaynggirr People" means the native title holders as described in paragraph 8.

"Gumbaynggirr Corporation" means the Wangaan (Southern) Gumbaynggirr Nation Aboriginal Corporation incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)*.

"laws" include statutes, regulations and other subordinate legislation

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and the common law.

"Proceedings" means the application for determination of native title made by Barry Phyball, Peter Gary Williams, Larry Kelly, Colin Jarrett, Michele Donovan, Bridget Jarrett, Richard Pacey, Trevor Ballangarry, Aden Ridgeway and Conway Edwards (NC96/41; NSD6054/98) .

- 17 ~~21~~. If a word or expression is not defined in these orders, but is defined in the Native Title Act 1993 (Cth), then it has the meaning given to it in the *Native Title Act 1993* (Cth).


Date:

Judge

Note: Settlement and entry of orders is dealt with in Order 39 of the Federal Court Rules.

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I V Knight
Solicitor for the NSW Attorney General, First
respondent


On behalf of the Applicant

Signed in my capacity as a solicitor
employed in the office of the said
I V Knight

On behalf of the Unkya Local
Aboriginal Land Council

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SCHEDULE A
CONSENT DETERMINATION AREA

The land and waters in which the Gumbaynggirr People hold native title are the parcels described in this schedule and shown on the map as purple hachure at Schedule B.

- (a) That part of Lot 7310 of DP1149441 not subject to an easement 15 metres wide for access, pipeline and rising main to Lot 1 of DP710419
- (b) Lot 7311 of DP1149441
- (c) Lot 7312 of DP1149441
- (d) Lot 7313 of DP1149441
- (e) Lot 7314 of DP1149441
- (f) Lot 7315 of DP1149441
- (g) Lot 235 of DP755539
- (h) Lot 236 of DP755539
- (i) Lot 237 of DP755539
- (j) Lot 238 of DP755539
- (k) Lot 239 of DP755539
- (l) Lot 240 of DP755539
- (m) Lot 241 of DP755539
- (n) Lot 242 of DP755539
- (o) Lot 243 of DP755539
- (p) Lot 244 of DP755539
- (q) Lot 245 of DP755539
- (r) Lot 246 of DP755539

In the event of an inconsistency between the written description provided in this schedule and the map, the written description shall prevail.

SCHEDULE B

MAP OF THE CONSENT DETERMINATION AREA AND AMENDED APPLICATION AREA

The land and waters in which the Gumbaynggirr People hold native title are the parcels described in Schedule A and shown on the map in this Schedule B in purple hachure.

The land and waters within the external boundaries of the amended native title determination application for the Gumbaynggirr People are the parcels described in Schedule C and shown on the map in this Schedule B in purple hachure.

SCHEDULE C
AMENDED APPLICATION AREA

The land and waters within the external boundaries of the amended native title determination application for the Gumbaynggirr People are the parcels described in this schedule and shown on the map as purple hachure at Schedule B.

- (a) That part of Lot 7310 of DP1149441 not subject to an easement 15 metres wide for access, pipeline and rising main to Lot 1 of DP710419
- (b) Lot 7311 of DP1149441
- (c) Lot 7312 of DP1149441
- (d) Lot 7313 of DP1149441
- (e) Lot 7314 of DP1149441
- (f) Lot 7315 of DP1149441
- (g) Lot 235 of DP755539
- (h) Lot 236 of DP755539
- (i) Lot 237 of DP755539
- (j) Lot 238 of DP755539
- (k) Lot 239 of DP755539
- (l) Lot 240 of DP755539
- (m) Lot 241 of DP755539
- (n) Lot 242 of DP755539
- (o) Lot 243 of DP755539
- (p) Lot 244 of DP755539
- (q) Lot 245 of DP755539
- (r) Lot 246 of DP755539

In the event of an inconsistency between the written description provided in this schedule and the map, the written description shall prevail.

Note

Data Reference and source

- Application boundary data compiled by National Native Title Tribunal based on information provided by NSW Department of Lands and the Applicant.

Prepared by Geospatial Services, National Native Title Tribunal (NNTT), by request of the State and the Applicant.

