

FEDERAL COURT OF AUSTRALIA

James on behalf of the Martu People v State of Western Australia (No 2)

[2003] FCA 731

NATIVE TITLE – determination of native title – prescribed body corporate – requirements for determination that prescribed body corporate holds native title rights and interests in trust – requirements of *Native Title (Prescribed Bodies Corporate) Regulations 1999* – membership requirements – membership limited to native title holders – class of members congruent with native title holders – determination made under s 56

Native Title Act 1993 (Cth)

**JEFFREY JAMES, TEDDY BILJABU, BILLY DUNN AND OTHERS ON BEHALF OF THE MARTU PEOPLE v THE STATE OF WESTERN AUSTRALIA AND OTHERS
WAG 6110 OF 1998**

**FRENCH J
17 JULY 2003
PERTH**

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

WAG 6110 OF 1998

**BETWEEN: JEFFREY JAMES, TEDDY BILJABU, BILLY DUNN, NEIL PITU
aka BIDU, NANCY TAYLOR, NANCY PATERSON, KEVIN FRED,
PINCHER RUBIN, FRANK FRENCH, PUKINA BURTON, TOMMY
WATSON, LINDSAY HARDCASE, ROLEY WILLIAMS aka
ROWLEY, COLIN PETERSON, BEN ODAPANIE aka
OOLAPARNIE, GRANT JUDSON, MACK GARDINER aka
GARDENER, LOLA WALKER, KENNY THOMAS, DULCIE
GIBBS and PATRICIA FRY FOR THE MARTU PEOPLE
APPLICANTS**

**AND: THE STATE OF WESTERN AUSTRALIA
FIRST RESPONDENT**

**NEWCREST MINING LTD
SECOND RESPONDENT**

**RIO TINTO EXPLORATION PTY LIMITED
THIRD RESPONDENT**

**STRAITS RESOURCES LIMITED
FOURTH RESPONDENT**

**SHIRE OF WILUNA
FIFTH RESPONDENT**

**TELSTRA CORPORATION LIMITED
SIXTH RESPONDENT**

**MOUNT BURGESS MINING NL
SEVENTH RESPONDENT**

**KIMBERLY LAND COUNCIL ABORIGINAL CORPORATION
EIGHT RESPONDENT**

**ANNETTE KOGOLO, BUTCHER WISE, CHARLIE NUNDUN,
HARRY YUNGABUN, HITLER PAMBA, HUGHIE BENT, IVAN
McPHEE, JIMMY NERRIMA, JIMMY PIKE, JOE BROWN, LUCY
CUBBY, MONA CHUGANA, PERCY BULAGARDIE, PETER
CLANCY, PETER SKIPPER, RONNI JIMBIDIE, STALIN
WODIGAR, TOMMY MAY, WARFORD BUDJIMAN and
WILFRED STEELE ON BEHALF OF THE NGURRARA PEOPLE
NINTH RESPONDENTS**

JUDGE: FRENCH J
DATE OF ORDER: 17 JULY 2003
WHERE MADE: PERTH

THE COURT ORDERS THAT:

Pursuant to ss 55 and 56 of the *Native Title Act 1993* (Cth) the Court determines that the Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu) is to hold the rights and interests from time to time comprising the native title the subject of the Determination made on 27 September 2002 in trust for the common law holders identified in the said Determination.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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

WAG 6110 OF 1998

**BETWEEN: JEFFREY JAMES, TEDDY BILJABU, BILLY DUNN, NEIL PITU
aka BIDU, NANCY TAYLOR, NANCY PATERSON, KEVIN FRED,
PINCHER RUBIN, FRANK FRENCH, PUKINA BURTON, TOMMY
WATSON, LINDSAY HARDCASE, ROLEY WILLIAMS aka
ROWLEY, COLIN PETERSON, BEN ODAPANIE aka
OOLAPARNIE, GRANT JUDSON, MACK GARDINER aka
GARDENER, LOLA WALKER, KENNY THOMAS, DULCIE
GIBBS and PATRICIA FRY FOR THE MARTU PEOPLE
APPLICANTS**

