FEDERAL COURT OF AUSTRALIA

Drury on behalf of the Nanda People v State of Western Australia

[2020] FCAFC 69

File numbers:	WAD 30 of 2019 WAD 339 of 2018 WAD 402 of 2018
Judge:	**MORTIMER, WHITE AND COLVIN JJ**
Date of judgment:	21 April 2020
Catchwords:	**NATIVE TITLE** - consideration of questions referred to the Full Court - where consent determination made recognising non-exclusive native title rights held by two groups over same area - whether Court has power under *Native Title Act 1993* (Cth) to determine more than one prescribed body corporate to perform functions given to PBCs - whether Court has discretion to determine that there should only be one PBC where each group nominates separate PBCs - consideration of practical issues arising where overlapping determinations of native title are proposed to be made by consent
Legislation:	*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) *Acts Interpretation Act 1901* (Cth) s 2, 15AA, 23 *Federal Court of Australia Act 1976* (Cth) s 26 *Native Title Act 1993* (Cth) ss 7, 10, 13, 24BC, 24BD, 24BI, 24CC, 24CD, 29, 30, 30A, 49, 50, 51, 51A, 55, 56, 57, 58, 59, 59A, 60, 61, 67, 68, 81, 86F, 87, 87A, 94A, 192, 193, 208, 213, 223, 224, 225, 251A, 251B, 253, Part 2, Divisions 3, 5 and 6 *Native Title Amendment Act 1998* (Cth) *Racial Discrimination Act 1975* (Cth) s 8, 10 *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) regs 3, 4, 5, 6, 7, 8
Cases cited:	*Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33; (2013) 250 CLR 209 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 *Alphapharm Pty Ltd v H Lundbeck A/S* [2014] HCA 42; (2014) 254 CLR 247

Australian Building and Construction Commissioner v Powell [2017] FCAFC 89; (2017) 251 FCR 470

Australian Securities Commission v Marlborough Gold Mines Ltd [1993] HCA 15, (1993) 177 CLR 485

Banjima People v State of Western Australia [2015] FCAFC 84; (2015) 231 FCR 456

Bodney v Bennell [2008] FCAFC 63; (2008) 167 FCR 84

Budby on behalf of the Barada Barna People v State of Queensland (No. 6) [2016] FCA 1267

CAL No 14 Pty Ltd v Motor Accidents Insurance Board [2009] HCA 47, (2009) 239 CLR 390

Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross [2012] HCA 56; (2014) 248 CLR 378

CG (Deceased) on behalf of the Badimia People v State of Western Australia [2016] FCAFC 67; (2016) 240 FCR 466

Commonwealth of Australia v Clifton [2007] FCAFC 190; (2007) 164 FCR 355

Commonwealth of Australia v Yarmirr [2001] HCA 56; (2001) 208 CLR 1

Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55; (2012) 250 CLR 503

Country Carbon Pty Ltd v Clean Energy Regulator [2018] FCA 1636; (2018) 267 FCR 126

Daniel v State of Western Australia [2003] FCA 666

Daniel v State of Western Australia [2004] FCA 849; (2004) 138 FCR 254

Daniel v State of Western Australia [2005] FCA 536

De Rose v State of South Australia (No 2) [2005] FCAFC 110; (2005) 145 FCR 290

Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v State of Queensland (No 2) [2014] FCA 528

Drury on behalf of the Nanda People v State of Western Australia [2018] FCA 1849

Drury on behalf of the Nanda People v State of Western Australia [2019] FCA 1138

Drury on behalf of the Nanda People v State of Western Australia (No 2) [2019] FCA 1642

Drury on behalf of the Nanda People v State of Western Australia (No 3) [2019] FCA 1812

Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22, (2007) 230 CLR 89

Freddie v Northern Territory [2017] FCA 867

Independent Commission Against Corruption v Cunneen [2015] HCA 14; (2015) 256 CLR 1

K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd [1985] HCA 48; (1985) 157 CLR 309

Lake Torrens Overlap Proceedings (No 3) [2016] FCA 899

Lander v State of South Australia [2012] FCA 427

Lovett on behalf of the Gunditjmara People v State of Victoria (No 5) [2011] FCA 932

Mabo v Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1

Manado on behalf of the Bindunbur Native Title Claim Group v State of Western Australia [2017] FCA 1367

Manado on behalf of the Bindunbur Native Title Claim Group v State of Western Australia [2018] FCA 854

Manado on behalf of the Bindunbur Native Title Claim Group v State of Western Australia [2019] FCA 30

McGlade (Formerly Wanjurru-Nungala) v South West Aboriginal Land & Sea Aboriginal Corporation (No 2) [2019] FCAFC 238

Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58; (2002) 214 CLR 422

Moses v State of Western Australia [2007] FCAFC 78; (2007) 160 FCR 148

Murray on behalf of the Yilka Native Title Claimants v State of Western Australia (No 6) [2017] FCA 703

Northern Territory v Collins [2008] HCA 49; (2008) 235 CLR 619

Northern Territory v Griffiths (decd) and Lorraine Jones obh of Ngaliwurru and Nungali Peoples [2019] HCA 7

Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group [2005] FCAFC 135; (2005) 145 FCR 442

Oxenham on behalf of the Malgana People v State of Western Australia [2018] FCA 1929

Pegler on behalf of the Widi People of Nebo Estate #2 v State of Queensland (No 3) [2016] FCA 1272

QGC Pty Limited v Bygrave (No 2) [2010] FCA 1019; (2010) 189 FCR 412

State of Western Australia v Ward [2000] FCA 191; (2000) 99 FCR 316

State of Western Australia v Ward [2002] HCA 28; (2002) 213 CLR 1

SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 262 CLR 362

Ward v State of Western Australia [2006] FCA 1848

Western Australia v Ward [2002] HCA 28; (2002) 213 CLR 1

Date of hearing:	4 February 2020
Registry:	Western Australia
Division:	General Division
National Practice Area:	Native Title
Category:	Catchwords
Number of paragraphs:	262

In WAD 30 of 2019:

Solicitor for the Applicant:	Mr S Wright SC with Mr C McKellar of Yamatji Marlpa Aboriginal Corporation
Solicitor for the State of Western Australia:	Mr GJ Ranson of the State Solicitors Office
James Michael Drew; Loreto Mary Drew; and Gabor Holdings Pty Ltd (Pastoral Respondents):	The Pastoral Respondents filed a submitting notice
Solicitor for the Yamatji Marlpa Aboriginal Corporation:	Yamatji Marlpa Aboriginal Corporation
Telstra Corporation Ltd	No appearance
Solicitor for Cape York Land Council Aboriginal Corporation:	Mr R Blowes SC
Solicitor for the State of Queensland:	Mr Stephen Lloyd SC with Ms Nitra Kidson QC

In WAD 339 of 2018:

Solicitor for the Applicant:	Mr S Wright SC with Dr CL Tan of Yamatji Marlpa Aboriginal Corporation
Solicitor for the State of Western Australia:	Mr GJ Ranson of the State Solicitors Office
Shire of Shark Bay:	No appearance
Solicitor for Cape York Land Council Aboriginal Corporation:	Mr R Blowes SC

Solicitor for the State of Queensland:	Mr Stephen Lloyd SC with Ms Nitra Kidson QC

In WAD 402 of 2018:

Solicitor for the Applicant:	Mr S Wright SC with Dr CL Tan of Yamatji Marlpa Aboriginal Corporation
Solicitor for the State of Western Australia:	Mr GJ Ranson of the State Solicitors Office
Shire of Shark Bay:	No appearance
Solicitor for Cape York Land Council Aboriginal Corporation:	Mr R Blowes SC
Solicitor for the State of Queensland:	Mr Stephen Lloyd SC with Ms Nitra Kidson QC

ORDERS

WAD 30 of 2019

BETWEEN:	**VIOLET DRURY, COLLEEN DRAGE, JOHN STEPHEN DRAGE, STEVEN KELLY (FATHER OF MARRICK KELLY), STEVEN KELLY (GRANDSON OF CORNELIUS KELLY), WILLIAM MALLARD JR, WILLIAM MALLARD SR, NORA MALLARD, GWEN MITCHELL, HELEN NUTTER, ANNETTE PEPPER, JUNE RUFFIN, MARY TULLOCK, GERALD JOHN WHITBY, LORRAINE WHITBY, JANET WILSON** Applicant
AND:	**STATE OF WESTERN AUSTRALIA, JAMES MICHAEL DREW, LORETO MARY DREW, YAMATJI MARLPA ABORIGINAL CORPORATION, GARBOR HOLDINGS PTY LTD, TELSTRA CORPORATION LIMITED** Respondent

WAD 339 of 2018

BETWEEN:	**JOHN THOMAS OXENHAM, SARAH LOUISE BELLOTTIE, TERRENCE GORDON MCKIE, BIANCA ELISE MCNEAIR, DENISE CHARMAINE MITCHELL, LESLIE ANTHONY O'NEILL, ALBERT DARBY WINDER** Applicant
AND:	**STATE OF WESTERN AUSTRALIA, SHIRE OF SHARK BAY** Respondent

WAD 402 of 2018

BETWEEN:	**JOHN THOMAS OXENHAM, SARAH LOUISE BELLOTTIE, TERRENCE GORDON MCKIE, BIANCA ELISE MCNEAIR, DENISE CHARMAINE MITCHELL, LESLIE ANTHONY O'NEILL, ALBERT DARBY WINDER** Applicant
AND:	**STATE OF WESTERN AUSTRALIA, SHIRE OF SHARK BAY** Respondent

JUDGES: **MORTIMER, WHITE AND COLVIN JJ**

DATE OF ORDER: **21 APRIL 2020**

THE COURT ORDERS THAT:

1. The questions reserved for consideration be answered as follows:

   Question (a)

   Whether, in an instance where the Court has determined that there are distinct groups of persons each of which hold common rights comprising native title over the same area of land, the Court has power, when making a determination of native title under the *Native Title Act 1993* (Cth), to determine that more than one PBC is to perform the functions given to PBCs under the *Native Title Act* and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

   Answer

   Yes, but only where, as in this case, there has been an overall determination of the existence of separate and distinct native titles over the same land.

   Question (b)

   If the answer to question (a) is in the affirmative, whether the Court has a discretion to determine that there should be only one PBC for the area in circumstances where each group nominates a separate PBC.

   Answer

   No.

2. There be liberty to each party and any intervener to apply within 14 days as to any orders for costs.

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

REASONS FOR JUDGMENT

MORTIMER AND COLVIN JJ:

1 Native title is recognised and protected by the *Native Title Act 1993* (Cth): s 10. In that regard, the Preamble to the Act states:

> It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.
>
> A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.
>
> Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:
>
> (a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and
>
> (b) proposals for the use of such land for economic purposes.
>
> It is important that appropriate bodies be recognised and funded to represent Aboriginal peoples and Torres Strait Islanders and to assist them to pursue their claims to native title or compensation.

2 The Act confers upon this Court a jurisdiction to make a determination of native title. If the Court proposes to make a determination of native title then the Court must make a further determination as to the identity of a prescribed body corporate (**PBC**) to hold the native title on trust or to act as agent for those persons who are proposed to be determined to be the common law holders of the native title, sometimes described as the traditional owners.

3 Two questions concerning the nature and extent of the power of the Court when making a determination of a PBC have been reserved for consideration. They arise because the proposed determination of native title in these proceedings concerns claims by each of the Malgana People and the Nanda People that by separate and distinct laws and customs they each have a connection to the same land such that each group might be said to have a separate native title to the same land.

4 In short, the reserved questions concern the proper approach to the appointment of a PBC where there are overlapping native titles. An issue arises as to whether, in such cases, there must be

a determination of a single PBC for the land in respect of which there is to be a determination of native title. The parties and interveners maintain that each group whose connection with the land arises from a distinct body of laws and customs is entitled to nominate a separate PBC to hold native title and if the common law holders nominate a PBC then the nominated body must be appointed.

5 One intervener, Cape York Land Council, goes further and submits that groups or sub-groups within a larger group united by a single body of traditional laws and customs could each nominate separate PBCs. It submits that the resolution of the reserved questions should be undertaken with that possibility in mind. In particular, it submits that such an approach was adopted in a number of decisions made in the course of determining the Bindunbur claim following the decisions by North J in *Manado on behalf of the Bindunbur Native Title Claim Group v State of Western Australia* [2017] FCA 1367 and *Manado on behalf of the Bindunbur Native Title Claim Group v State of Western Australia* [2018] FCA 854. It submits that the determinations made in respect of that single claim resulted in a determination of native title rights and interests held by separate language groups with those rights and interests overlapping in part. PBCs were appointed for each group.

6 In the course of submissions, reference was also made to the native title determination the subject of the decision in *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33; (2013) 250 CLR 209 where group rights comprising the native title were determined to be held by the members of each of thirteen island communities in the Torres Strait. Although one PBC was appointed in respect of all those rights, it was submitted that there could have been separate PBCs in respect of the native title rights held by each island community.

7 For the following reasons, the reserved questions should be answered in the following way:

> *Question (a)*
> Whether, in an instance where the Court has determined that there are distinct groups of persons each of which hold common rights comprising native title over the same area of land, the Court has power, when making a determination of native title under the *Native Title Act 1993* (Cth), to determine that more than one PBC is to perform the functions given to PBCs under the *Native Title Act* and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

Answer

Yes, but only where, as in this case, there has been an overall determination of the existence of separate and distinct native titles over the same land.

Question (b)

If the answer to question (a) is in the affirmative, whether the Court has a discretion to determine that there should be only one PBC for the area in circumstances where each group nominates a separate PBC.

Answer

No.

Relevant principles of statutory construction

8 The questions posed for consideration raise two points as to the proper construction of the provisions of the Act concerned with the determination of PBCs.

9 In construing a statute the task is to ascertain the contextual meaning of the words used: *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 at [14]. It involves choosing from the range of possible meanings which Parliament should be taken to have intended: *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 256 CLR 1 at [57]. Further, the range of meanings is itself to be informed by matters of context from the outset and not just when ambiguity is thought to arise: *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HCA 48; (1985) 157 CLR 309 at 315 and *SZTAL* at [14].

10 Context includes matters that manifest the purpose of a statute or particular provisions. Purpose may be determined 'based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials': *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; (2014) 248 CLR 378 at [25].

11 Consideration of contextual matters should not deflect the Court from what is a 'text-based activity': *Alphapharm Pty Ltd v H Lundbeck A/S* [2014] HCA 42; (2014) 254 CLR 247 at [42]. Hence the warnings that matters of context should not be used to displace the clear meaning of the text: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [47]. Ultimately, 'the fundamental duty of the Court is to give meaning to the legislative command according to the terms in which it has been expressed': *Northern*

Territory v Collins [2008] HCA 49; (2008) 235 CLR 619 at [16]. 'Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text': *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 at [39]. In this instance part of the context is the recognition that the *Native Title Act* gives effect to traditional rights recognised by the High Court. Even so, the fundamental task is to construe the particular statutory language used to express the manner and respects in which there is to be recognition of the native title rights that it describes.

12 As already noted, the Act has express statements as to its purpose and includes an express provision by which the Act recognises and protects native title. The provisions of the Act concerning PBCs fall to be construed in that context. It is also necessary to consider the provisions of the Act that deal with the determination of native title, because the provisions concerned with determination of PBCs apply if and when the Court proposes to make a determination of native title.

The nature of native title

13 The terms 'native title' and 'native title rights and interest' are used interchangeably in the Act and are defined in s 223 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 the 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 recognised by the common law of Australia.

14 The first two characteristics described in the statutory definition of native title 'reflect that native title rights and interests have a physical or material aspect (the right to do something in relation to land or waters) and a cultural or spiritual aspect (the connection with the land or waters)': *Northern Territory v Griffiths (decd) and Lorraine Jones on behalf of Ngaliwurru and Nungali Peoples* [2019] HCA 7 at [23].

15 The inquiry required by the Act is to identify those rights and interests possessed under a particular body of laws and customs that are observed by a particular body of people by which

they have a connection to particular land or waters: *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1 at [14]-[19].

16 Significantly for present purposes, native title refers to rights and interests that 'can be *possessed* under traditional laws and customs' (emphasis added). Those rights and interests may reflect a different conception of 'property' or 'belonging' to those familiar to the common law. But the rights and interests must be possessed under traditional laws and customs that form a normative system: *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; (2012) 214 CLR 422 at [40]-[42], [47] (Gleeson CJ, Gummow and Hayne JJ). Therefore, they depend for their existence upon a society, 'a body of persons united in and by its acknowledgment and observance of a body of law and customs': at [49].

17 There is a coherent and collective character to native title which derives from a common physical and spiritual connection manifested in the acknowledgment of laws and the observance of customs by the members of a society who share that connection. Therefore, it may be expected that usually there will be a necessary and direct correlation between the extent of that common connection and the extent of the native title. However, it may be the case that the common laws and customs as observed by a society have a character that means that it is inapt to treat all members of the society as possessing a particular right or interest in all parts of the land with respect to which they share a common connection. In such cases, even the extent of communally possessed rights and interests may be confined to particular individuals or groups with no overarching communal possession pertaining to all members of the society. Nevertheless, the title remains a communal native title that is an incident of the common connection of all members of the society observing the body of laws and customs from which the native title is derived.