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 6054 of 1998

BETWEEN: **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: **ATTORNEY GENERAL OF NEW SOUTH WALES**
First Respondent

UNKYA LOCAL ABORIGINAL LAND COUNCIL
Second Respondent

JUDGE: **JAGOT J**

DATE: **15 AUGUST 2014**

PLACE: **NAMBUCCA HEADS, NSW**

REASONS FOR JUDGMENT

1 This is the second determination, by consent, of the existence of native title in New South Wales which has occurred in the last 12 months. Before December 2013, there had been only two such earlier determinations since the commencement of the relevant legislation, the *Native Title Act 1993* (Cth) (the **NTA**), on 1 January 1994. While it cannot yet be said that the progression of matters in the native title list in New South Wales wholly reflects the overriding objective of civil procedure prescribed by s 37M of the *Federal Court of Australia Act 1976* (Cth) (the **FCA Act**), to facilitate the just resolution of disputes, according to law, and as quickly, inexpensively and efficiently as possible, the fact that the same number of consent determinations will have been achieved in the past 12 months as previously occurred in the past 18 years indicates that parties are now beginning to apply the common sense, practicality, proportionality, and flexible, constructive and creative thinking about achievable outcomes essential to the just resolution of native title claims in this State.

2 Despite this, I repeat something I said in 2013, in *Bandjalang People No 1 and No 2 v Attorney General of New South Wales* [2013] FCA 1278, because I consider it must never be forgotten by parties to proceedings of this kind. It is that the passing of more than seventeen years between the making of a claim for native title and its resolution is never to be accepted as satisfactory. There is no native title claim so complex, or so bedevilled by seemingly intractable issues, which can justify such a delay. Not even this matter, which raised numerous challenges for the parties which they have overcome by the application of those essential qualities I have identified, can justify delay of this magnitude. While right to be proud and pleased with the outcome that has been reached by the dedicated efforts of all those involved in making the proposed consent orders a reality, the fundamental truth that justice delayed is also justice denied should never be overlooked and must guide our efforts in respect of the resolution of future applications of the present kind.

3 This said, let me record the essential facts.

4 Between 1984 and 1995 the Nambucca Heads and Unkya Local Aboriginal Land Councils (the **LALCs**), constituted under the *Aboriginal Land Rights Act 1983* (NSW), with the support of the Gumbaynggirr People, made several land claims over islands and areas of land in Warrell Creek and the Nambucca River on the mid North Coast of New South Wales under that legislation. Subsequent negotiations between the LALCs and the State of New South Wales, in the context of these claims, led to an agreement in 2002 for the establishment of a national park in the Warrell Creek/South Beach area, the Gaagal Wanggaan (South Beach) National Park, to be jointly managed by the LALCs and the State, with the majority of the remaining land to be transferred to the Nambucca Heads LALC (and which, in 2011, became the Gumma Indigenous Protected Area).

5 Against this evolving background, on 16 December 1996, the Gumbaynggirr People lodged their native title claim in the National Native Title Tribunal over much of the same area. Unsurprisingly, there is significant overlap between the Gumbaynggirr People who filed the native title claim and the membership of the LALCs. The claim was notified between 18 June and 18 August 1997, and accepted for registration under Pt 7 of the NTA on 9 November 1999.

6 Amendments to the claim in 1998, 1999 and, most recently, on 8 August 2014 confine the land and waters claimed by the Gumbaynggirr People in this proceeding and the subject of

the determination to part of the area of the Gaagal/Wanggaan (South Beach) National Park. There are no overlapping or competing claims to any part of the land or waters the subject of the agreement between the parties and the proposed consent orders and no indigenous or other respondents who oppose the claim of the Gumbaynggirr People.

7 Today the Court will give effect to the agreement of the parties that recognises the existence of the Gumbaynggirr People's native title rights in those lands and waters. This will be the first determination of native title over land owned by LALCs in New South Wales and the first over a jointly managed national park in this State.