**AND: THE STATE OF WESTERN AUSTRALIA
FIRST RESPONDENT**

**NEWCREST MINING LTD
SECOND RESPONDENT**

**RIO TINTO EXPLORATION PTY LIMITED
THIRD RESPONDENT**

**STRAITS RESOURCES LIMITED
FOURTH RESPONDENT**

**SHIRE OF WILUNA
FIFTH RESPONDENT**

**TELSTRA CORPORATION LIMITED
SIXTH RESPONDENT**

**MOUNT BURGESS MINING NL
SEVENTH RESPONDENT**

**KIMBERLY LAND COUNCIL ABORIGINAL CORPORATION
EIGHT RESPONDENT**

**ANNETTE KOGOLO, BUTCHER WISE, CHARLIE NUNDUN,
HARRY YUNGABUN, HITLER PAMBA, HUGHIE BENT, IVAN
McPHEE, JIMMY NERRIMA, JIMMY PIKE, JOE BROWN, LUCY
CUBBY, MONA CHUGANA, PERCY BULAGARDIE, PETER
CLANCY, PETER SKIPPER, RONNI JIMBIDIE, STALIN
WODIGAR, TOMMY MAY, WARFORD BUDJIMAN and
WILFRED STEELE ON BEHALF OF THE NGURRARA PEOPLE
NINTH RESPONDENTS**

JUDGE: FRENCH J
DATE: 17 JULY 2003
PLACE: PERTH

**REASONS FOR JUDGMENT ON NOMINATION OF PRESCRIBED BODY
CORPORATE**

1 On 27 September 2002, I made a Determination of Native Title in this matter by consent. As part of the Determination the following orders were made:

3. *Within three months of the date these orders are made, a representative of the common law holders of the native title rights and interests shall indicate whether they intend to have the native title rights and interests held in trust and if so by whom, by:*
 - (a) *nominating in writing to the Federal Court a prescribed body corporate to be trustee of the native title rights and interests; and*
 - (b) *including within the nomination the written consent of the prescribed body corporate.*
4. *If a prescribed body corporate is nominated in accordance with order 3, it will hold the native title rights and interests described in order 2 in trust for the common law holders of the native title rights and interests.*
5. *If a prescribed body corporate is not nominated in accordance with order 3, the native title rights and interests described in order 2 will be held by the common law holders (as defined in the determination) in respect of the determination area as the common law holders of the native title rights and interests.*
6. *If a prescribed body corporate is not nominated in accordance with order 3, and native title is therefore held by the common law holders in accordance with order 5, then the matter is to be relisted by the Registrar in order that the Court can consider the making of orders in accordance with section 57(2) of the Native Title Act 1993 (Cth).*
7. *Until such time as there is a registered native title body corporate in relation to the determination area, any notices required under the Native Title Act 1993 (Cth) or otherwise to be served on the common law holders may be served upon the Ngaanyatjarra Council Aboriginal Corporation and the Kimberley Land Council Aboriginal Corporation, and such service shall be deemed to be sufficient.'*

- 2 A prescribed body corporate has now been nominated in writing to be trustee of the native title rights and interests recognised in the determination.
- 3 The nomination is made by Colin Peterson who describes himself in the nomination as ‘a representative of the common law holders of the native title rights and interests the subject of these proceedings...’. He nominates Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu) as the Prescribed Body Corporate for the purpose of s 56(2)(a) of the *Native Title Act 1993* (Cth) (‘Corporation’), to hold the native title in trust for the common law holders. Annexed to the nomination is a written consent of the Corporation bearing its common seal and signed by two members of its governing committee. Also attached is a Certificate of Incorporation of the Corporation under the *Aboriginal Councils and Associations Act 1976* (Cth) and a copy of the Rules of the Association.
- 4 The nomination is supported by an affidavit of Malcolm O’Dell. Mr O’Dell was formerly a Case Manager employed by the National Native Title Tribunal. In 1998 and 1999 in connection with that employment he attended meetings organised by the Western Desert Puntukunaparna Aboriginal Corporation which was then the native title representative body responsible for the native title determination application which was ultimately the subject of the Determination. The purpose of the meetings was to workshop the concept and structure of a prescribed body corporate with the Martu People and to assist their understanding of its roles and functions. A consultant anthropologist, Mr Gallagher, was engaged by the representative body to organise and conduct each of the workshops. Mr O’Dell attended some four workshops in 1998 and 1999. A further three workshops were conducted with the Martu People in late 1999 and in 2000. From these early meetings and other research conducted by the anthropologist, the ‘countries’ or area subgroups of Martu land were documented to which Martu People could identify their connection for the purpose of decision-making within a corporate structure. These area subgroups were identified as Walalkaja/Pilakaja (Wala-Pila), Rirra, Ngayunanalku, Karlamily and Pitjjarli.
- 5 Subsequently, in August 2002 as a solicitor employed by Messrs Dwyer Durack, Mr O’Dell was engaged by the Ngaanyatjarra Council as a consultant solicitor to continue and complete the process of formulating and securing the registration of an entity that could act as the prescribed body corporate for the Martu People. On 9 and 11 September 2002 he attended workshops at South Hedland and Jigalong at each of which approximately thirty Martu People attended. The focus of the workshops was to again discuss the role and nature of a