18 In the language used by Brennan J (Mason CJ and McHugh J agreeing) in *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 at [66]-[70]:

> Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence… Australian law can protect the interests of members of an indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as it is practicable to do so).
>
> … so long as the people remain as an identifiable community, the members of whom

> are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.
>
> …where an indigenous people (including a clan or group), as a community, are in possession or are entitled to possession of land under a proprietary native title, their possession may be protected or their entitlement to possession may be enforced by a representative action brought on behalf of the people or by a sub-group or individual who sues to protect or enforce rights or interests which are dependent on the communal native title. Those rights and interests are, so to speak, carved out of the communal native title. A sub-group or individual asserting a native title dependent on a communal native title has a sufficient interest to sue to enforce or protect the communal title.
>
> … The recognition of the rights and interests of a sub-group or individual dependent on a communal native title is not precluded by an absence of a communal law to determine a point in contest between rival claimants. By custom, such a point may have to be settled by community consensus or in some other manner prescribed by custom. A court may have to act on evidence which lacks specificity in determining a question of that kind.

19 In *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135; (2005) 145 FCR 442, Wilcox, French and Weinberg JJ considered an appeal from a decision where the primary judge had held that the claimant group was one community operating under a common set of laws and customs and containing sub-groups with particular responsibilities under those common laws and customs: at [26]. The claim area was part of the traditional country of Aboriginal people comprising what were described as 'landholding estate groups': at [1]. In issue in the appeal was whether the native title holders were 'all the members of one community comprising the seven estate groups or whether the seven estate groups hold their native title rights and interests severally in respect of their various estate areas': at [4].

20 The nature and extent of the common connection shared by all groups was summarised in the following way at [27]:

> The claim group or community had its ancestral source in the community which occupied the claim area at the time of sovereignty. The evidence demonstrated, at that earlier period, the existence of a communal title wider than an estate based title. The Aboriginal evidence indicated that within the claim area there was one set of avoidance relationship rules, one set of mourning customs, one set of gender restriction rules and the same general rules relating to looking after country, whether or not the country was specifically identified by reference to a particular estate group. There were aspects of common ceremonial practice consistent throughout the claim area which did not differ by reference to separate estate groups. There was no significant evidence to indicate that individual country or estate groups functioned separately as communities with different rules or customs or with different ceremonies or with separate and isolated residential arrangements. They shared ceremonies and members of each of the four language groups would attend them. There was considerable evidence of marriage

> between linguistic or tribal groups and between members of different estate groups within the claim group. There was a set of rules to determine whether proposed marriages were permissible in accordance with traditional laws and customs. There was commonality of ceremonial and dreaming connections in the claim area between the four language or tribal groups and between the seven estate groups. Those connections extended across the areas of the different tribal estate groups. Ceremonies carried out throughout the claim area were and had been the same wherever the ceremonies were conducted and irrespective of estate groups. These included ceremonies relating to young man's business, womens' awely ceremonies, mourning customs and the like. His Honour said (at [140]):
>
> > *'The same traditional laws and customs regulate throughout the claim area what a particular person is entitled to know or to see, or to participate in, and what particular places a person is entitled to go to.'*
>
> The hunting practices and use of bush resources by the applicants were consistent and shared among all members of the claim group independently of particular estate groups. There was no evidence of separate estate groups conducting ceremonies independently of the other groups or in other ways regarding themselves as a separate community distinct from a general community in the claim area.

21 It was noted that notwithstanding the existence of groups and individuals with particular native title rights and interests in *Mabo (No 2)*, the form of declaration made by the Court was global and declared the rights held by all the Meriam people: at [70]. It was also noted that the provisions of the *Native Title Act* had their origins in the majority judgment in *Mabo (No 2)* 'and could not have been intended to undercut the fundamental principle of the communal character of native title': at [71]. It was emphasised that the laws and customs from which native title rights and interests derive their existence 'must necessarily be those of a society or group': at [77]. Nevertheless, the decision recognised the following two possibilities depending upon the nature of the society said to be the repository of the traditional laws and customs giving rise to the native title rights and interests:

(1) The members of the community identified as the relevant society may enjoy communal ownership of the native title rights and interests, albeit they are allocated intramurally to particular families and clans (at [79]);

(2) The members of the relevant society may be dispersed in groups over a large arid or semi-arid area such that an inference of communal ownership by all members of the society may be difficult if not impossible to draw in which case a determination may be made in favour of individuals or small groups who held native title rights under traditional laws of a society of which they are part (at [80]).

22 It is a question of fact in each case as to whether the common connection, by reason of the manner in which it is shared, results in communal ownership by all members of the society

(which may be shared intramurally) or in communal ownership of particular areas by particular individuals or groups with no communal ownership by the whole society. If communal ownership is found to be held by a particular group rather than the whole society then all the members of that group hold the native title. However, the *Native Title Act* does not contemplate some form of derivative or subsidiary communal native title which is also a native title such that each intramural right or interest possessed by a sub-group or individual has the same character as the community title described in *Mabo (No 2)*.

23 In *Alyawarr* at [80], the Court referred to the decision in *De Rose v State of South Australia (No 2)* [2005] FCAFC 110; (2005) 145 FCR 290 as an example of an instance where 'the Court held that a native title determination could be made in favour of individuals or small groups who held native title rights under the traditional laws and customs of a society or community of which they are part'. In *De Rose* at [38]-[40], Wilcox, Sackville and Merkel JJ said:

> It is hardly likely that the traditional laws and customs of Aboriginal peoples will themselves classify rights and interests in relation to land as 'communal', 'group' or 'individual'. The classification is a statutory construct, deriving from the language used in *Mabo (No 2)*. If it is necessary for the purposes of proceedings under the [*Native Title Act*] to distinguish between a claim to communal native title and a claim to group or individual native title rights and interests, the critical point appears to be that communal native title presupposes that the claim is made on behalf of a recognisable community of people, whose traditional laws and customs constitute the normative system under which rights and interests are created and acknowledged. That is, the traditional laws and customs are those of the very community which claims native title rights and interests. By contrast, group and individual native title rights and interests derive from a body of traditional laws and customs observed by a community, but are not necessarily claimed on behalf of the whole community. Indeed, they may not be claimed on behalf of any recognisable community at all, but on behalf of individuals who themselves have never constituted a cohesive, functioning community.
>
> The distinction between group and individual rights and interests (to the extent it matters) is perhaps more difficult to identify. An example of group rights and interests may be those held by a subset of a wider community, the traditional laws and customs of which determine who has interests in particular sites or areas. The members of the subset may or may not themselves be an identifiable community, but their rights and interests are determined by the traditional laws and customs observed by the wider community. The members of the subset might be expected, under the traditional laws and customs, to share common characteristics in relation to certain land or waters, such as rights and responsibilities as the custodians of particular sites. Ordinarily, it might be expected that the 'group' holding native title rights and interests would have a fluctuating membership, the composition of which would be determined by the relevant body of traditional laws acknowledged and customs observed.
>
> A person holding individual native title rights and interests, by contrast, may not necessarily share common characteristics, in relation to land or waters, with other members of that community under the relevant body of traditional laws and customs. Unless the traditional laws and customs provide for the individual rights and interests to be transmitted to other community members, they presumably will terminate upon the death of the holder.

24 Then, in *Bodney v Bennell* [2008] FCAFC 63; (2008) 167 FCR 84, Finn, Sundberg and Mansfield JJ at [146] summarised the position by stating that s 223(1) 'envisages three possible native title "owning" entities - the community (or "society") under whose laws and customs native title is possessed, a group or groups, and an individual or individuals'. Significantly, in that decision, their Honours recognised that the fundamental principle is that ordinarily native title is communal: at [158].

25 These authorities reveal significance in the distinction between two different questions. First, whether the communal title is possessed by the whole society or by individual groups. Second, whether the particular rights and interests that form part of the communal title are themselves communal, group or individual rights.

26 The distinction is evident in the terms of the definition of the term 'determination of native title' in s 225. A determination of native title is made by way of an order of this Court: s 94A, and s 225 defines the mandatory content of any such order. The definition in s 225 has two aspects. First, a determination as to 'whether or not native title exists in relation to a particular area … of land or waters' and second, if it does, a determination of various further matters concerning the native title. Those further matters are:

> (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.

27 A determination as to whether native title exists is a determination as to whether there is a traditional title possessed as a manifestation of a communal connection to particular land, usually but not necessarily coincident with the extent of a single society acknowledging traditional laws and observing traditional customs over the land (**overall determination**). The further determination of the matters stated in paragraphs (a) to (e) is of the incidents of that traditional title (**further determination**). In the *Native Title Act* the term native title is used

interchangeably to refer to both. However, significantly for present purposes, s 55 operates by reference to the determination that native title exists thereby indicating an intention to refer to a singular and particular determination. The use of the definite article is consistent with an intention to refer only to the overall determination, not the extent of the native title rights and interests the subject of the further determination.

28 Importantly, the scope of the overall determination is not a function of the scope of the application. Rather, it depends upon the factual findings made concerning the nature and extent of communal connection to the land that manifests in possession by the community according to laws and customs observed. (We use the term community rather than society at this point in order to recognise that the overall determination will usually but not always be coincident with the extent of the society). So, an application for the determination of native title may give rise to multiple overall determinations, especially where the conclusion reached is that there are separate societies each with native title over the land the subject of the application, as was the case in the present instance.

29 As we have noted, the above distinctions expose an important issue raised by the reserved questions, namely whether the determination of a PBC required to be made by s 55 must be a determination of a PBC for the overall determination or whether it can be a determination of a PBC for each further determination such that, as submitted by Cape York Land Council, there can be a separate PBC for each right and interest (irrespective of whether it is an intramural incident of the native title the subject of the overall determination). An issue of that character could have arisen in *Akiba* if the native title holders had sought the determination of separate PBCs for each island group, but did not because a single PBC was nominated.

30 In adjudicating the Bindunbur claim, North J considered separate but overlapping applications by each of the Bindunbur people, Jabirr Jabirr people and Goolarabooloo people. In determining native title, emphasis was placed upon the concept of society implicit in the requirement that the rights and interests be possessed under traditional laws acknowledged and customs observed, being the body of persons united in their acknowledgment and observance of those laws and customs: at [224]-[226]. It was common ground that the Bindunbur people and Jabirr Jabirr people each had native title rights and interests, subject to extinguishment, in the Bindunbur and Jabirr Jabirr application areas respectively: at [220]. There was evidence to the effect that their rights and interests in land were held 'at the local level' in family estates known as bur, burr or buru: at [236]. At the sub-regional level they had rights and interests in

land 'as members of language groups', being Jabirr Jabirr and Ngumbarl (for the Jabirr Jabirr application area) and Nyul Nyul and Nimanbur (for the Bindunbur application area): at [247]. Further, under their traditional laws and customs, rights and interest in land were acquired only by descent, subject to rules about adoption and succession: at [252]. It was by that normative system that they made their claims: at [252]. The Goolarabooloo applicants made their claims in different ways only one of which was by descent: at [253]. Ultimately, their claims were not successful.

31 North J found that the determination should specify the land holding areas by reference to language identity: at [628]. However, his Honour did not address whether that was done as part of the overall determination or as part of the further determination of the matters listed in paragraphs (a) to (e) of s 225. Thereafter, the parties were invited to prepare a draft determination that reflected that conclusion. Ultimately, a determination was made in general terms that native title rights and interests existed in various parts of the determination area (where there had not been extinguishment). The determination then identified 'the rights and interests comprising the native title' as being held by the various language groups. For one area, native title was determined to be held by 'Jabirr Jabirr/Ngumbarl people, Nyul Nyul people and Nimanburr people': *Manado v State of Western Australia* [2018] FCA 854.

32 A further determination of another application was made on the basis of the findings made by North J: *Manado on behalf of the Bindunbur Native Title Claim Group v State of Western Australia* [2019] FCA 30 (Robertson J). Separate PBCs were appointed. However, the Court's attention does not appear to have been directed to the issues that fall for determination by the reserved questions in this case. It appears to have been assumed by the parties that there could be separate PBCs appointed; and any possible legal difficulties with that course were not drawn to the Court's attention. Therefore, in our respectful view, the decisions concerning the Bindunbur claim do not assist is resolving the reserved questions.

33 Returning to the present case, we note that the factual circumstances that have given rise to the reserved questions concern overlapping native title interests that have been declared on the basis of the existence of separate societies each of which possesses rights and interests in respect of the same land. The Court has made a consent determination that for a particular area near the town of Shark Bay in Western Australia, native title rights described in the same terms are held by each of the Malgana People and the Nanda People. By consent, the determination has been made that the Malgana People and the Nanda People are each separate societies with

their own laws recognised and customs observed that are the source of their separate connections to the same land.

34 Nevertheless, we accept the submission that the possibility exists for overlapping native titles to arise intramurally or by reason of the form in which native title rights and interests are described in making what we have described as the further determination required by s 225. Therefore, we address the reserved questions in that context.

Overlapping native title

35 It appears that the Act may have been drawn without recognising the potential for overlapping native titles each sourced from the laws and customs of separate societies. The reasons in *Mabo (No 2)*, do not appear to have contemplated the possibility of overlapping native titles of that kind. Toohey J did refer to the decisions by Aboriginal Land Commissioners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) that had recognised that traditional occupation of land may not be exclusive: at 190. In that context, his Honour said, by way of illustration, that there may be instances where 'one group is entitled to come on to land for ceremonial purposes, all other rights in the land belonging to another group'. His Honour's observation contemplated the possibility that traditional title may not be exclusive. However, his Honour was not concerned with whether there may be overlapping traditional titles. Further, although the Act contemplates overlapping *applications* for a determination of native title (see s 67), the Act as a whole contains no express acknowledgment of the possibility of a determination in favour of two distinct groups, with two distinct native titles in respect of the same land or waters. Instead, it appears to assume that all those with a connection to the same land will observe the same laws and customs which will govern the circumstances in which rights and interests in that land may be possessed under a single traditional title.

36 Even so, it is now well established that there may be circumstances that support a finding of overlapping native title. They were found to exist after the final hearing in *Daniel v State of Western Australia* [2004] FCA 849; (2004) 138 FCR 254, upheld on appeal in *Moses v State of Western Australia* [2007] FCAFC 78; (2007) 160 FCR 148. They appear to have been recognised in *Banjima People v State of Western Australia* [2015] FCAFC 84; (2015) 231 FCR 456 at [48]-[55].

37 In a number of decisions, judges of this Court have observed that the boundaries for native title may have a degree of imprecision: *Lake Torrens Overlap Proceedings (No 3)* [2016] FCA 899 at [125] (Mansfield J); *Pegler on behalf of the Widi People of Nebo Estate #2 v State of*

Queensland (No 3) [2016] FCA 1272 at [15] (Dowsett J); and *Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v State of Queensland (No 2)* [2014] FCA 528 at [131] (Mortimer J). It was submitted that this characteristic leads to the prospect that there may be partly overlapping native titles at the boundaries and there should be overlapping PBCs unless the common law holders of both groups agreed to a different arrangement. These outcomes in the decided cases provide support for the view that the outworking of many years of native title determinations in this Court has recognised that there may be some circumstances in which there may be limited overlap of native title as determined in accordance with the Act. However, such matters do not justify an approach to resolution of native title claims on the basis of some form of compromise that does not have as its foundation a substantiated claim to native title.

Applications for the determination of native title

38 An application may be made to the Court for a determination of native title in relation to an area for which there is no approved determination of native title: s 13(1)(a). A determination of native title may also be sought as part of a claim for compensation for any loss, diminution or impairment of native title rights or interests: s 51(1). If there has already been an approved determination of native title then there can be no further application. However, there is the possibility of an application to revoke or vary an earlier approved determination of native title: s 13(1)(b). In each case, the jurisdiction relates to a determination of native title, being a recognition of the existence at common law of a coherent system of rights and interests under which there is a connection on the part of a society of people to particular land or waters.

39 An application for determination of native title may be made by any of the persons specified in the table that forms part of s 61(1) of the Act. They include 'a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group'. In short, the application may be brought by the persons who claim to hold the native title.

40 Any determination of native title must be made in accordance with the procedures in the Act: s 213. There are two important aspects of the process to be followed for the making of a determination of native title under the Act. First, the Act provides for various steps to be taken to identify whether there is validity in the claim group and to ascertain all those persons who may have an interest in the land the subject of the native title claim to be notified so that they

may participate in any hearing concerned with whether there should be a determination of native title. Second, steps are taken to identify the area of land to which the claim relates so that it properly encompasses the extent of disputes as between those who claim to hold native title so that there can be a single determination as to the nature and extent of native title for a particular area of land.

41 Therefore, the extent of the area of land the subject of a particular determination will be a function of the nature and type of claims made. However, once made, the particular area over which a determination should be made is a matter for adjudication by the Court. The Court can and does determine that there are separate native titles held by separate societies over different parts of the land the subject of the one application, or competing applications. Further, the area the subject of the determination may not concern the full extent of the native title of a society. The traditional land of a particular society may extend beyond the boundaries of the area the subject of the application into an adjoining area.