8 It is convenient to return now to the call for common sense, practicality, proportionality, and flexible, constructive and creative thinking about achievable outcomes in native title matters. As is appropriate, an affidavit of Janet Rosemary Moss (the solicitor within the office of the Crown Solicitor of New South Wales with the carriage of this matter) affirmed on 4 August 2014, recounts the procedural history of the matter. That history suggests that the application of these qualities of common sense, practicality, proportionality, and flexible, constructive and creative thinking from the outset might well have avoided the gross and unacceptable delay which has burdened the parties, the Court and the public of New South Wales in the reaching of a resolution acceptable to all parties. Four affidavits accompanied the Gumbaynggirr People's amended application that was filed in September 1999. More formal connection material in the form of an expert anthropological report and four further affidavits were provided to the State in 2002. The State's assessment of this material raised a number of issues. Over the next eight years, and it is here that I pause to mention again that justice requires conduct proportional to outcomes, a further 33 affidavits, one witness statement, nine expert reports, a site map, and volumes of source materials and field notes were provided by the Gumbaynggirr People to the State. By October 2009, following an assessment of the Gumbaynggirr material by not only the State's in-house researchers, but also an independent external expert and both junior and senior counsel of this vast amount of material, the matter remained unresolved. Deputy President Sosso of the National Native Title Tribunal convened mediation on country involving three days of evidence by Gumbaynggirr witnesses in the presence of the State's lawyers. On 3 November 2010, almost fourteen years from the day the claim was first made, the State informed the Gumbaynggirr People of its preparedness to resolve the claim through negotiation of an indigenous land use agreement and consent determination. There can be no

doubt that this process ensures that I can be satisfied that the parties have freely entered into their agreement for the determination of native title on an informed basis and that the State, as the guardian of the public interest, has made exhaustive efforts to protect those interests. Despite this, it is difficult not to conclude that the enormous resources and extraordinary length of time involved in this process could have been avoided, in large part, by the bringing to bear at an earlier time of a focus on the outcomes sought to be achieved and the application of common sense, practicality, proportionality, and flexible, constructive and creative thinking about how those outcomes might properly be accommodated and achieved.

9 Native title claims, in common with most litigation but perhaps also particularly given their character, run the risk of the consuming of resources and time well beyond what is reasonable given that the overriding purpose of the civil practice and procedure provisions of the Court is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible (s 37M of the FCA Act). Recognition of this fact, and of the need for the kind of focus and approach which I have described, is essential to guard against the repetition of examples such as the present case, spanning not years but decades. The risk of extraordinary expense and inordinate delay highlights the need for a provision such as s 37M and for vigilance in its application to avoid injustice not only to the parties but to other litigants and the public at large who rightly expect the proper use of public resources of which courts form part.

10 None of this diminishes the significance of the agreement the parties have reached, not only for the Gumbaynggirr People and the Local Aboriginal Land Councils, but also the State of New South Wales and the wider community. The rights of the Gumbaynggirr People will at last formally be accorded their proper recognition by the making of orders today to give effect to that agreement as contemplated by s 87 of the NTA which, by reason of the agreement, permits the Court to make a determination of native title and of other matters consistent with the terms of the agreement, without a hearing, if the Court considers it appropriate to do so. Needless to say, for the reasons already given and as will be further discussed, I do consider it appropriate to do so in the circumstances recorded above. Certain procedural requirements condition the power of the Court. By s 87(1) of the NTA, the Court may make such orders if, at any stage after the end of the period specified in the notice given under s 66:

(a) agreement is reached between the parties on the terms of an order of the Federal

Court in relation to:

- (i) the proceedings; or
 - (ii) a part of the proceedings; or
 - (iii) a matter arising out of the proceedings; and
- (b) the terms of the agreement, in writing signed by or on behalf of the parties, are filed with the Court; and
- (c) the Court is satisfied that an order in, or consistent with, those terms would be within the power of the Court.