prescribed body corporate and to explore again with the Martu People the way in which their system of traditional laws and customs could be reflected in its structure. In October 2002, he attended a further meeting of approximately seventy Martu People with several Ngaanyatjarra Council employees and councillors and the anthropologist at Coongan River. The model for the prescribed body corporate agreed by the Martu People at their earlier meetings was reviewed at this meeting by the anthropologist. The model involved one body for all Martu People with five area groups resulting in a governing committee of twenty Martu, that is two men and two women from each of the area subgroups. There was also discussion of whether the prescribed body corporate should be a trustee or an agent. At that meeting the Martu People appointed twenty one of their number to be a working group for the prescribed body corporate. These, according to Mr O'Dell, represented an even spread of Martu People from each of the five area sub groups identified by the anthropologist.

6 Mr O'Dell attended the inaugural meeting of the working group at Telfer in October and November 2002. Discussions were discontinued until Ngurrara People who were included in the Determination in respect of part of the land covered by it, could be involved. Mr O'Dell attended a meeting of Martu working group members together with Ngurrara People at Bidyadanga on 2 December 2002. The meeting was chaired jointly by himself and Mr Ian Irving, a solicitor employed by the Kimberley Land Council. After discussion those present agreed that the Martu and Ngurrara Peoples were 'one' and there should only be one prescribed body corporate for the whole of the Determination area. The Ngurrara People present appointed six Ngurrara persons to be their representatives on the working group.

7 Subsequently, Mr O'Dell attended a meeting at Telfer attended by eighteen working group members including the Ngurrara representatives. A number of issues were discussed and, in the event, instructions were given by the working group for Mr O'Dell to prepare a draft set of Rules for the proposed Prescribed Body Corporate based upon the agreed outcomes of the issues discussed.

8 He attended a further working group meeting at Telfer on 6 February 2003. There were seventeen working group members present as well as nine other Martu and Ngurrara People. The purpose of the meeting was to show to the working group the Rules which had been drafted in accordance with its previous instructions and to discuss any issues raised. Additional instructions were provided on some matters and other issues were taken back to wider Martu and Ngurrara Peoples for further consideration. On 24 February 2003, Mr

O'Dell attended a further meeting of five working group members in Perth and received additional instructions on remaining issues and instructions to complete a final draft of the Rules for presentation to a meeting of the combined Martu and Ngurrara Peoples. Following the Perth meeting several community consultations took place involving two of the working group members who travelled to a number of communities to discuss the proposed Rules and to prepare people for the combined meeting.

9 On 11-13 March 2003, Mr O'Dell attended a meeting at Punmu at which between 92 and 126 Martu and Ngurrara Peoples were present at various times. Also present was Mr Wallace-Smith, an officer of the Kimberley Land Council with other Council support staff, Mr Chaney, a Deputy President of the National Native Title Tribunal and staff and members of the Ngaanyatjarra Council. Mr O'Dell presented the amended Rules to the group at that meeting. Following discussion it was agreed that to ensure an increased representation of Ngurrara People there should be six area subgroups instead of five with the shared area being split into two subgroups. The Rules as further amended were endorsed by consensus of those present. They were filed with the Registrar of Aboriginal Corporations on 4 April 2003 and on 17 April 2003 Mr O'Dell was notified by the Registrar that the Corporation had been incorporated.

10 On 13-14 May 2003, the first meeting of the Governing Committee of the Corporation took place. Following explanations of the requisite procedures given at the meeting, the Governing Committee passed a resolution consenting to be the Prescribed Body Corporate in a process which was in compliance with the Rules. The requirements of s 56(2) of the *Native Title Act* were explained to Mr Peterson. Mr O'Dell deposes that he believes Mr Peterson to be a Martu person and acknowledged as such by other Martu People. On that basis he believes Mr Peterson to be an appropriate representative of the native title holders to sign the nomination form.