Determinations of native title

42 If the Court makes a determination of native title, it must set out details of the matters mentioned in s 225: s 94A. As we have noted, s 225 refers to two aspects of a determination or order, which we have described as the overall determination and the further determination.

43 The following observations may be made as to the aspects of the determination listed in paragraphs (a) to (e) of s 225.

44 The terms of paragraph (a) and their context within the opening words used in s 225 are significant. Consistently with what has already been said about native title, paragraph (a) uses the term 'native title' to identify compendiously all of the common or group rights that together comprise the native title. By the time the Court is dealing with the matters in paragraphs (a) to (e) of s 225, the existence and geographical extent of native title on the land the subject of the application has already been identified. The existence of native title 'in relation to a particular area' (being the overall determination) is the first aspect of the determination to be made. It is not a determination made in the air that is only given content when the further determinations required by paragraphs (a) to (e) are made. Rather, the overall determination expresses a finding that there is native title for an identified area. The further determination to be made as required by s 225 provides more detail as to the content of the native title. However, the determinations to be made under paragraphs (a) to (e) must only be made in respect of the native title that has been determined.

45 So, the structure of s 225 does not admit of the possibility that there might be a general determination that there is one or more native titles for a particular area with the geographical extent of the native title to be fleshed out by the further determinations to be made under paragraphs (a) to (e). The overall determination described in s 225 must manifest a conclusion as to whether native title exists in relation to a particular area. Even reading the reference to native title as including the plural, it is not possible to make such a determination without reaching a conclusion that there is native title within the meaning of the definition of the interchangeable terms 'native title' and 'native title rights and interests'. Therefore, in order to make the overall determination there must be a final view reached that there is a particular native title for a particular area. Further, the native title means all of the communal, group or individual rights that are possessed under one body of laws acknowledged and customs observed by a society of people with a shared spiritual connection to a particular area of land.

46 As has been noted, it has been held that there may be determinations of more than one native title on any application and those determinations may be of native titles that are overlapping in some respects. Therefore, the question as to whether there may be more than one PBC in respect of the same area of land is to be considered in that context.

47 Then, under paragraph (b), the nature and extent of each of the rights and interests that exist as part of the determination of native title are to be determined. It may be expected that will involve consideration of the geographical extent of particular rights and interests. However, a determination of the geographical extent of particular rights and interests is not to be confused with the overall determination that native title exists as to a particular area. The overall determination of native title is a separate aspect, and a preceding identification of geographical extent. Thereafter, there are further determinations to be made including as to the geographical extent of particular rights that form part of the native title. Conceivably, another aspect of the nature and extent of the rights may be the specification of any particular group that has particular rights or interests according to the native title.

48 To illustrate, under the native title for an area, there may be significance given to membership of particular groups of people (which may be described as estate or landholding groups) such that the members of one group may be those who are entitled to undertake particular activities on an identified part of the land the subject of the native title or may be those whose permission is required before undertaking certain activities on that land. The rights of that group may admit of exceptions. For example, all people who share a common connection manifested by

the native title may share access to a particular water resource at a point where the land for each group meets. However, these matters do not mean that the separate rights of the groups are each a native title. In such cases, each group does not assert an independent body of traditional laws and customs which connects them to their own land. Rather, the laws are acknowledged and the customs are observed across the whole community; and confer and regulate the rights of each group. Those laws and customs are the source of the group rights. It is that common connection that gives rise to that which is described in the Act as native title or the native title rights and interests (collectively).

49 In such a case, to describe the rights of a particular group as they pertain to a particular geographical area as 'native title rights' is not to identify those rights as being commensurate with the overall determination of native title for the area. The native title is and remains the possessory interest or belonging to the land that is commensurate with the whole of the traditional laws and customs observed as an expression of the shared and common spiritual connection to the area. Native title is the full extent of the title of the community. It encompasses all of the communal, group and individual rights and interests conferred by laws acknowledged and customs observed by people with a connection to a particular area. The identification of particular rights and interests that derive from that native title that may be enjoyed, or exercised, by the whole community or by particular groups or by particular individuals is not itself the determination of native title. Rather, it is the determination of the nature and extent of rights and interests that are particular incidents of the native title.

50 Under paragraph (c), interests other than native title are also to be determined.

51 Once the rights and interests have been identified then, under paragraph (d), the relationship between the rights and interests that together form the native title and the other rights and interests in the same land must be determined.

52 Finally, under paragraph (e), the determination is to consider the extent to which the native title confers exclusive rights.

Prescribed bodies corporate

53 By s 55 of the Act, if a determination that native title exists is made then the Court must 'at the same time as, or as soon as practicable after, it makes the determination make such determinations as are required' by s 56 and s 57. Section 55 focusses upon the first aspect of any determination of native title being the determination of the existence of native title (which

we have described as the overall determination), a matter considered further below. Section 56 deals with a determination as to whether the native title is to be held in trust: s 56(1). It provides for the Court to take a number of steps in that regard. It must first request 'a representative of the persons it proposes to include in the determination of native title as the native title holders' (a group then defined as the common law holders) to indicate whether they intend to have the native title held in trust by nominating a PBC within a specified period: s 56(2).

54 There is no evident provision as to how the representative is to be identified. It appears that the request is to invite both a representative to be identified by the common law holders and for the representative to nominate a PBC. A construction to that effect appears to be consistent with the character of the native title to be the subject of a determination. In that sense it advances the evident purpose of the Act in recognising and protecting native title. It would be inconsistent with the native title described in the Act if the Court could identify or impose a person as the representative. Such a construction is confirmed by the balance of s 56(2) which contains further provisions as to what is to occur 'if the common law holders give the nomination within the period': s 56(2)(b) and (c).

55 There are two possibilities as to what is to occur after the request has been made for the nomination of a PBC to be the trustee of the native title. First, there may be a nomination. In that event:

> … the Federal Court *must* determine that the [PBC] is to hold the rights and interests from time to time comprising the native title in trust for the common law holders
>
> (emphasis added)

56 The second possibility is that there is no nomination of a PBC, in which case the Court *must* determine that the rights and interests are to be held by the common law holders.

57 Significantly, the language in both instances is mandatory. There are many examples in the Act where the word 'may' is used in conferring a particular power on the Court or words directing the Court to consider the appropriateness of exercising particular powers: see, for example, s 86F and s 87(1A). Again, consistently with the evident purpose of the Act as providing for the recognition and protection of native title, a mechanism by which the nomination by the common law holders is given effect without the exercise of further inquiry or discretion by the Court and otherwise the native title is to be held by the common law holders, appears to be consistent both with that purpose and with the nature of the determination

under s 225 as already explained. To impose a different body as the PBC contrary to the choice of the common law holders would be fundamentally inconsistent with the recognition of the native title.

58 Where the Court orders that the nominated PBC is to hold the native title on trust then the functions of the body corporate as trustee may be provided for by regulations: s 56(3) and (4).

59 Where the Court orders that the common law holders are to hold the native title then there is a further process to be followed for the nomination of a PBC to act as agent or representative of the common law holders in respect of matters relating to native title: s 57(2). The process is similar. There is a request for a representative of the common law holders to nominate a PBC to act as agent or representative: s 57(2)(a). If there is a nomination then the Court must determine that the nominated prescribed body is to perform the functions as agent or representative: s 57(2)(b). However, if there is no nomination, then the Court must determine in accordance with the regulations which body is to perform the functions of agent or representative: s 57(2)(c). In either case, the functions of the PBC may be specified by regulations: s 58.

60 The upshot is that if a PBC is nominated by the common law holders then it holds the native title on trust for the common law holders and it exercises the functions provided for by regulations. If the native title is held by the common law holders then there must still be a PBC, but it acts as agent or representative. Only if there is no PBC nominated to act as agent or representative does the Court determine the identity of the PBC. The existence of this limited power reinforces the earlier analysis that if the common law holders nominate a PBC to hold the native title on trust then the Court must appoint that PBC to hold the native title on trust.

61 The regulation-making power concerning PBCs who hold native title on trust is in different terms to the regulation-making power concerning PBCs who act as agent or representative: compare s 56(4) and s 58. However, in both instances, the regulation-making power does not extend to altering the nature of the native title. Inherent within the character of native title are the traditional mechanisms for making decisions and resolving disputes that may arise within the society comprised by the common law holders. Therefore, although the scheme of the Act permits the establishment of a trust relationship for the purpose of holding the native title, general law preconceptions about the nature and extent of powers that might be exercised by

trustees when entrusted with the powers of management of trust property in other contexts should not necessarily be imported.

62 The provisions of the Act which provide for the determination of a PBC to act as trustee are directed to facilitating dealings as between the parties who are part of the community who acknowledge the laws and observe the customs under which the traditional rights and interests (on the one hand) and non-native title holders as to the land the subject of the native title (on the other hand). Decisions as to those dealings are still to be made conformably with the nature of the native title. The trustee does not have a power to manage independently of consulting with those persons who, according to the traditional laws and customs, should be consulted as to particular acts on the land.

63 Accordingly, reg 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) provides that for a PBC holding native title on trust, the PBC must for 'a native title decision' (other than certain specified decisions) consult with and obtain the consent of common law holders in accordance with the regulations. The expression 'native title decision' is defined in reg 3 to mean a decision:

> (a) to surrender native title rights and interests in relation to land or waters; or
>
> (b) to do, or agree to, any other act that would affect the native title rights or interests of the common law holders.

64 There are regulations to the effect that the PBC must ensure that the common law holders understand the purpose and nature of a proposed native title decision: reg 8(2). The PBC must follow a process of decision-making under the traditional laws and customs of the common law holders: reg 8(3). If there is no such process, then the consent to a proposed native title decision must be made in accordance with a process of decision-making that has been agreed to or adopted by the common law holders: reg 8(4).

65 Relevantly for present purposes, reg 8(5) provides that a PBC that holds the native title in trust 'for more than one group of common law holders' or is an agent for more than one such group, the PBC must consult with, and obtain the consent of, only those groups of common law holders whose native title rights or interests would be affected by the proposed native title decision. It is perhaps unclear as to whether this provision is dealing with a case where the same PBC holds different native titles on trust or with the issues that arise where the native title gives rise to particular rights or interests of a kind that are to be enjoyed by one group of the common law holders, but not others. However, the terms in which the regulations are expressed could not

govern the proper construction of the Act. In any event, it is not the case that they are inconsistent with the construction we have explained.

66 Finally, as to the provisions in the Act concerning PBCs, the Act requires there to be a National Native Title Register: s 192. Amongst other things, the Register must include the name of the PBC: s 193(2)(e) and (4). The Act refers to a PBC that is on the Register as a 'registered native title body corporate' (**RNTBC**): s 253. Once on the register, the RNTBC must perform functions given to RNTBCs under the Act: s 57(3).

67 Returning then to the terms of s 55 of the Act (which is the provision that requires the Court to make the determinations required by s 56 and s 57 for the appointment of a PBC), it is expressed in the following terms:

> If:
>
> (a) the Federal Court proposes to make an approved determination of native title; and
>
> (b) the determination is that native title exists at the time of making the determination;
>
> the Federal Court must, at the same time as, or as soon as practicable after, it makes the determination, make such determinations as are required by sections 56 (which deals with holding the native title on trust) and 57 (which deals with non-trust functions of prescribed bodies corporate).

68 The terms in which s 55 is expressed provide support for the view that there must be one PBC for each overall determination that native title exists, not for each consequent determination concerning the particular rights and interests that form part of that traditional title. It requires the Court to make the determinations as to a PBC where the Court 'proposes to make an approved determination of native title'. The provisions which follow s 55 are, as has been explained, couched in terms that require the Court to give effect to nominations made by the common law holders, that is, the persons included in the overall determination as the holders of that traditional title. The only point at which the Court has any power to make its own determination as to the identity of the PBC is where there has been no nomination. The overall structure contemplates that the consequence of a determination of native title is that the common law holders will control the identity of the PBC and it is only if they fail to act that there is a default provision leaving that matter to the Court.

69 Significantly, s 55 does not refer to a PBC being appointed over all the land the subject of an application where native title has been found to exist. Further, s 55 operates in the same way

irrespective of whether native title is or is not overlapping. In both instances, the requirement to appoint a PBC is a consequence of the determination of native title, namely each determination.

70 Therefore, the language of the Act (a) requires the Court to deal with the appointment of a PBC whenever there is a determination of the existence of native title; (b) states that a nominated PBC must be appointed; (c) requires a request to be made of all the common law holders (being the holders of the native title that is determined to exist by the overall determination) to indicate the manner in which they intend to hold the native title; and (d) provides expressly for the possibility of an entity other than the nominated PBC to be appointed only where there is no nomination. Those matters, when considered in the context of the overall character of the *Native Title Act* in providing for the recognition of native title, should be construed as requiring a properly nominated PBC to be appointed. The same position would pertain irrespective of whether there are overlapping native title rights and interests to be determined.

71 Further, in the context of our analysis of s 225, the PBC is being appointed in respect of the native title the subject of the overall determination. If s 55 was construed as allowing a PBC to be appointed in respect of each group or individual determined to hold a particular right or interest then there would be the potential for a very large number of PBCs to be appointed in respect of the same land over which one native title has been determined to exist. Such an outcome should instead count against an affirmative answer to the first question. For that reason, our conclusion that the determination of the PBC is in respect of the overall determination of native title being the first of the two determinations contemplated by s 225 is an important contextual matter that confines the respect in which we consider the first question should be answered in the affirmative.

72 The outcome of two PBCs over the same land is a necessary consequence of an adjudication that there are overlapping native titles that exist for the same land. As we have noted, the possibility that there may be overlapping native titles is a matter that is now well established and the reserved questions assume that two such titles have been identified and are to be determined in the present case.

73 The consequence is that each overall determination of the existence of native title is a determination for which the PBC nomination process must be followed. Whether by consent or after a final hearing, where there is an adjudication by the Court in relation to separate applications covering (in whole or part) the same land or waters or both, there may be more

than one native title that is adjudicated, to exist each to be reflected in an overall determination of native title. The Court's decision or adjudication is not itself the determination. The Court's decision or adjudication is reflected in its orders, which may - as we have explained - involve more than one overall determination of native title over the same land or waters. Therefore, the appointment of separate PBCs for each overlapping native title the subject of an overall determination does not result in more than one PBC for the *same* determination.

One PBC for one native title

74 In the circumstances of this case, the separate native titles of each of the Malgana People and the Nanda People extend beyond the overlapping area to adjoining areas. There have been other determinations to that effect. Sensibly, the common law holders have each nominated the PBC that has been appointed for adjoining areas as the PBC for the overlapping area. Therefore, it is not necessary to consider whether separate PBCs could be nominated for different parts of the same native title where the extent of the same native title is the subject of a number of determinations made as a result of different applications for adjoining areas. However, we note that the Act requires the Court to invite the common law holders to nominate whether 'the native title' is to be held in trust and to nominate a PBC for the native title. If a PBC has already been nominated for a particular native title under an earlier overall determination and the Court thereafter proposes to make a further overall determination which recognises that the native title extends further then it may be that the Court is required to give effect to that earlier nomination. That is to say, our present view is that there cannot be two PBCs for different land and waters which are the subject of the same traditional title.

75 The nature of native title would not be given proper recognition if there could be two PBCs for one native title. Such an approach would result in a form of administration of native title that was inconsistent with the nature of native title which recognises a single body of laws and customs of a society in respect of the whole area of the native title.

Some important qualifications

76 It follows from the above analysis that in circumstances of the kind under present consideration, the common law holders of the overlapping native titles can each nominate a separate PBC. Further, if they do so within time then the Court must determine that each PBC holds the rights and interests of the relevant common law holders on trust. However, such a determination is only to be made where the Court has found that the native title for the land comprises rights and interests that are possessed under distinct traditional laws recognised and customs observed

that give rise to separate sources of connection to the same land or waters. Here, that is a matter of agreement between the parties (including, of course, the State). In cases where claims of that kind are made, it will be important to consider whether there are indeed distinct overlapping native titles or whether there are arrangements between groups by which those with a connection to particular country may be permitted access to other country (such as adjoining land or waters) and the access is of a kind or character that does not derive from their own, distinct, traditional law and custom in relation to that other country but rather from the authority and permission of those whose traditional law and customs, at an overall level, give rise to rights and interests in the other country.

77 Further, where a determination is to be made by consent, in order to establish the jurisdiction to appoint separate PBCs over the same land, there must first be demonstrated to be distinct but overlapping native title interests of the kind just described that are properly the subject of an overall determination. If the Court is not so satisfied, then the fact that there may be distinct groups of persons with particular rights and interests as to the same land will not be sufficient to give rise to a jurisdiction to appoint more than one PBC over the same land. Nor will the existence of a practice, even a long-standing practice, by which those with the connection to the land permit others without the requisite connection to have access to that land such that they might be said to have a right to such access, be a sufficient basis upon which to seek the appointment of a separate PBC in respect of the land where the right is to be exercised.