11 In this case, as mentioned, the notice period under s 66 ended on 18 August 1997. An agreement in writing signed by or on behalf of the parties was filed on 4 August 2014. This agreement includes not only the proposed consent determination but a number of other matters including a shared intention to continue negotiations towards an indigenous land use agreement that will “give the parties greater certainty and confidence in relation to the exercise of their respective rights and obligations” in the determination area, a regime regulating the use of firearms, and shared intentions to use best endeavours to work with the board of management of the Gaagal/Wanggaan (South Beach) National Park to finalise a plan of management for the park. I am satisfied that an order in, or consistent with, the terms agreed would be within the power of the Court. Accordingly, all of the requirements of s 87 of the NTA are met.

12 Section 94A of the NTA requires that an order in which the Federal Court makes a determination of native title must set out details of the matters mentioned in s 225.

13 Section 225 provides that:

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 land or waters in the determination area are not covered by a non-exclusive agricultural lease or 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.

14 The expression native title or native title rights and interests is defined in s 223 of the NTA to mean the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognisable by the common law of Australia.

15 The fact that a determination of native title operates to bind not just the parties to the proceeding but all people in the Australian community underlines the importance of the Court's consideration of the source of the power and the appropriateness of making the orders sought: *Munn (for and on behalf of the Gunggari People) v Queensland* (2001) 115 FCR 109 at 114; [2001] FCA 1229 at [22].

16 In *King (on behalf of the Eringa Native Title Claim Group) v South Australia* (2011) 285 ALR 454; [2011] FCA 1386, Keane CJ spoke of the Court's regard to the processes undertaken by the relevant State or Territory in these terms (at [19]):

More recently, the Court has been prepared to rely upon the processes of the relevant state or territory about the requirements of s 223 being met to be satisfied that the making of the agreed orders is appropriate. That is because each state and territory has developed a protocol or procedure by which it determines whether native title (as defined in s 223) has been established. It acts in the public interest and as the public guardian in doing so. It has access to anthropological, and where appropriate, archaeological, historical and linguistic expertise. It has a legal team to manage and supervise the testing as to the existence of native title in the claimant group. Although the court must, of course, preserve to itself the question whether it is satisfied that the proposed orders are appropriate in the circumstances of each particular application, generally the court reaches the required satisfaction by reliance upon those processes.

17 North J in *Lovett on behalf of the Gunditjmarra People v Victoria* [2007] FCA 474 at [36]-[37] similarly said:

The Act [NTA] is designed to encourage parties to take responsibility for resolving proceedings without the need for litigation. Section 87 must be construed in this

context. The power must be exercised flexibly and with regard to the purpose for which the section is designed.

[37] In this context, when the Court is examining the appropriateness of an agreement, it is not required to examine whether the agreement is grounded on a factual basis which would satisfy the Court at a hearing of the application. The primary consideration of the Court is to determine whether there is an agreement and whether it was freely entered into on an informed basis: *Nangkiriny v State of Western Australia* (2002) 117 FCR 6; [2002] FCA 660; *Ward v State of Western Australia* [2006] FCA 1848. Insofar as this latter consideration applies to a State party, it will require the Court to be satisfied that the State party has taken steps to satisfy itself that there is a credible basis for an application: *Munn v Queensland* (2001) 115 FCR 109; [2001] FCA 1229.

18 My conclusion that it is appropriate to make the orders sought is consistent with these principles.

19 Sections 55 and 56 of the NTA require that the Court determine whether the native title is to be held in trust and, if so, by whom. In this instance the Gumbaynggirr People, as native title holders, have nominated the Wanggaan (Southern) Gumbaynggirr Nation Aboriginal Corporation to hold their native title on trust and to perform the functions set out in s 57(1) of the NTA and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth). The Wanggaan (Southern) Gumbaynggirr Nation Aboriginal Corporation has provided its written consent to the nomination. The requirements of ss 55 and 56 of the NTA, accordingly, are also satisfied.

20 Agreement having been reached between all parties and all substantive and procedural requirements having been met, orders should be made which recognise the native title rights and interests of the Gumbaynggirr People in accordance with the proposed consent determination. I congratulate the parties and, in particular, the Gumbaynggirr People for the achievement which the orders to be made today embody.

I certify that the preceding twenty
(20) numbered paragraphs are a true
copy of the Reasons for Judgment
herein of the Honourable Justice
Jagot.

Associate:

Dated: 2 September 2014