78 Therefore, a determination that there should be separate PBCs over the same land is not a means by which disputes as to who should administer and control the exercise of native title over a particular area of land may be resolved unless the jurisdictional foundation is established to the satisfaction of the Court, namely the existence of overlapping native titles to be made the subject of distinct overall determinations. Even where those with present interests in the area consent to such a course, it is important that such a foundation be established because the existence of two PBCs in respect of the same land may have significant consequences not only for those who make the claim to native title, but also those in the rest of the world who deal with the PBCs.

79 The potential for conflict between two or more PBCs as to future acts, compensation claims and other matters in respect of the same area of land or waters is different to the potential for conflict within a single PBC. In the former case, there are no shared traditional laws recognised and customs acknowledged concerning activities on the land. That is why it would be

appropriate for matters such as compensation to be determined separately. In particular, there is no means by which particular groups may be identified with authority to speak for parts of the land the subject of the native title. However, in the latter case, if there is a concern or dispute then there may be resort to the shared traditional laws and customs by which the connection to the land is manifest and they may be resolved by a process of consultation amongst the native title holders in a manner consistent with those laws and customs. A decision made in accordance with those traditional laws and customs will respect and give effect to native title. Decisions of that kind are provided for by the Act and the regulations concerning such matters for which the Act provides: s 56(4) and s 59.

80 By definition, a decision reached between two peoples whose native title arises from separate bodies of traditional laws and customs cannot be resolved according to the laws and customs that embody the collective nature of the rights and interests held by each of them. Appointing two PBCs for the same land opens up the potential for disputes of a kind that will not be within the scope of the regulation-making power as to the management of native title because those disputes will be between PBCs rather than within them.

Are there contextual matters that lead to a different construction of the PBC provisions?

81 The existence of two PBCs for the same land may pose some practical difficulties for the operation of other parts of the Act. Some of those matters were referred to in *Drury on behalf of the Nanda People v State of Western Australia* [2019] FCA 1138.

82 As to indigenous land use agreements (**ILUAs**), the Act contemplates that the agreements may be made between parties in respect of land (a) where there are claims to native title that have not yet been determined; (b) where native title has been determined but a PBC has not been appointed; (c) where native title has been determined and a PBC has been appointed; and (d) where there are no claims to native title. There may be a combination of any of those alternatives. The ILUA provisions were introduced by the *Native Title Amendment Act 1998* (Cth) as part of a plan to facilitate the negotiation of agreements as to future acts on land that comprises or includes land the subject of native title claims or determinations. Some of the complexities involved were described by Reeves J in *QGC Pty Limited v Bygrave (No 2)* [2010] FCA 1019; (2010) 189 FCR 412 at [64]-[65].

83 Before an ILUA may be made and registered there must be agreement with the holders of native title as to the proposed future use of the land: *McGlade (Formerly Wanjurru-Nungala) v South West Aboriginal Land & Sea Aboriginal Corporation (No 2)* [2019] FCAFC 238. Given the

different circumstances that may pertain as to the determination of native title, there are different types of ILUA provided for by the Act. A body corporate agreement cannot be made unless there are RNTBCs in relation to all of the area: s 24BC. In such cases, all of the RNTBCs must be parties to the agreement: s 24BD. These provisions are equivocal as to whether there may be more than one PBC for the same area because a body corporate ILUA may relate to an area that includes separate native titles. However, it is a provision that could operate so as to include instances where there are two PBCs for overlapping native titles. Nevertheless, as noted above, overlapping native titles will mean that there will be no mechanism within the structure of one PBC for resolving divergent views between two PBCs as to what should happen where future acts are proposed on land. The two PBCs will represent distinct groups who will be independent actors in the negotiations as to an ILUA over the same land. This will make the negotiation more complex than would be the case where matters could be resolved according to a single law and custom for the land.

84 An area agreement ILUA is made where there is a registered native title claim as to part of the land to be the subject of the ILUA: s 24CC and s 24CD(2). However, again the provisions are expressed in terms that require all RNTBCs in relation to the area to be parties to the agreement: s 24CD(2)(b). The language could accommodate the possibility of separate PBCs for the same land by reason of the determination of overlapping native titles.

85 As to compensation, an RNTBC may bring a compensation application: s 61(1). It refers to the claim being brought by 'the' RNTBC (if any). The reference to the possibility that there will be no RNTBC reflects the fact that the compensation provisions allow for a claim to be brought as part of an application for the determination of native title. However, the claim to compensation derives from the native title held. Therefore, the provisions can operate as to each native title in the case of an overlapping claim. There is a statutory limit on compensation expressed in s 51A(1) in the following terms:

> *Compensation limited by reference to freehold estate*
>
> (1) The total compensation payable under this Division for an act that extinguishes all native title in relation to particular land or waters must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters.
>
> *This section is subject to section 53*
>
> (2) This section has effect subject to section 53 (which deals with the requirement to provide 'just terms' compensation).

86 On its face, the limit applies to the total compensation for an act that 'extinguishes all native title in relation to particular land or waters'. How this would operate as between overlapping native titles will need to be considered in appropriate case. The Act provides no indication as to how that might occur. Consideration would also need to be given to s 49, which provides that there is not to be multiple compensation for the same act. These aspects mean that overlapping native titles have the potential to raise complex issues for the assessment of compensation.

87 As to applications for a revised native title determination, s 61(1) provides that 'the' RNTBC may be an applicant. However, it is to be noted that an application for revocation or variation will relate to the determination of native title. Having regard to our analysis of the provisions in the Act for the determination of native title, there will be a single PBC for each native title. Therefore, it is the PBC for the particular native title as determined that can bring the application for revocation or variation of that native title. It will not have authority to seek a revocation or variation of an overlapping, and distinct, native title. It would be expected that the PBC for the overlapping native title would be made a party to the proceedings along with any other party with an interest that would be affected. However, it can be seen that the existence of overlapping native title will mean that there will be greater complexities if there is sought to be a change to the determination of native title where there have been overlapping native titles previously determined.

88 In the above circumstances, the submissions for the parties properly acknowledged that there may be practical issues that arise where there are multiple PBCs for the same area, but maintained that none of the provisions of the Act would be unworkable in such cases. Therefore, we accept that it is not the case that those provisions manifest an intention that is contrary to the conclusion we have reached.

Significance of practical consequences where two PBCs for overlapping native titles are proposed to be determined by consent

89 We make the following further observations concerning instances where consent determinations of overlapping native title are proposed.

90 The Court may make a determination of native title by consent, without holding a hearing: s 87. It has been said that it may do so without receiving evidence or embarking upon its own inquiry: *Ward v State of Western Australia* [2006] FCA 1848 at [8]. It has also been said that

the primary focus of the Court's consideration is upon the demonstration that there has indeed been the requisite agreement: *Lander v State of South Australia* [2012] FCA 427 at [11].

91 Nevertheless, there is an express statutory condition to the making of a consent determination to the effect that the making of the consent determination must '[appear] to the Court to be appropriate': s 87(1A). A determination of native title operates as against the world at large particularly in relation to future acts on the land the subject of the determination. As it will have consequences beyond the parties who give their consent, heightened scrutiny is warranted: *CG (Deceased) on behalf of the Badimia People v State of Western Australia* [2016] FCAFC 67; (2016) 240 FCR 466 at [48] (North, Mansfield, Jagot and Mortimer JJ). The same concern pertains when the Court is invited to make a consent determination: *Freddie v Northern Territory* [2017] FCA 867 at [18] (Mortimer J).

92 Where there is a significant area of overlap between two native titles that are proposed to be determined by consent, the Court may consider that aspect to be a reason why it is not appropriate for the purposes of s 87(1A) to make the orders without some form of hearing. A hearing may be appropriate to consider whether there is a sufficient basis to make the two overall determinations of native title given the practical consequences for the operation of the Act of the kind already considered.

93 Further, the absence of any evidence concerning the nature and extent of traditional laws about the interaction between the rights and interests of the two societies with native title over the same land may be a reason for a hearing. In such a case, the Court may wish to consider whether there should be greater detail in the proposed order, appropriate to reflect some of the complexities which (a) give rise to such determinations; and (b) may arise if there are two PBCs for the same land and waters.

94 For those reasons, it is to be expected that a party seeking a determination by consent that there are overlapping native titles will demonstrate that there is an appropriate basis for such a determination or articulate why it is submitted that it is appropriate to make the determinations by consent without any hearing even though the proposed consent determinations will recognise overlapping native titles.

Submissions as to possible discrimination

95 We note that arguments were advanced to the effect that there may be an unlawful discriminatory character to the Act of it operated so as to enable the Court, in effect, to override

the expressed preference of the common law holders as to the identity of a PBC for a particular native title. It is not necessary to consider those arguments in view of the conclusions that we have reached as to the proper construction of the relevant provisions of the Act. However, we note that if they were accepted then to the extent that they would otherwise give rise to invalidity, that may be a further reason for adopting the construction contended for by the parties which we have accepted to be correct: s 7 and s 208.

Conclusion and costs

96 For the above reasons we are satisfied that the first question must be answered in the affirmative (appropriately qualified to reflect the concerns expressed in these reasons) and the second in the negative. It is therefore, unnecessary to consider whether the reasoning in *Moses v State of Western Australia* and various single judge decisions where orders have been made for the appointment of more than one PBC for the same area of land are wrongly decided.

97 In the result, all parties appearing on the hearing of the questions reserved for consideration made submissions supporting the same answer to the first question, although the reasoning pathway for that conclusion was not the same for all parties. There were two parties granted leave to intervene. Submissions were not received concerning the appropriate costs orders. It may be appropriate for there to be no order as to costs or for costs to be determined in the proceedings in which the questions were stated. We will reserve liberty to apply so that any party who wishes to seek a particular costs order may apply. If such an application is made, the Court is minded to make directions for any such question to be resolved on the papers. A party who seeks a different course should, at the time of applying for the cost order, make any submissions as to why the matter should not be dealt with on the papers.

I certify that the preceding ninety-seven (97) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Mortimer and Colvin.

Associate: 

Dated: 21 April 2020

REASONS FOR JUDGMENT

WHITE J:

Introduction

98 This judgment on questions reserved for the consideration of the Full Court concerns the obligations of the Court under s 56 of the *Native Title Act 1993* (Cth) (the NT Act) with respect to the determination of a prescribed body corporate (PBC) to hold the determined native title in trust.

99 On 4 November 2019, the Court made, by consent, a determination of native title over two areas near the town of Shark Bay in Western Australia: *Drury on behalf of the Nanda People v State of Western Australia (No 3)* [2019] FCA 1812. The two areas, which are adjacent to one another, are referred to in the determination as the "Malgana Area" and the "Shared Area". The Malgana People were declared to hold non-exclusive native title over the Malgana Area. Both the Malgana People and the Nanda People were declared to have non-exclusive native title over the Shared Area.

100 In respect of the Malgana Area, the Court ordered, pursuant to s 56(2)(b) of the NT Act, that the Malgana Aboriginal Corporation RNTBC (Malgana PBC) hold the native title in trust for the Malgana People. The reserved questions concern the determination of the PBC for the native title in the Shared Area.

101 The Malgana People sought an order that the Malgana PBC hold their native title rights and interests (NTRI) in the Shared Area in trust and the Nanda People sought an order that Nanda Aboriginal Corporation RNTBC (Nanda PBC) hold their NTRI in the Shared Area in trust. The Judge was concerned that the Court may not have the power to make an order in the terms sought by the parties with respect to the Shared Area.

102 Because of that concern, the Judge reserved, pursuant to s 26 of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act), two questions for consideration by the Full Court:

> (a) Whether, in an instance where the Court has determined that there are distinct groups of persons each of which hold common rights comprising native title over the same area of land, the Court has power, when making a determination of native title under the *Native Title Act 1993* (Cth) to determine that more than one prescribed body corporate is to perform the functions given to prescribed bodies corporate under the *Native Title Act* and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth); and

(b) If the answer to question (a) is in the affirmative, whether the Court has a discretion to determine that there should be only one prescribed body corporate for the area in circumstances where each group nominates a separate prescribed body corporate.

103 The Judge ordered that, if the first question was answered in the affirmative and the second in the negative, then the Malgana PBC hold the determined native title of the Malgana People in the Shared Area in trust, pursuant to s 56(2)(b) of the NT Act and that the Nanda PBC hold the determined native title of the Nanda People in trust, also pursuant to s 56(2)(b) of the NT Act.

104 The Judge also ordered that, if the Full Court answered the first question in the negative, the matter should be referred to a case management hearing.

105 At the hearing of the reserved question, the Court heard submissions from counsel appearing for the Malgana and Nanda Peoples, the State of Western Australia and from two interveners, being the State of Queensland and the applicant in Action QUD673/2014 (the Cape York Applicant Intervener).

106 Both parties and both interveners submitted that the first question should be answered in the affirmative and the second answered in the negative. This meant that the Court did not receive any submissions from a contradictor.

107 Both parties and both interveners referred to, and relied on, the decision in *Daniel v State of Western Australia* [2004] FCA 849; (2004) 138 FCR 254 (*Daniel (2004)*). In that case, RD Nicholson J held that, when a determination is made that NTRI in a determination area which includes a shared area are held by different groups, the NT Act permits the nomination of more than one PBC to hold the determined NTRI in trust at [21]-[23]. That decision was upheld on appeal: *Moses v State of Western Australia* [2007] FCAFC 78; (2007) 160 FCR 148 at [376]-[386]. The parties and interveners submitted that it would not be appropriate for this Court to take a different view from that taken by the Full Court in *Moses* unless satisfied that the reasoning of the Full Court in that case was plainly wrong.

108 For the reasons to be given later, I do not consider that the decisions in *Daniel (2004)* and in *Moses* addressed the issue now before the Court. Accordingly the principle of comity on which the parties and interveners relied is inapplicable.

109 For the reasons which follow, I consider that ss 56(2)(a) and 57(2)(a) of the NT Act require the Court to request one representative of *all* the common law holders of native title in a shared

area to nominate a PBC. They do not require, let alone permit, the Court to make the request to a representative of each of the groups which are declared to have native title over that area.

110 Accordingly, I would answer the first question in the negative with the consequence that it is not necessary to answer the second.

111 In the following reasons, I will first consider the issues without reference to the decisions in *Daniel (2004)* and *Moses* and the other authorities to which counsel referred. I will return to those decisions after that consideration.

Further background

112 Although the first of the referred questions may be capable of referring to determinations of diverse kinds, it is appropriate to understand it as addressed to the circumstances of the determination made by the Judge on 4 November 2019. His Honour is not to be understood as asking the Court to give an advisory opinion on the application of s 56(2) of the NT Act in all the circumstances in which it may apply, for example, when a determination is that one group has NTRI in one part of the determination area and another group has NTRI in another (separate) part; when two or more groups form a single society holding NTRI over an area; and possibly, in the circumstances to which the Cape York Applicant Intervener referred, namely, when there are subgroups within a larger group.

113 There are three applications before the Judge in the underlying proceedings in which the questions were reserved for consideration of the Full Court. These are Action WAD30/2019 (the Nanda Application), Action WAD339/2018 (the Malgana #2 Application) and Action WAD402/2018 (the Malgana #3 Application).

114 The Malgana People are not parties to the Nanda Application and the Nanda People are not parties to the Malgana #2 and Malgana #3 Applications.

115 The determination of native title made on 4 November 2019 was made by consent. The orders made by the Court are prefaced by the Judge's note of a number of matters. Several of these concern the identification of the applications on which the determination was being made, the identification of the parties and the identification of the area to which the determination relates (referred to as "the Determination Area"). Four of the noted matters are pertinent to the issues which arise presently:

> H. The Applicants in the Nanda Application, the Malgana #2 Application, the Malgana #3 Application, the State of Western Australia and the other

> Respondents to those Applications (**the parties**) have reached an agreement as to the terms of the determination which is to be made in relation to an area that comprises the whole of the land and waters covered by the Malgana #2 Application and the Malgana #3 Application (**the Determination Area**). The external boundaries of the Determination Area are described in Schedule One to the determination.
>
> …
>
> K. Pursuant to s 87A(1)(d), (2) and (4) of the *Native Title Act* (in respect of the Nanda Application) and s 87(1), (1A) and (2) of the *Native Title Act* (in respect of the Malgana #2 Application and the Malgana #3 Application) the parties have filed with the Court this *Minute of Proposed Consent Determination of Native Title* setting out the terms of the agreement reached by the parties in relation to those applications.
>
> L. The terms of the agreement involve the making of consent orders for a determination pursuant to s 87A (in respect of the Nanda Application) and s 87 (in respect of the Malgana #2 Application and the Malgana #3 Application) and s 94A of the *Native Title Act* that native title exists in relation to the land and waters of the Determination Area.
>
> M. The parties acknowledge that the effect of the making of the determination is that the members of the relevant native title claim groups, in accordance with the traditional laws acknowledged and the traditional customs observed by them, should be recognised as the native title holders for part or all of the Determination Area as set out in the determination.
>
> …
>
> (Emphasis in the original)

116 The first three orders made by the Judge are as follows:

> 1. Proceeding WAD 6236 of 1998 be dismissed.
>
> 2. Pursuant to s 67(1) of the *Native Title Act*, proceedings WAD 30 of 2019, WAD 339 of 2018 and WAD 402 of 2018 be determined together.
>
> 3. In relation to the Determination Area, there be a determination of native title in WAD 30 of 2019, WAD 339 of 2018 and WAD 402 of 2018 in the terms provided for in Attachment A.

117 The proceeding WAD6236/1998 to which Order 1 referred is an earlier application by the Malgana People. A previous determination of native title had been made in respect of part of that area to which that application related. The Malgana #3 Application overlapped the whole of the undetermined portion of the area claimed in the 1998 application.

118 Attachment A to the Judge's orders, which contains the determination of native title, commences with the following four paragraphs:

> **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 paragraph 5 of this determination.

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

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

3. The native title in the Malgana Area is held by the Malgana People.

4. The native title rights and interests in the Shared Area are held by each of the Malgana People and the Nanda People.

119 The Determination Area is identified with precision in Schs 1 and 2 to the determination.

120 Paragraph [12] of the determination defines the Shared Area as being the land and waters in the Malgana #2 Application which are overlapped by the Nanda Application.

121 The following features of the determination may be noted:

(1) it is expressed as a single determination of native title. Despite this, it is appropriate to regard the determination as containing, in substance, separate determinations in respect of the Malgana Area and in respect of the Shared Area. Even so, there is but one determination in respect of the Shared Area;

(2) the nature and extent of the NTRI in the Determination Area are identified in para [5] of the determination, albeit subject to paras [2], [6], [7], [8] and [11]. Paragraph [5] makes no distinction between the NTRI of the Malgana People and the NTRI of the Nanda People in respect of the Shared Area. Instead, they are stated in a composite manner. Although it is of no consequence presently, the NTRI of the Malgana People in respect of the Malgana Area are also identified in [5] of the determination and are accordingly identical with the NTRI of the Malgana People and of the Nanda People in the Shared Area;

(3) although the NTRI of each of the Malgana People and the Nanda People are identical, they have different derivations, being based on the traditional laws and customs of each group; and

(4) apart from paras [3] and [4] set out above, none of the paragraphs containing the other details required by s 225 of the NT Act (qualifications on the NTRI ([6]-[8]), the areas to which s 47B of the NT Act applies ([9]), the nature and extent of other interests ([10]), and the relationship between the NTRI and the other interests ([11])) or the Schedules, make any distinction between the NTRI of the Malgana People and the NTRI of the Nanda People.

122 The hearing of the reserved questions proceeded on the basis that the NTRI of the Malgana People and the NTRI of the Nanda People determined on 4 November 2019 are *overlapping* rights and interests, as opposed to a *shared single* native title held by the two Peoples. That characterisation is supported by the reasons of the Judge in an earlier judgment concerning the proposed consent determination: *Drury on behalf of the Nanda People v State of Western Australia (No 2)* [2019] FCA 1642 at [2]-[6]. The wording of the first of the reserved questions reflects that understanding.

123 Although the terminology is not entirely apt, it is convenient to refer to the concurrent NTRI of the Malgana and of the Nanda in the Shared Area as "overlapping". Doing so does not alter the circumstance that the determination of the NTRI in the Shared Area is a single determination.

124 There have been previous determinations recognising the native title of each of the Malgana People and the Nanda People. On 28 November 2018, the Nanda People were recognised as having native title over an area adjoining the eastern and southern boundaries of the Shared Area: *Drury on behalf of the Nanda People v State of Western Australia* [2018] FCA 1849. Although the application of the Nanda People on which this determination was made concerned a larger area, the determination concerned only those parts of the claim area which were not overlapped by other claims. The Malgana #2 Application was one of the overlapping claims.

125 When making the determination in favour of the Nanda People on 28 November 2018, the Court accepted the nomination of Nanda Aboriginal Corporation as the PBC and determined that it hold the native title of the Nanda People in the determination area in trust.

126 On 4 December 2018, the Malgana People were recognised as having native title over an area adjoining the Malgana Area and the Shared Area: *Oxenham on behalf of the Malgana People v State of Western Australia* [2018] FCA 1929. This determination concerned part of the area which was the subject of the 1998 application of the Malgana People. As already noted, the Malgana #3 Application overlapped partially the undetermined portion of the 1998 application. As part of the 4 December 2018 determination, the Court ordered that Malgana Aboriginal Corporation hold the determined native title in trust for the Malgana People.

127 A consequence of the determinations made in 2018 is that Malgana Aboriginal Corporation RNTBC and Nanda Aboriginal Corporation RNTBC are the PBCs in respect of areas adjacent to the Malgana Area and the Shared Area and it is understandable that the Malgana People and

the Nanda People would wish them to be their PBCs in respect of their NTRI in the Shared Area.

128 The Court's determination on 4 November 2019 concerning the Nanda Application was made pursuant to s 87A(1), (2) and (4) of the NT Act (which provides for determinations over part of a claimed area). That is because a portion of the area claimed by the Nanda People is overlapped by another native title application (the Mullewa Wadjari Community Application). The determination of 4 November 2019 concerning the Malgana People was made pursuant to s 87(1), (1A) and (2) of the NT Act. It was not suggested, however, that, in relation the first question, anything turned on these different sources of the Court's power.

Determinations of native title and PBCs

129 The Court's obligations with respect to determining PBCs are contained in ss 55-57 of the NT Act. Looked at generally, these provisions (and those following) establish a scheme by which determined NTRI are either to be held in trust by a PBC for the native title holders or, if not held in trust, managed in the interests of the native title holders by a PBC. The scheme provides for the manner in which the PBCs are to be identified and appointed and for their functions. The NT Act contemplates that the PBCs will be concerned with the management, on behalf of the common law holders, of the NTRI found to exist and that they will be the entities which engage in dealings with others in relation to the area subject to the NTRI: *State of Western Australia v Ward* [2000] FCA 191; (2000) 99 FCR 316 at [199].

130 Section 55 provides:

> 55 **Determinations by Federal Court**
>
> If:
>
> (a) the Federal Court proposes to make an approved determination of native title; and
>
> (b) the determination is that native title exists at the time of making the determination;
>
> the Federal Court must, at the same time as, or as soon as practicable after, it makes the determination, make such determinations as are required by sections 56 (which deals with holding the native title on trust) and 57 (which deals with non-trust functions of prescribed bodies corporate).

131 The term "approved determination of native title" appearing in s 55 is defined in s 253 to have the meaning given by s 13(3), (4) and (7) of the NT Act. Relevantly for present purposes, it is a "determination of native title" made on an application under s 13(1)(a) or in accordance with

s 13(2). Section 13(1)(a) authorises an application for a determination of native title in relation to an area for which there is no existing approved determination. By s 13(2), the Court must, when making a determination of compensation in accordance with Div 5 of Pt 2 of the NT Act in respect of an area over which an approved determination has not been made, make "a current determination" of native title in relation to the whole or part of the area concerned.

132 I will refer shortly to the definition of the term "determination of native title".

133 In the present case, the Court's obligations under s 55 were enlivened on its proposing to make the consent determination on the applications made under s 13(1).

134 Section 56 provides that the Court must determine whether the determined NTRI are held in trust and for the identification of the trustee (which can only be a PBC). It provides (relevantly):

> 56 **Determination whether native title to be held in trust**
>
> *Trust determination*
>
> (1) One of the determinations that the Federal Court must make is whether the native title is to be held in trust, and, if so, by whom.
>
> *Steps in making determination*
>
> (2) The Federal Court is to take the following steps in making the determination:
>
> (a) first, it must request a representative of the persons it proposes to include in the determination of native title as the native title holders (the ***common law holders***) to indicate whether the common law holders intend to have the native title held in trust by:
>
> (i) nominating, in writing given to the Federal Court within a specified period, a prescribed body corporate to be trustee of the native title; and
>
> (ii) including with the nomination the written consent of the body corporate; and
>
> (b) secondly, if the common law holders give the nomination within the period, the Federal Court must determine that the prescribed body corporate is to hold the rights and interests from time to time comprising the native title in trust for the common law holders; and
>
> (c) thirdly, if the common law holders do not give the nomination within the period, the Federal Court must determine that the rights and interests are to be held by the common law holders.
>
> *Native title held in trust*
>
> (3) On the making of a determination under paragraph (2)(b), the prescribed body corporate holds, in accordance with the regulations, the rights and interests from time to time comprising the native title in trust for the common law holders.

Other matters relating to the trust to be dealt with by regulation

(4) The regulations may also make provision in respect of:

(a) the following matters relating to the holding in trust of the native title rights and interests:

(i) the functions to be performed by the body corporate;

(ii) the nature of any consultation with, or other role for, the common law holders;

(iii) the circumstances in which the rights and interests may be surrendered, transferred or otherwise dealt with;

(iv) the determination of any other matter by the Federal Court;

(v) any other matter; and

…

135 As is apparent, one of the determinations which the Court must make under s 55 when making a "determination of native title", or shortly thereafter, is whether the native title is to be held in trust (s 56(1)).

136 Section 56(2) contemplates that the holders of the native title which is the subject of the determination (referred to as "the common law holders") will decide whether they wish the native title to be held in trust and, if so, nominate to the Court the PBC they propose for that purpose. If the common law holders do not make the requisite nomination, the NTRI will not be held in trust and the Court must determine that the common law holders hold the NTRI.

137 Section 56(5) and (6) contain provisions limiting the circumstances in which the native title can be assigned or put at jeopardy by a PBC. Subsection (7) provides for the circumstance in which common law holders who do not nominate a PBC decide later that they do wish their NTRI to be held in trust.

138 The term "prescribed body corporate" is not defined in the NT Act. However, s 253 indicates that the word "prescribed" means "prescribed by the regulations" and defines "registered native title body corporate" (RNTBC) to mean:

registered native title body corporate means:

(a) a prescribed body corporate whose name and address are registered on the National Native Title Register under paragraph 193(2)(e) or subsection 193(4); or

(b) a body corporate whose name and address are registered on the National Native Title Register under paragraph 193(2)(f).

139 The term "prescribed body corporate" is defined in reg 3 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (the Regulations) made pursuant to ss 58-60 of the NT Act (to which I will refer shortly) as:

> ***prescribed body corporate*** means:
>
> (a) a body corporate prescribed by regulation 4; or
>
> (b) the Indigenous Land Corporation established by subsection 191A (1) of the *Aboriginal and Torres Strait Islander Act 2005*.

140 Section 57 provides as follows:

> 57 **Determination of prescribed body corporate etc.**
>
> *Where trustee*
>
> (1) If the determination under section 56 is that the native title rights and interests are to be held in trust by a prescribed body corporate, the prescribed body corporate, after becoming a registered native title body corporate (see the definition of that expression in section 253), must also perform:
>
> (a) any other functions given to it as a registered native title body corporate under particular provisions of this Act; and
>
> (b) any functions given to it as a registered native title body corporate under the regulations (see section 58).
>
> *Where not trustee*
>
> (2) If the determination under section 56 is not as mentioned in subsection (1) of this section, the Federal Court must take the following steps in determining which prescribed body corporate is, after becoming a registered native title body corporate, to perform the functions mentioned in subsection (3):
>
> (a) first, it must request a representative of the common law holders to:
>
> (i) nominate, in writing given to the Federal Court within a specified period, a prescribed body corporate for the purpose; and
>
> (ii) include with the nomination the written consent of the body corporate;
>
> (b) secondly, if a prescribed body corporate is nominated in accordance with the request, the Federal Court must determine that the body is to perform the functions;
>
> (c) thirdly, if no prescribed body corporate is nominated in accordance with the request, the Federal Court must, in accordance with the regulations, determine which prescribed body corporate is to perform the functions.
>
> *Functions where not trustee*
>
> (3) After becoming a registered native title body corporate, the body must perform:

> (a) any functions given to it as a registered native title body corporate under particular provisions of this Act; and
>
> (b) any functions given to it under the regulations (see section 58).

141 As is apparent, s 57(1) provides that a PBC which holds the native title in trust must also perform the functions given to it as a RNTBC under the NT Act itself and under the Regulations.

142 Section 57(2) provides for those circumstances in which the NTRI are not held in trust. In those cases, the Court must seek the nomination of a PBC in a similar manner as provided for in s 56(2). In the absence of a nomination, the Court must, in accordance with the Regulations, determine which PBC is to perform the functions under s 57. By s 57(3), the PBC so determined (defined in s 253 as an "agent prescribed body corporate") must perform the functions given to it as a RNTBC under the NT Act and under the Regulations.

143 The effect is that, irrespective of whether the RNTBC holds the NTRI in trust under s 56(2) or is appointed under s 57(2), it is to discharge the functions required of it under the NT Act and under the Regulations (s 57(1), (2) and s 58). Regulation 6 in the Regulations specifies the functions of a PBC holding NTRI in trust. Regulation 7 specifies the functions of an agent prescribed body corporate.

144 Expressed generally, reg 6 provides that a PBC holding native title in trust is to manage the NTRI, hold money (including payments received as compensation or otherwise related to the NTRI) in trust and to invest or otherwise apply it as directed by the common law holders, and to consult with and obtain the consent of the native title holders in relation to decisions affecting the NTRI (reg 6(1)). Regulation 7 vests functions of a like kind in an agent PBC but with the additional function of being the agent PBC for the NTRI of the common law holders.

145 The term "common law holders" used in ss 56 and 57 refers to the persons who hold the common or group rights comprising the native title. It is not synonymous with "native title holders" as, for the purposes of the NT Act, that term has the broader meaning given in s 224:

> The expression ***native title holder***, in relation to native title, means:
>
> (a) if a prescribed body corporate is registered on the National Native Title Register as holding the native title rights and interests on trust—the prescribed body corporate; or
>
> (b) in any other case—the person or persons who hold the native title.

146 Section 58 authorises the making of regulations specifying the functions of PBCs; s 59 authorises regulations prescribing the kinds of body corporate which may be determined under ss 56 and 57; s 59A contemplates that a PBC may be the trustee of NTRI for more than one group of common law holders; and s 60 authorises the making of regulations concerning the replacement of an agent PBC. Whether the PBC is a trustee or agent, the relationship between the PBC and the common law holders is governed by the Regulations and by the Rules of the PBC.

147 Some aspects of ss 55, 56 and 57 are plain:

(1) the Court is obliged, when making an approved determination that native title exists, to make the relevant determinations required by ss 56 and 57;

(2) one of the required determinations is whether the native title is to be held in trust and, if so, by whom;

(3) for that purpose, the Court must request a representative of the common law holders to indicate, in the required manner and within the specified time, whether the common law holders intend that the native title be held in trust;

(4) primacy is thereby given to the intention of the common law holders;

(5) when a nomination is given within the specified period, the Court must determine that the nominated PBC holds the NTRI in trust for the common law holders;

(6) if the requested nomination is not given within the specified period, the Court must determine that the NTRI are to be held by the common law holders;

(7) if the NTRI are not to be held in trust, then the Court must, by a similar process, request a representative of the common law holders to nominate a PBC and, on the nomination of a PBC in accordance with the request, determine that that PBC is to perform the s 57(3) functions; and

(8) in the absence of a nomination in accordance with the request under s 57(2), the Court must, in accordance with the Regulations, determine the PBC which is to be the agent PBC.

148 Neither s 56(2) nor s 57(2) contain any indication of the means by which the Court is to identify the representative to whom it is to make the required request. It seems, however, that it is the common law holders who are to select the representative, and not the Court. The fact that it is the common law holders whose intention is to be communicated supports that view.

Other aspects of the statutory scheme

149 Although the basis of the native title recognised by the NT Act is found in the common law, it is the NT Act itself which provides for the NTRI which may be recognised and for their determination. A determination of native title is accordingly a creature of the NT Act, and not of the common law: *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] HCA 58; (2002) 214 CLR 422 at [32] (Gleeson CJ, Gummow and Hayne JJ).

150 Section 223 of the NT Act defines "native title" and "native title rights and interests":

> *Common law rights and interests*
>
> (1) The expression ***native title*** or ***native title rights and interests*** means 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 the 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 recognised by the common law of Australia.
>
> *Hunting, gathering and fishing covered*
>
> (2) Without limiting subsection (1), ***rights and interests*** in that subsection includes hunting, gathering, or fishing, rights and interests.
>
> …

It is for this reason that I have been using the terms "native title" and "NTRI" interchangeably.

151 Section 223 indicates that the native title may be of three kinds: communal, group or individual: *Bodney v Bennell* [2008] FCAFC 63; (2008) 167 FCR 84 at [146].

152 As already noted, s 13 provides for an application for a determination of native title to be made to this Court.

153 Section 61 provides for the some of the procedural aspects of the making of an application, (relevantly):

> 61 **Native title and compensation applications**
>
> *Applications that may be made*
>
> (1) The following table sets out applications that may be made under this Division to the Federal Court and the persons who may make each of those applications:

Applications		
Kind of application	**Application**	**Persons who may make application**
Native title determination application	Application, as mentioned in subsection 13(1), for a determination of native title *in relation to an area for which there is no approved determination of native title*.	(1) A person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests *comprising the particular native title claimed*, provided the person or persons are also included in the native title claim group; or …
...		

…

(Emphasis added)

154 Section 81 makes express the jurisdiction of the Court to hear and determine applications relating to native title:

> 81 **Jurisdiction of the Federal Court**
>
> The Federal Court has jurisdiction to hear and determine applications filed in the Federal Court that relate to native title and that jurisdiction is exclusive of the jurisdiction of all other courts except the High Court.

155 Section 213(1) of the NT Act requires that any determination of native title made by the Court be "in accordance with the procedures" in the NT Act: see *Commonwealth of Australia v Clifton* [2007] FCAFC 190; (2007) 164 FCR 355 at [40]-[43].

156 Section 225 defines the term "determination of native title":

> 225 **Determination of native title**
>
> 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.

157 As is apparent, s 225 is definitional, and not prescriptive.

158 Section 94A, which obliges the Court when making a determination of native title to "set out details of the matters mentioned in section 225", is prescriptive: *State of Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1 at [51].

159 The NT Act has recognised since its enactment that claims for a determination of native title in respect of the same area may be made by more than one group of Aboriginal people or Torres Strait Islanders. This is evident in s 67, which requires the Court to make orders to ensure that, to the extent that the applications cover the same area, they are dealt with in the same proceeding (see also *Commonwealth v Clifton* at [21]) and in s 190C concerning the registration of native title claims by the National Native Title Tribunal.

160 The NT Act also evinces an intention that there be only one approved determination of native title with respect to a given area. That intention is evident in s 13(1)(a) (which, as already seen, permits an application for a determination of native title only in relation to areas over which there is no approved determination of native title), in s 61A (which is to the same effect), in s 67 and is made express in s 68 of the NT Act which, under the heading "Only one determination of native title per area", precludes the Court, subject to certain exceptions which are not presently material, from conducting any proceedings relating to an application for determination of native title and from making any other determination of native title in respect of an area for which there is already a determination.

161 In *CG (Deceased) on behalf of the Badimia People v State of Western Australia* [2016] FCAFC 67; (2016) 240 FCR 466, the plurality (North, Mansfield, Jagot and Mortimer JJ) described s 67 as facilitating the achievement of s 68's purpose, namely, that there may be only determination of native title in relation to any area of land, at [25].

162 In *Lake Torrens Overlap Proceedings (No 3)* [2016] FCA 899 at [101] and following, Mansfield J referred to ss 67 and 68 in particular as indicating that applications over the same

area should be dealt with in the one proceeding and that there should be only one determination of native title.

163 Likewise, in *Murray on behalf of the Yilka Native Title Claimants v State of Western Australia (No 6)* [2017] FCA 703 at [34], McKerracher J described as "trite" the proposition that "usually the framework of the [NT Act] suggests a single determination of native title in relation to a particular area (including an area that has been the subject of overlapping claims), the delineation of the relevant native title rights and interests and the nomination of a registered native title body corporate to perform specified functions in relation of that native title".

164 In short, the combined effect of ss 13(1), 67, 68 and 225(a) is to ensure that there be a single determination of the existence, nature and extent of the NTRI in the area subject to the claim or claims and of those who hold the NTRI.

165 Although there may be only one determination of native title in respect of the one area, the determination may be that distinct groups of persons have separate, but overlapping, NTRI in respect of that area: *Budby on behalf of the Barada Barna People v State of Queensland (No. 6)* [2016] FCA 1267 at [15]; *Drury on behalf of the Nanda People v State of Western Australia (No 2)* [2019] FCA 1642 at [4]. Section 225(a) (which was inserted into the NT Act by the *Native Title Amendment Act 1998* (Cth)) contemplates this expressly by specifying that a determination of native title is a determination of "the *persons, or each group of persons*, holding the common or group rights comprising *the* native title" in relation to the area. This understanding of the effect of s 225(a) is confirmed by the statement in the Explanatory Memorandum for the *Native Title Amendment Bill 1997 [No 2]* (Cth) introduced in the House of Representatives on 9 March 1998:

> [26.25] There is a new definition of the term ***determination of native title***. ***[Schedule 2, item 79, section 225]***. In brief, this is a determination about whether native title exists over a particular area and, if it does exist, it determines:
>
> - which persons or groups of persons hold the rights which make up the native title. (This paragraph was inserted by ***Government amendment (71)*** which was made by the Senate and included in the Bill. *The purpose of this paragraph is to make clear that there can be more than one group of native title holders for one area of land*. For example, several different groups may have access rights. Paragraph 225(a) will ensure that determinations clearly identify who the native title holders are and how, in terms of group composition, they hold the native title.);
>
> …
>
> (Emphasis added)

166 Read in conjunction with the other provisions in the NT Act to which I have referred, s 225(a) indicates that the only means by which two or more persons, or groups of persons, may be recognised as having NTRI over the same area is by a single determination.

167 The fact that there may be only a single determination of native title with respect to a given area does not preclude the possibility of two or more determinations being made over separate areas covered by a single application or by overlapping applications.

168 In summary:

(1) there may be more than one application for a determination of native title in respect of the same area of land. Overlapping claims by two or more groups are common;

(2) when there are two or more claims in respect of the same area, they should be dealt within the one proceeding;

(3) although more than one determination of native title can be made on the one application for a determination of native title and the one determination may cover areas in two or more applications, only one determination of native title can be made in relation to the same area;

(4) that determination may recognise that two or more groups have native title in the one area, and the NTRI of those groups may not necessarily be identical. The NTRI of each group will not extend beyond "the particular native title claimed" by that group – see s 61(1); and

(5) when two or more groups of persons are recognised as having native title over the same area, they are the common law holders for that area.

169 Against this rather lengthy background, I turn to the submissions of the parties and the interveners.

The submissions of the parties and interveners

170 The issue in the first of the reserved questions concerns at its heart the identity of the "common law holders" to whose representative the Court must make the requests required by s 56(2)(a) and s 57(2)(a). When two or more groups are determined to have NTRI over the same area, are the common law holders to whom these provisions refer each group, so that the Court's request must be made to a representative of each? Alternatively, are the common law holders *all* the persons holding NTRI over the area in question, irrespective of the particular group to

which they belong, so that the Court's request must be made to a representative of *all* the persons?

171 *Prima facie*, the second of the two alternatives seems the appropriate construction. Using s 56(2) as the example, it requires the request to be made of a representative of *the* common law holders, and not to a representative of a subset of the common law holders; the request concerns the manner in which *the* native title which is to be the subject of the determination is to be held; the request seeks the intention (singular) of the common law holders with respect to that subject matter; and, while s 225(a) is an express recognition that two or more groups may have native title in the one area, there is no indication in s 56 that the request is to be made to each of those groups.

172 The submissions of Queensland acknowledged this *prima facie* position by saying "in so far as the nomination of a PBC is concerned, the language of ss 56(2)(a) and 57(2)(a), at first blush, might be understood as referencing a *singular* representative of the common law holders, a *singular* intention, and a *singular* PBC" (emphasis in the original).

173 Nevertheless, the parties and interveners contended for the first of the alternatives identified above. The Cape York Applicant Intervener went further and contended that subgroups within a larger group united by a single body of traditional laws and customs could each nominate a separate PBC.

174 In addition to implications which the parties and interveners sought to draw from the NT Act as a whole, several of the submissions sought to avoid the *prima facie* construction just identified by invoking s 23(b) of the *Acts Interpretation Act 1901* (Cth) (AI Act):

> 23 **Rules as to gender and number**
>
> In any Act:
>
> (a) …
>
> (b) words in the singular number include the plural and words in the plural number include the singular.

175 In reliance on s 23(b), the parties and interveners submitted that the reference in ss 56 and 57 to "a prescribed body corporate" or "the prescribed body corporate" should be taken to include two or more prescribed bodies corporate, that the reference to "a representative" of the common law holders should be taken to include "representatives", and that the reference to "the native title" should be taken to include "native titles".

176 The effect, so the submissions ran, is that ss 56(2)(a) and 57(2)(a) are not to be understood as referring to a *single* representative of the common law holders, a *single* intention and a *single* PBC. Instead, in circumstances like those of the present determination, the Court is to make a request under s 56(2) to a representative of each group found to have NTRI and each group may nominate a PBC to be the trustee of its native title.

177 The Malgana and Nanda Applicants referred to s 59A of the NT Act, which provides:

> 59A **Prescribed bodies corporate for subsequent determinations of native title**
>
> (1) If a prescribed body corporate holds native title rights and interests in trust for some common law holders, the Federal Court may determine under section 56 that the prescribed body corporate is to hold native title rights and interests in trust for other common law holders, so long as all of the common law holders mentioned consent to the determination.
>
> (2) If a prescribed body corporate is an agent prescribed body corporate for some common law holders, the Federal Court may determine under paragraph 57(2)(b) that the prescribed body corporate is to be the agent prescribed body corporate for other common law holders, so long [as] all of the common law holders mentioned consent to the determination.
>
> (3) For the purposes of subsections (1) and (2), the regulations may prescribe the ways in which the consent of the common law holders may be obtained, and if the regulations do so, the common law holders must obtain the consent in that way.

178 The Malgana and Nanda Applicants submitted that s 59A reveals a legislative presumption that, ordinarily, each group of common law holders will have its own PBC.

179 I indicate now my view that s 59A cannot reasonably be construed as containing such a presumption. Instead, the purpose and effect of s 59A is that stated in the Explanatory Memorandum for the *Native Title Amendment Bill 2006* at Sch 3:

> [4.5] … to enable an existing PBC to be determined as a PBC for subsequent determinations of native title in circumstances where the native title holders covered by all determinations agree to this …
>
> [4.6] … this measure may encourage economies of scale by allowing PBC infrastructure and resources to be utilised by more than one group of native title holders …

180 Next, the Malgana and Nanda emphasised that the NT Act should be construed beneficially and so as best to achieve its objects: *Commonwealth of Australia v Yarmirr* [2001] HCA 56; (2001) 208 CLR 1 at [124]. The submissions were that these approaches support a construction of s 56(2) and s 57(2) which would allow each group recognised as holding NTRI to establish

and nominate for itself the PBC to hold the native title in trust or to act as its agent. Related to this was a submission that the recognition of "overlapping PBCs" would facilitate the resolution of overlapping claims by consent, by providing the parties with more options and greater flexibility in settling negotiations.

181 The Cape York Applicant Intervener made a like submission by reference to s 15AA of the AI Act.

182 The Cape York Applicant Intervener also referred to the statement in the preamble to the NT Act that "[i]t is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests". Counsel submitted that the imposition of an unwanted PBC on the common law holders was unlikely to facilitate the complete enjoyment by them of their NTRI. Counsel made a like submission by reference to the object concerning "the recognition and protection of native title" contained in s 3.

183 Next, the Malgana and Nanda Applicants, Western Australia and the Cape York Applicant Intervener referred to the potential difficulty for the Court in identifying a single representative of two or more groups of common law holders, including difficulties arising from dissension in the groups as to a suitable representative and as to the particular PBC to be nominated. There may also be dissension in the determination of the constitution of the PBC and of the persons to be appointed as directors and employees. They submitted that the prospect of conflicts of this kind is inconsistent with the notions of traditional law and custom, including as to decision-making, amongst native title holding groups. It would also be undesirable, so the submissions ran, that there be some directors of a PBC making decisions for a group of common law holders of which they are not part.

184 Next, the Malgana and Nanda Applicants referred to the inefficiency and expense which may be occasioned if a new PBC must be formed in respect of a relatively small area such as the Shared Area in the present determination, despite there being established RNTBCs in respect of immediately adjacent areas.

185 The Applicants and the State of Queensland emphasised that ss 56 and 57 do not allocate functions to a PBC with respect to a particular geographical area but instead with respect to NTRI. In this respect it was submitted that the PBCs follow the NTRI and not the area to which they relate. I note that this submission does not sit altogether comfortably with provisions such as ss 29(2)(a) and (b).

186 The Cape York Applicant Intervener referred to s 10(3) of the *Racial Discrimination Act 1975* (Cth) and suggested that a construction of s 56(2)(a) and s 57(2)(a) as requiring the appointment of a single PBC in respect of overlapping or concurrent NTRI would attract its application. I indicate now that I do not regard s 10(3) as referring to NTRI. In any event, the Preamble to the NT Act indicates that it is intended to be a special law for the descendants of the original inhabitants of Australia so that it should attract the application of s 8(1) of the *Racial Discrimination Act*.

Implications from the functions of PBCs

187 Several of the parties' submissions were directed to the avoidance of any implication for the proper construction of ss 56 and 57 being drawn from the functions of PBCs found in the NT Act itself.

188 At a general level, there did not seem to be any dispute that PBCs are intended to facilitate dealings with the land over which NTRI are held by being the "practical and legal point of contact" for those who wished to deal with native title holders – see the Explanatory Memorandum Pt B to the *Native Title Bill 1993*. The general gist of the parties' submissions was that it should not be inferred that the nomination of a single PBC in respect of an overlap area would result in "a more functional post-determination environment" than multiple PBCs.

189 The parties' submissions on this topic were directed to the role of PBCs with respect to:

(1) future acts and the entry into Indigenous Land Use Agreements (ILUAs); and

(2) compensation.

Future Acts

190 Part 2 Div 3 of the NT Act deals with future acts and provides for various means by which a future act may be lawfully carried out. Subdivision B provides for the entry into ILUAs by RNTBCs. The conditions for a body corporate ILUA include:

(i) there must be RNTBCs in relation to *all* of the area which will be affected by the future act (s 24BC); and

(ii) all the RNTBCs in relation to the area must be parties to the agreement (s 24BD(1)).

191 Further, the National Native Title Registrar must not register a body corporate ILUA if any of the parties to the agreement advises the Registrar, within one month after the notification day, that the party does not wish the agreement to be registered (s 24BI(2)).

192 The negotiation of a body corporate ILUA is likely to be more complex when there are two or more RNTBCs in relation to the area proposed to be the subject of the agreement than would be the case when there is only one RNTBC.

193 The parties submitted that this should not influence the construction of ss 56 and 57, having regard to the following matters:

(1) if a proposed ILUA covers more than one determination area (which may well be the case with mining tenements), the PBCs for each determination area would have to be a party to it so that the supposed additional complexity of negotiation will necessarily exist and can be taken to be contemplated by the NT Act; and

(2) the potential for complexity of this kind also exists with respect to the "Right to Negotiate" procedure in Pt 2, Div 3, Subdiv P of the NT Act. That procedure commences with the Government Party giving notice to, amongst others, "any registered native title body corporate … in relation to any of the land or waters that will be affected by the act" (s 29(2)(a)). The RNTBC will then be one of the negotiating parties in connection with the performance of the notified future act (ss 30 and 30A). The parties noted that, while this process may involve the two or more PBCs determined for a single determination area, it would also involve necessarily the participation of two or more PBCs if the area to which the proposed future act relates extends beyond a single determination area.

194 Having regard to these provisions, the submission was that the NT Act contemplates, necessarily, that there may be some complexity of the postulated kind when a future act relates to more than one determination area for which there may be multiple PBCs so that this should not be regarded as indicia pointing against a construction allowing two or more PBCs in relation to an area in which NTRI overlap.

195 To my mind that is not a satisfactory response. The circumstance that a complexity may exist when compensation is sought in respect of an area covered by two or more determinations is not an indication that the NT Act contemplates like complexity in relation to a shared area wholly within the boundaries of a single determination. The former may be a necessary consequence of there being two or more determinations: there is no reason to suppose that the NT Act contemplates the same complexity in respect of an area in which NTRI overlap.

Compensation

196 Section 61(1) of the NT Act provides that "the" registered native title body corporate (if any) may bring an application under s 50(2) for a determination of compensation. This suggests that the NT Act contemplates there being only one RNTBC in respect of the area to which the compensation claim relates. Section 61(1) does not contemplate that one or other or both (if there are two) PBCs could bring the application. Perhaps if there were two PBCs in respect of an area in which the NTRI overlap, s 61(1) in conjunction with s 23(b) of the AI Act could be understood as permitting an application to be brought but only by both RNTBCs. Necessarily, that would involve additional complexity. It would be a significant inhibition on the ability of one PBC to discharge its function in this respect. Moreover, such a prospect does not seem to accord with the statutory scheme of having one PBC managing the native title in relation to each area.

197 The parties' submissions, as I understood it, seemed to accept that there may be additional complexity if there are two or more applications for compensation but no more so than when there are two or more overlapping claims for native title. Section 67 would require each such claim for compensation be dealt with in the one proceeding and s 49(a) would have the effect that the Court's determination of compensation would be a full and final compensation.

198 The role of RNTBCs with respect to applications for compensation is similar to their role with respect to applications for revocation or variation of an approved determination of native title. Under s 61(1) of the NT Act, *the* RNTBC is one of the entities which can bring the application. That too seems to contemplate there being a single RNTBC in relation to the area in question. If there were two or more PBCs, the potential for conflict or disagreement between them about the bringing of such an application is obvious, especially if one RNTBC sought the variation and another did not.

199 At a general level, the parties submitted that the functions of PBCs concerning future acts and compensation did not give rise to any necessary or persuasive implications concerning the construction of ss 56 and 57 and that such complexities, if any, as may exist, were simply a consequence of the operation of the NT Act according to its terms. As just noted, they also referred to the prospect of the same complexities existing, albeit at the intra-PBC level, if there is a single PBC than at the inter-PBC level if there are two or more PBCs.

200 I consider that, while some of the matters to which the parties and interveners referred cannot be gainsaid, it is clear that a single PBC for a shared or overlapped area will better discharge

the statutory functions of PBCs and is more consistent with the statutory scheme. The potential for conflict or inconsistency of action were it otherwise is obvious. In this respect, I respectfully agree with the reasons of McKerracher J in *Murray on behalf of the Yilka Native Title Claimants*. His Honour distinguished the decisions in *Daniel (2004)*, *Moses*, *Lovett on behalf of the Gunditjmara People v State of Victoria (No 5)* [2011] FCA 932 and *Budby* and said:

> [34] The [NT Act] contemplates that the body corporate functions in respect of all native title in an area the subject of multiple claims will be performed by a single registered native title body corporate (whether as trustee of that native title or as agent of the common law holders): see *Lake Torrens* per Mansfield J (at [99]-[127]. In this way, the [NT Act] provides third parties with a single point of interaction with the common law holders. Intra-indigenous issues are resolved between the common law holders in accordance with traditional law and custom, within the framework of the body corporate and the requirements of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) and in accordance with agreed dispute resolution mechanisms. Failing such resolution, there is recourse to other forms of protection and relief.
>
> [35] There can be no doubt that the determination of multiple registered native title bodies corporate in respect of essentially the same area would defeat this objective and have the effect of:
>
> (a) conferring upon those bodies corporate separate and distinct procedural rights under Div 3 of Pt 2 [NT Act] in respect of future acts in the determination area; and
>
> (b) enabling those bodies corporate to bring separate and distinct compensation applications under s 50(2) [NT Act] in respect of compensable acts within the determination area.

201 In my respectful opinion, this passage reflects the intention evident in ss 55-59 that a single PBC have the responsibility in respect of all the NTRI in a given area. It points to all the common law holders being involved in the appointment of a single PBC.

202 There may of course be intra-PBC conflicts. But issues of that kind can be addressed within the PBC. It is open to the common law holders to adopt Rules for the PBC which provide the means for resolution of such internal conflicts and, in practice, that is what commonly occurs.

Consideration

203 In the statutory context outlined earlier, two matters are plain. First, s 56 is engaged when the Court proposes making a determination as defined in s 225 – see s 55. That determination will, by virtue of s 94A, have the details contained in the definition of "determination of native title". Secondly, the "native title" to be held in trust, and of which the PBC is to be the "trustee", is

the native title which is the subject of the proposed approved determination of native title. That determination will indicate who it is (where appropriate the persons or each group of persons) who hold the native title so determined, and the nature and extent of the NTRI held by those persons.

204 Part of the statutory scheme is that, within the single determination, there may be determinations of the NTRI of two or more groups and, implicitly, that those NTRI may differ and exist in relation to the same or different areas within the determination area. That is so because the NTRI derive their existence from the traditional laws and customs for each group and those laws and customs may be distinct. When the areas within a determination area in which each of two groups has NTRI are separate and distinct, it will usually be possible to regard the determination as being in substance two determinations. For the reasons given earlier, that will not be possible in respect of areas over which two or more groups have overlapping or co-existing NTRI. When the NTRI of each group in the shared area differ, there must be a single determination of native title.

205 A number of matters in the statutory scheme seem pertinent:

(1) despite the express recognition in the NT Act at s 225 that two or more groups may have overlapping NTRI, ss 56(2)(a) and 57(2)(a) do not contain any reference to separate groups of persons holding the NTRI. Instead, they refer to *the* common law holders generally (and, in the case of s 56(2)(a), to *the* native title holders) making no distinction between them on the basis of the derivation of their NTRI;

(2) again, despite the recognition in the NT Act that two or more groups may have NTRI in the one area, there is no indication in ss 56(2) and 57(2) that requests may be made to subsets of the common law holders;

(3) sections 56(2) and 57(2) introduce the new concept of "common law holders" and do so in a way which is suggestive of a *collective* body of native title holders. Whether the term "common law holders" is used because the term "native title holders" is later defined more expansively in s 224 is unclear but it does seem pertinent that a collective term is used;

(4) the identification of the PBC is not to be addressed until the identity of the common law holders is known. There could be more than one reason why the NT Act provides that that be so, but it is consistent with an understanding that it is only when the common law holders *as a whole* are known that the Court can identify the representative to whom

it is to make the request. If the intention had been that each group having NTRI could nominate a PBC, there is no apparent need for a scheme commencing with a request by the Court at the time it proposes making the determination. Instead, the NT Act could have required that subject matter to be addressed at an earlier time, for example, in the authorisation required by s 61, in the application for the determination of native title or in an agreement submitted to the Court pursuant to ss 87 or 87A. To my mind, the circumstance that the process of identification of the PBC commences only when the common law holders (or proposed common law holders) are known is a matter pointing to s 56(2)(a) referring to *all* the common law holders, regardless of the group to which they may belong;

(5) the circumstance that ss 56(2)(a) and 57(2)(a) introduce a new mechanism for the identification of the PBC. They do not, for example, involve the procedures for authorisation by a native title claim group contained in ss 251A and 251B. The mechanism is one which does not involve formality, and seems well suited to a circumstance in which there are two or more groups; and

(6) it seems improbable that the careful scheme evident in the NT Act by which overlapping claims are, in effect, to be brought together, so that a single outcome is achieved with a means of facilitating the management of, and dealings with, determined native title, is intended to be compromised, if not frustrated, by a determination that there may be two or more PBCs in respect of NTRI in the one area, with all the potential for difficulties of administration and management that may entail.

206 To my mind, these matters point strongly against the construction for which the parties and interveners contend.

207 The legislative history of s 193 of the NT Act is also instructive. Section 193 prescribes the information concerning a determination of native title to be entered in the National Native Title Register. When the NT Act was first enacted, there was close correspondence between the content of s 193 and s 225. Both s 193(2)(d) and s 225 were repealed and re-enacted by the *Native Title Amendment Act 1998* (Cth). Section 193(2) now provides:

> *Information to be included*
>
> (2) The Register is to contain the following information in relation to each determination:
>
> (a) the name of the body that made the determination;

> (b) the date on which the determination was made;
>
> (c) the area of land or waters covered by the determination;
>
> (d) the matters determined, including:
>
> (i) whether or not native title exists in relation to the land or waters covered by the determination; and
>
> (ii) if it exists—*who the common law holders of the native title are and a description of the nature and extent of the native title rights and interests concerned*;
>
> (e) in the case of an approved determination of native title by the Federal Court, where the determination is that native title exists—the name and address of any prescribed body corporate that:
>
> (i) holds the native title rights and interests concerned on trust; or
>
> (ii) is an agent prescribed body corporate in relation to the native title rights and interests concerned;
>
> (f) in the case of an approved determination of native title by a recognised State/Territory body, where the determination is that native title exists—the name and address of any body corporate that holds the native title rights and interests concerned on trust or that is determined in relation to the native title under a provision of a law of the State or Territory concerned that corresponds to section 57.
>
> (Emphasis added)

208 Thus, despite the pre-existing similarities in the content of s 193(2) and s 225, when s 225 was amended so as to recognise expressly that more than one group of persons may hold NTRI in an area, a corresponding amendment was not made to s 193 despite it having been amended at the same time. On the contrary, there is no express indication in s 193(2) that it contemplates two or more PBCs with respect to the NTRI with which the determination is concerned. Moreover, it seems natural to understand s 193(2)(d)(ii) as referring to the common law holders of the native title as a whole and to a single description of the nature and extent of the NTRI *concerned*. It does not seem apt to understand s 193(2)(d)(ii) as referring to the common law holders of *some of* the native title and to separate descriptions of the nature and extent of the NTRI.

209 Contrary to the submissions of the parties and interveners, I do not consider that s 23(b) of the AI Act is of assistance. Even if the term "a representative" is read in the plural, the Court's request is still to be made to representatives of the common law holders, that is, the common law holders as a whole. The use of the plural cannot reasonably be understood as authorising the Court not only to make the request to several representatives but to representatives of

persons who are not the entire group of common law holders. For that to be possible, the construction proposed by the parties and interveners requires that additional words be read into s 56(2)(a) in order to identify the subset of the common law holders of which the person is to be the representative. There are circumstances in which it may be appropriate for a Court to read words into a statute as part of the process of construction but generally they are rare: *Country Carbon Pty Ltd v Clean Energy Regulator* [2018] FCA 1636; (2018) 267 FCR 126 at [126].

210 Moreover, multiple requests do not seem to be contemplated. Section 56(2)(a) does not seem to contemplate that the NTRI of some of the common law holders over an area may be held in trust and the NTRI of others in the same area not in trust. There is, in other words, to be a single intention. Were it otherwise, the different regimes contemplated by regs 6 and 7 in the Regulations according to whether the NTRI are held by a trust PBC or agent PBC would be applicable in respect of the NTRI in a single area.

211 The expression "native title" is used throughout the NT Act in the singular sense. Nowhere does it use the term "native titles". If the NT Act intended "native title" to include "native titles" it is probable that several provisions, in particular s 225(a) would be expressed differently, for example, by referring to "the persons, or each group of persons", holding the common or group rights comprising *each* native title, not *the* native title. This impression is strengthened by the reference in s 225(a) to the common or group rights *comprising* the native title.

212 The application of s 23(b) is subject to a contrary intention in the particular Act – see s 2(2) of the AI Act. The matters to which I have just referred indicate that such a contrary intention is evident in s 56(2)(a). It contemplates that a single intention will be communicated to the Court, that is, that *the* native title be held in trust or not, as the case may be.

213 The understanding that there may be only one PBC for an area over which two or more groups hold overlapping NTRI is also supported by the Explanatory Memorandum for the Native Title Bill presented to the Parliament on 16 November 1993. In relation to cl 53 (which became s 56) the Explanatory Memorandum Pt B stated:

> This clause makes provision for native title to be held on behalf of the native title holders by *a* suitable body corporate. *This is designed to provide a mechanism for efficient dealings with native title land* and is consistent with existing systems under special legislation to provide land for the benefit of Aboriginal people and Torres Strait Islanders.

> Subclause (1) requires the Tribunal or the Federal Court when making a determination that native title exists to also determine *which* body corporate, to be dealt with in regulations, will hold *the* native title on behalf of *all* the individual native title holders. When such a determination is made, *the* body corporate holds the rights on behalf of *the* native title holders: subclause 3.
>
> Subclause (2) sets out the steps the NNTT or the Federal Court must follow when deciding *which body corporate* will hold the native title. Once the determination is made, *the* body corporate holds the native title: subclause (3).
>
> …
>
> (Emphasis added)

214 The Explanatory Note to Government Amendment 75 which occurred during the presentation of the Native Title Bill, presented on 16 December 1993, stated (Hansard at 5377):

> The High Court held that one of the central features of native title rights is that they are rights held by a group and that that group changes over time. To provide for dealings with native title holders and native title rights the Government believes that there is a need for a corporate body to be *the contact point* for dealings in native title …
>
> These amendments still achieve the government's objective that there be *a* body corporate *which can represent native title holders without persons wishing to deal with those native title holders having to deal with each individual native title holder*.
>
> (Emphasis added)

215 The construction of s 56(2)(a) which I consider appropriate is reflected in reg 4 of the Regulations. That Regulation provides:

> 4 **Prescribed bodies corporate (Act s 59)**
>
> (1) An Aboriginal and Torres Strait Islander corporation is prescribed for section 59 of the Act if it is registered for the purpose of being the subject of a section 56 or 57 determination.
>
> (2) An Aboriginal and Torres Strait Islander corporation is taken to be registered for the purpose of being the subject of a section 56 or 57 determination only if:
>
> (a) the purpose of becoming a registered native title body corporate is set out in the objects of the corporation; and
>
> (b) all members of the corporation are:
>
> (i) persons who, at the time of making of the section 56 or 57 determination, are included, or are proposed to be included, in the native title determination as native title holders; or
>
> (ii) persons to whom the persons mentioned in subparagraph (i) have consented; and
>
> (c) at all times after the section 56 or 57 determination is made, all members of the corporation are:

(i) persons who have native title rights and interests in relation to the land or waters to which the native title determination relates; or

(ii) persons, or a class of persons, to whom the persons mentioned in subparagraph (i) have consented; and

(d) the corporation meets the Indigeneity requirement mentioned in section 29–5 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

216 As is apparent, by reg 4(2)(b), a PBC is to be taken to be registered for the purpose of being the subject of a s 56 determination only if *all* members of the corporation are persons who, at the time of the making of the s 56 determination are included, or are proposed to be included, in the native title determination as native title holders. That condition cannot be satisfied by a PBC whose members are, or would be, only some of the common law holders of the NTRI, as would be the case if the PBC holds in trust only some of the NTRI (those held by one group).

217 The extent to which the content of regulations made pursuant to an enactment may be used in the construction of the enactment is limited. However, it would not be open to the Court under s 56(2) to determine that a nominated PBC hold the NTRI if that that PBC cannot lawfully do so. This is a consideration which would also bear upon the second of the reserved questions, if that required consideration.

218 I accept that reference to the objects stated in the NT Act and its beneficial purpose to which the submissions referred are valuable aids to its construction. But the objects of an Act do not control its meaning: *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89; (2017) 251 FCR 470 at [48]. It is also to be remembered that the NT Act has more than one purpose. One object is the provision of certainty to the Australian community with respect to dealings with native title – see the Preamble and s 3(b) of the NT Act.

219 Although I have been deferring consideration of the decisions in *Daniel (2004)* and *Moses*, it is convenient at this point to refer to the analysis of s 225 in *Daniel (2004)* which is capable of providing some support for the notion that there may be two or more native titles. Justice RD Nicholson there considered that s 225 contemplated two forms of determination, which his Honour described as "principal" and "subsidiary":

> [5] … Section 94A of the [NT Act] requires a determination to set out the details of the matters mentioned in s 225. 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'. It further provides that if it does exist there has to be a determination of, among other

things, 'who the persons, or each group of persons, holding the common or group rights comprising the native title are'. This supports the view that there should be a determination in relation to the determination area, which will include within it a determination of who holds common or group rights. *There are thus two levels of determination: the principal determination being a determination of whether native title exists in relation to the particular area, and the subsidiary determinations being a determination of the matters set out in pars (a) – (e) of s 225. Where different groups are found to hold different native titles, necessarily there is a requirement for more than one subsidiary determination.* Those paragraphs require determination of who holds native title and the nature and extent of the native title rights and interests. This statutory language accommodates variations in entitlement to rights between applicants and groups of applicants.

…

[7] A plain reading of ss 61, 223 and 225 supports the view that the determination should be approached on the basis that the Court should make *a single principal determination in which subsidiary determinations are made on the issues raised in pars (a) – (e) of s 225*. That approach may, in appropriate evidentiary circumstances, lead to a finding that different persons or groups of persons hold common or group rights comprising the native title. The statute requires the subsidiary determinations to be made in relation to each group: the focus is to be on the holder group rather than a geographical area (such as an overlap area). Importantly s 225 directs attention, in respect of a particular determination area, to who holds native title and to the nature and extent of the rights and interests so held. Looked at from the perspective of each group, the fact of overlap in a geographical area is relevant only to the extent of rights of each group and does not support the making of a determination in respect of a so-called overlap area of a determination of one native title held by two groups.

WHETHER TWO DETERMINATIONS IN RESPECT OF TWO DETERMINATION AREAS

[8] As has been already stated, that, however, does not mean that there should be two principal determinations. What the Court is required by s 225 is to make 'a determination of native title'. *That determination is required in subsidiary determinations to identify the persons or group of persons holding common or group rights comprising the native title*. Each subsidiary determination may vary as to its terms depending on the findings of fact concerning the native title rights and interests held by each claimant group. Nevertheless, there will still be one principal determination in respect of the determination area.

[9] This view is supported by the use of the description 'the determination area' as it appears in s 225(b) and s 225(c). That description is a reference to the particular area of land and waters in relation to which the claim was made and a determination is required; it does not require a focus only on the area where any native title is found to exist. Furthermore, the underlying rationale of ss 13, 67 and 68 of the [NT Act] is that the issue of whether native title exists in any particular area is to be determined once only in respect of a determination area (i.e. in the one proceedings; subject to any revision application or appeal). For that reason the principal determination must relate to the determination area. Variations in native title holding by groups within the area are matters to be addressed in subsidiary determinations.

(Emphasis added)

220 Justice RD Nicholson accepted that the NT Act provides for only one principal determination in relation to the one area which addresses all the issues in s 225, at [17]. His Honour also said that s 225 required that both the principal determination and all subsidiary determinations be made at the same time, at [17].

221 So far as I can ascertain, the notion that s 225 contemplates a "principal" determination and "subsidiary" determinations has not been adopted in any subsequent decision of the Court. The Full Court judgment in *Moses* on appeal from *Daniel (2004)*, makes no reference to the "principal/subsidiary" determination analysis of RD Nicholson J and therefore cannot be understood as having endorsed it.

222 In *Lake Torrens Overlap Proceedings*, Mansfield J (one of the members of the Full Court in *Moses*) said, at [113], that he did not regard the separation of the two steps in the manner suggested by RD Nicholson J as being appropriate, with the steps instead being "an integrated process of the one inquiry". It is apparent that Mansfield J was also concerned in the *Lake Torrens Overlap Proceedings* with the procedural requirements for the making of the particular determination sought but, on my understanding, that does not detract from the force of the views his Honour had expressed about the analysis in *Daniel (2004)*.

223 Earlier in these reasons, I referred to the decision of McKerracher J in *Murray*. At [34], his Honour expressed agreement with the reasons of Mansfield J at [99]-[127] and therefore with what his Honour said in [113]. I accept, however, that McKerracher J was not then addressing the particular issue now being addressed.

224 In my respectful opinion, the NT Act does not support the notion of "principal" and "subsidiary" determinations of native title. Instead, s 94A and s 225 contemplate a single composite and integrated determination. The circumstance that that single determination may involve different elements (or, using the language of s 94A, "matters") does not warrant the conclusion that the Court makes two kinds of determinations, principal and subsidiary.

225 In this respect, I note again that s 225 is definitional and not prescriptive. It identifies what a determination of native title is. It is s 94A which is prescriptive as it requires "an order" in which this Court makes a determination that native title exists (that is, a single determination) to set out the s 225 "details". Those details are, first, whether or not native title exists in relation to the particular area and, in the event that it does, the matters specified in subparas (a)-(e). The subparas (a)-(e) matters are thereby an integral part of a determination that native title

exists. The Court is not empowered to determine, as though in the abstract, that native title exists in relation to a particular area, without giving content to that determination.

226 Using the language of s 94A, s 225(a) and (b) are the *details* of the native title being determined to exist. Accordingly, the Court must, as an integral part of the determination determine, at the least, the matters to which s 225(a) and (b) refer. It is part and parcel of the one process.

227 I understood the submissions of counsel for Queensland to support this understanding of s 225.

228 In a case like the present involving the one area of land, it is the determination of the native title in relation to the determination area, whether comprised of the particular NTRI of two or more groups, which is the determination of the native title for the purposes of the s 225 definition. In turn, that is the native title to which s 56 refers.

229 To this stage and without reference to the authorities to which the parties and interveners referred, I would hold that, in a case like the present, it is not open to the Court to determine that more than one body corporate perform the functions of a PBC under Div 6 of Pt 2 of the NT Act in respect of area of overlapping native title.

230 I now turn to those authorities.

The decision in *Daniel (2004)*

231 In *Daniel (2004)*, RD Nicholson J considered the form of the determination to be made to give effect to his earlier decision in *Daniel v State of Western Australia* [2003] FCA 666 (*Daniel (2003)*) that two groups of persons (the Ngarluma People and the Yindjibarndi People) held native title over the claim area. That decision was made on two applications lodged jointly by the Ngarluma and the Yindjibarndi, in the sense that each application was made by persons nominated by each group to constitute the composite applicant – see [41] of *Daniel (2003)*. The claims of other groups overlapping part of the claim area which were heard at the same time were dismissed, at [501], [527] and [528] of *Daniel (2003)*. The claims of the Ngarluma and Yindjbarndi were over separate areas within the overall claim area, although there was a relatively small intermediate area in which both claimed to have native title.

232 It is a matter of some significance that the later determination (made by RD Nicholson J in 2005) giving effect to the decision in *Daniel (2004)* was a single determination but recognising the separate NTRI of the Ngarluma People in one relatively large part of the determination area and the NTRI of the Yindjbarndi People in a distinct and relatively large area and with a small

intermediate area of overlap: *Daniel v State of Western Australia* [2005] FCA 536 (*Daniel (2005)*). As a matter of substance, if not form, there were separate determinations in respect of each of the two large areas and it is understandable that the Ngarluma and Yindjbarndi wished to have their own PBCs appointed for those areas.

233 The presence of the two large separate areas in which the NTRI were separately held appears to have subsumed the issue concerning the PBC for the relatively small overlap area. It does not appear to have been the subject of separate consideration in the parties' submissions. It is understandable in that context that RD Nicholson J did not address separately the question of the PBC for the overlap area.

234 In *Daniel (2004)*, RD Nicholson J concluded that there was nothing in the NT Act "to inhibit nomination of more than one PBC in respect of native title rights and interests *in the determination area*" (emphasis added) when it is found that such rights are held by different groups, at [23]. His Honour reasoned as follows:

(1) at least in a case in which two or more groups are found to have NTRI in a claim area, s 225 contemplates a "principal" determination, being a determination of whether native title exists in relation to the particular area, and "subsidiary" determinations, being determinations of the matters set in s 225(a)-(e), at [5];

(2) the possibility of different groups holding native title under the one principal determination flows from the provisions of s 225(a), at [21];

(3) the reference in s 56(2)(a) and s 57(2)(a) to the persons proposed to be included in the determination of native title is a reference to the persons described in s 225(a), and there may be more than one group of such persons, at [22];

(4) section 56(2) requires an intention by the common law holders with respect to the holding of the native title on trust, at [21];

(5) if the common law holders do not hold the same native title, it is possible for the intention of each group of common law holders to differ from that of another, at [21]; and

(6) this meant that s 56(2)(a) and s 57(2)(a) require the Court to request a representative of the persons comprising each group it proposes to include in the determination with the consequence that two or more prescribed body corporates may be nominated, one for each group of common law holders.

235 In essence, RD Nicholson J seems to have reasoned that, because a single determination may recognise the NTRI of two or more groups, the expression "common law holders" in s 56(2)(a) should be understood as referring to each of the identified groups. That is understandable when there are in substance separate determinations in respect of separate areas. But it is not clear whether his Honour also intended that reasoning to apply to an area of overlap. If that was the intention, on my understanding, his Honour's reasons do not indicate why the term "common law holders" should be understood as referring to each of the identified groups rather than being understood as referring to all the persons found to have NTRI in the overlap area. In addition, the reasons of RD Nicholson J do not indicate why the mere prospect that the intention of the two groups may not coincide indicates that the Court is to make a request of a representative for each group. It could just mean that more discussion and conferral would be required among the common law holders before a consensus position was reached.

236 It is likely, as I have said, that RD Nicholson J's approach and conclusion were influenced by two matters: first, his analysis of there being a required principal determination followed by subsidiary determinations and, secondly, by the circumstance already mentioned, namely that it was natural to think that the Ngarluma and Yindjbarndi should be able to have their own PBCs in respect of the large distinct areas over which each respectively had native title.

237 It does not appear to have been suggested that, although there was in form a single determination, the substance of the matter was that there were two separate determinations over the large and separate areas over which the Ngarluma and Yindjbarndi respectively were found to have native title. Had this occurred, the whole focus of the issue may have been different.

238 Justice RD Nicholson did not regard the prospect of difficulties in two or more bodies corporate having functions and powers with respect to NTRI over the same area of land as pointing against the construction he preferred. This was so, his Honour said, because the focus of the PBC's management was not upon the same piece of land but upon the NTRI held by the different groups of common law holders in the area, at [18]. This was a submission repeated in the present matter.

239 With respect, this does not seem a persuasive consideration. It is the essence of NTRI that they exist "in relation to" land or waters – see s 223(1). A determination of native title is a determination of whether or not native title exists *in relation to particular area* – see ss 225 and 193(2)(d). NTRI do not exist independently of the area to which they relate. Section 24BB of the NT Act (concerning body corporate ILUAs) and s 29(2) in the Right to Negotiate

provisions recognise this by referring to the area affected by the proposed future act. Section 29(2) in particular requires notice to be given to any RNTBC "in relation to any of the land or waters that will be affected by the act", not in relation to any NTRI which will be affected by the act.

240 Justice RD Nicholson saw no reason to suppose that the PBCs would have difficulty in managing the exercise of the NTRI of each group, at [18]. For the reasons given above, I consider that the existence of two or more PBCs in respect of an overlap area is likely to give rise to difficulties. These difficulties are pertinent to the proper construction of the NT Act.

241 As I have noted, it is apparent that RD Nicholson J read down the reach of the expression "common law holders" by reference to the term "intention". In addition, his Honour read into s 56(2)(a) the words "each group of", so that the Court was required to make the request of a representative of each group of the persons it proposed to include in the determination as native title holders.

242 Contrary to the conclusion reached by RD Nicholson J, I consider with respect and, for the reasons given earlier, that there are a number of indications in the NT Act which do "inhibit nomination of more than one PBC in respect of native title rights in the determination area".

The decision in *Moses*

243 The orders in *Daniel (2005)* were the subject of appeal and cross-appeal on multiple grounds. That which is pertinent presently is the cross-appeal of the Commonwealth challenging the determination that the NTRI of the Ngarluma and the Yindjibarndi should be held on trust by separate PBCs. The Commonwealth contended that the determination could nominate only one PBC for the *entire* determination area even though the NTRI were held by two separate groups over two largely separate areas within that area. Again, it does not appear to have been suggested before the Full Court that the respective determinations in favour of the Ngarluma and the Yindjibarndi in respect of their separate areas could be regarded in substance as separate determinations.

244 The issues on the appeals in *Moses* were substantial and involved a hearing by the Full Court over three full days. The appeal succeeded in part and the cross-appeals, including that by the Commonwealth, were dismissed. The Full Court gave effect to its decision on 27 August 2007 by setting aside the determination made by Nicholson J and substituting a new determination. By that determination, subject to defined areas of extinguishment, the Ngarluma People were

held to have non-exclusive NTRI in relation to "the Ngarluma Native Title Area" and the Yindjibarndi People were held to have non-exclusive NTRI in relation to the "Yindjibarndi Native Title Area", at [3] and [5]. There continued to be a small area of overlap between the Ngarluma native title area and the Yindjibarndi native title area.

245 Although the judgment of the Full Court is substantial, that part of the reasons concerning the dismissal of the cross-appeal of the Commonwealth concerning the determination of two PBCs is relatively short. The Full Court (Moore, North and Mansfield JJ) said:

> [382] … We agree with his Honour's approach [to the interpretation of ss 56(2)(a) and 57(2)(a)] and his reliance on the significance of the reference to the intention of the native title holders in s 56(2) and with his further reliance with the linkage between the concept of native title holders in s 225(a) and the sections under consideration.
>
> [383] The Commonwealth contended that the scheme of the [NT Act] demonstrated that Parliament intended that there would be only one PBC for each determination area. Whilst other provisions demonstrate that there may be only one native title claim group for each area (s 61(1) and (2)), and one determination for each area (s 68), the construction of the provisions which govern the determination of PBCs is not assisted by s 61 and s 68 which deal with a separate subject matter.

246 The Full Court then rejected a submission of the Commonwealth made by reference to reg 5 of the Regulations and a submission concerning the rationale for having a single PBC only, at [384]-[386].

247 Again, it is apparent that the Full Court was not required to consider the issue presently before the Court. That was because, as noted, the Commonwealth had contended on its cross-appeal that the Court could appoint only one PBC for *the entire determination area*, despite there being two large and distinct areas in which the NTRI were determined to be held separately. The Commonwealth did not submit, in the alternative, that if that principal submission failed, it should succeed in relation to the overlap area.

248 That being so, it is understandable that the Full Court addressed the submission advanced by the Commonwealth and did not consider the question of the appropriate PBC for the relatively small overlap area considered by itself. It was not required to do so. In fact, there are some indications that the Full Court considered that the presence of the "small area of overlap" should not detract from the substantive issue raised for its determination, at [376], [378].

249 For these reasons, I am satisfied that the Full Court did not address the question now before this Court concerning the appointment of a PBC or PBCs for a "freestanding" overlap area. In

particular, the Full Bench did not consider the nature of the "linkage" between the determination of NTRI in an overlap area and the appointment of a PBC under s 56(2)(a) in respect of that area.

250 If, as I consider appropriate, the determination in respect of the Malgana Area is put to one side as being, in substance, a separate determination, the present case is one of a "freestanding" area of overlap (albeit referred to as the "Shared Area"). That being so, while the reasoning of the Full Court deserves considerable respect, it cannot be said to have decided the same issue. Accordingly, this is not a case in which the Court should take a different view from that taken by the Full Court in *Moses* only if satisfied that the reasoning in that case was plainly wrong: cf *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15, (1993) 177 CLR 485 at 492; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89 at [135]; *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47, (2009) 239 CLR 390 at [49].

251 The consequence is that I do not regard the principle expressed in these cases as precluding the Court from giving effect to a view which is different from that decided in *Moses*, if it considers that that approach is otherwise appropriate.

Authorities since *Moses*

252 In *Lovett*, North J made by consent a determination that both the Gunditjmara People and the Eastern Maar People separately held NTRI in a particular area, being Part B of an application originally made by the Gunditjmara People and to which the Eastern Maar People had later been joined. His Honour found that the Part B area was shared by the Gundijmara and Eastern Maar People and noted that the NTRI were recognised by the two Peoples as co-extensive.

253 In relation to the Court's power to determine two PBCs to hold the NTRI, North J said:

> [38] The nomination of two corporate entities over one determination area has not occurred before in the State of Victoria. Section 56(2)(a) and s 57(2)(a) of the Act allow for two prescribed bodies corporate for one determination area where there are two groups that hold interests in the area and each intends to nominate its own prescribed body corporate: *Moses v State of Western Australia* [2007] FCAFC 78; (2007) 160 FCR 148 at [376]-[386].

254 Thus, North J regarded *Moses* as an authority for the appointment of two PBCs in the circumstances before him. It is not apparent, however, that his Honour adverted to the fact that the reasons of the Full Court in *Moses* were addressed to the particular (and different) issue

crystallised for its consideration and not to a single area of overlapping native title. Nevertheless, *Lovett* is an example of the *Moses* approach being applied in respect of the co-existing NTRI of two groups.

255 In *Budby*, Dowsett J made by consent a determination that the Barada Barna People and the Widi People held native title in the "Shared Country Native Title Area" and "in accordance with the *shared* traditional laws acknowledged and the traditional customs observed by them". Determinations were also made with respect to the native title of the Barada Barna People in respect of one distinct area and of the Widi People in a separate distinct area. The Court ordered that the NTRI of the Barada Barna People in the distinct area be held in trust by the Barada Barna Aboriginal Corporation (BBAC) and that the NTRI of the Widi People in the separate and distinct area be held in trust by the Gangali Narra Widi Aboriginal Corporation. The Court also ordered that BBAC hold the NTRI of Barada Barna People in the Shared Country Area in trust and that the Gangali Narra Widi Aboriginal Corporation be the PBC for the purpose of s 57(2) for the NTRI of the Widi People.

256 With respect, it is not immediately apparent how the NTRI of the Barada Barna and the Widi deriving from their *shared* traditional laws acknowledged and the traditional customs observed by them could give rise to *separate* NTRIs capable of being held by the two PBCs.

257 Earlier in these reasons I referred to the decision of McKerracher J in *Murray*. In the particular circumstances of that case, McKerracher J ordered that there be one PBC, although it is apparent that his Honour was influenced to that conclusion to an extent by the circumstance that the Yilka and Sullivan applicants derived their NTRI from essentially the same body of traditional laws and customs and, to an extent, by reference to discretionary considerations applicable in the circumstances of that case.

258 In *Manado (on behalf of the Bindunbur Native Title Claim Group) v State of Western Australia* [2018] FCA 854, North J made a determination of native title giving effect to his earlier decision in *Manado (on behalf of the Bindunbur Native Title Claim Group) v State of Western Australia* [2017] FCA 1367 (*Manado (2017)*). Three groups were found to have native title in the determination area: the Jabirr Jabirr/Ngumbarl People, the Nyul Nyul People and the Nimanburr People. Each Group had native title separately in three distinct areas, but there is an area of overlap in which all three were found to have native title. The orders of North J permitted each group to nominate a PBC to be the trustee of its native title in the overlap area or to be the agent PBC with respect to their NTRI. In orders made on 21 August 2019,

Robertson J gave effect to that position by determining that three separate PBCs held the respective NTRI of the three groups in trust.

259 Neither decision contains a discussion of the Court's powers and obligations presently under consideration.

260 There are other consent determinations of the Court in respect of overlapping or co-existing NTRI in which a single PBC has been appointed. They too have not involved a discussion of the Court's powers and obligations.

261 I do not regard any of the authorities reviewed as pointing conclusively against the construction which I consider appropriate.

Conclusion

262 For these reasons, I consider that it is open to this Court to give effect to its own conclusion about the proper construction of ss 56 and 57 in the circumstances of the present case. That being so, for the reasons given above, I would answer the first question in the negative. That makes it unnecessary to answer the second.

I certify that the preceding one hundred and sixty-five (165) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice White.

Associate: 

Dated: 21 April 2020