11 The objects of the Corporation in cl 6 of its Rules include:

'6.1(b) be and to perform the functions of a Prescribed Body Corporate, for the purpose of being the subject of a native title determination under sections 56 and 57 of the Native Title Act;

(c) be and to perform the functions of a Registered Native Title Body Corporate for the purpose of being the subject of a determination under section 57 of the Native Title Act. '

The membership of the Corporation is defined in cl 9.1 as follows:

'In addition to the Founding Members, and subject to these Rules and the PBC Regulations, the membership of the Corporation shall be open to adult Aboriginal persons who:

(a) *are those people known as Martu People who hold in common the body of traditional law and culture governing the Determination Area and who identify as Martu and who, in accordance with their traditional laws and customs, identify themselves as being members of one, some or all of the following language groups:*

- (i) *Manyjilyjarra;*
- (ii) *Kartujarra;*
- (iii) *Kiyajarra;*
- (iv) *Putijarra;*
- (v) *Nyiyaparli;*
- (vi) *Warnman;*
- (vii) *Ngulipartu;*
- (viii) *Pitjekarla;*
- (ix) *Kurajarra;*
- (x) *Jiwaliny;*
- (xi) *Mangala; and*
- (xii) *Nangajarra, or*

(b) *those Ngurrara People who:*

(i) *in accordance with their traditional laws and customs identify themselves and their forebears as:*

- (A) *Jiwaliny;*
- (B) *Mangala;*
- (C) *Manyjilyjarra;*
- (D) *Walmajarri; and*
- (E) *Wangkajungka, or*
- (F) *any combination of sub-rule 9.1(b)(i)(A)-(E); and*

(ii) *hold in common the body of traditional law and culture governing the Shared Area; and*

(c) *apply to the Governing Committee, either in writing or in a method otherwise considered appropriate by the Governing Committee, and are accepted as Members by the Governing Committee in accordance with sub-rule 9.3 or by the Members at a General Meeting in accordance with sub-rule 9.5.'*

Clause 9.2 provides:

'For the avoidance of doubt, the Members, including the Founding Members, shall be adult Aboriginal persons who belong to one or both of the groups identified in sub-rule 9.1(a) or (b).'

The term ‘Founding Members’ is defined in the Rules as ‘those persons whose names appear in Schedule 1’. There are 110 names set out in Schedule 1.

Statutory Framework – *Native Title Act 1993*

12 Section 55 of the *Native Title Act* provides that:

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 it makes the determination, make the determinations in section 56 (which deals with holding the native title on trust) or 57 (which deals with non-trust functions of prescribed bodies corporate).’

Section 56(1) specifies that one of the determinations the Court must make is whether the native title is to be held in trust and, if so, by whom. Subsection (2) of s 56 then provides:

‘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.’*

13 The effect of a determination under s 56(2)(b) is that 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 (s 56(3)). Section 59 provides that the regulations may prescribe the kinds of bodies corporate that may be determined under s 56 or s 57. That prescription is to be found in reg 4 of the Native Title (Prescribed Bodies Corporate) Regulations 1999. Regulation 4 provides:

- '4(1) An Aboriginal association is prescribed for section 59 of the Act if it is incorporated under the Aboriginal Councils and Associations Act 1976;*
- (a) on or after 30 December 1994; and*
 - (b) for the purpose of being the subject of a section 56 or 57 determination.*
- (2) An Aboriginal association is taken to be incorporated for the purpose of being the subject of a section 56 or 57 determination only if:*
- (a) all members of the association are persons who, at the time of making of the section 56 or 57 determination, are included, or proposed to be included, in the native title determination as native title holders; and*
 - (b) the purpose of becoming a registered native title body corporate is set out in the objects of the association; and*
 - (c) at all times after the section 56 or 57 determination is made, all members of the association are persons who have native title rights and interests in relation to the land or waters to which the native title determination relates.'*

Whether the Association complies with the requirements of the Act and Regulations

14 The proposed prescribed body corporate was incorporated under the *Aboriginal Councils and Associations Act 1976* (Cth) and after the commencement of the *Native Title (Prescribed Body Corporate) Regulations 1994*. It was incorporated for the purpose of being the subject of a determination under s 56 or s 57 of the *Native Title Act*. It therefore meets the requirements of reg 4(1).

15 The persons included in the Native Title Determination of 27 September 2002 as native title holders are set out in the Third Schedule to that determination in the following terms:

THIRD SCHEDULE

1. In respect of the determination area, the common law holders are those people known as the Martu people. The Martu people are those Aboriginal people who hold in

common the body of traditional law and culture governing the determination area and who identify as Martu and who, in accordance with their traditional laws and customs, identify themselves as being members of one, some or all of the following language groups:

- (a) Manyjilyjarra;
- (b) Kartujarra;
- (c) Kiyajarra;
- (d) Putijarra;
- (e) Nyiyaparli;
- (f) Warnman;
- (g) Ngulipartu;
- (h) Pitjikala;
- (i) Kurajarra;
- (j) Jiwality;
- (k) Mangala; and
- (l) Nangajarra.

2. In respect of that part of the determination area within the following boundary (“the Shared Area”):

commencing at a point of Latitude 21.498617 South, Longitude 123.926319 East and extending easterly, northeasterly, generally southeasterly, westerly, southerly, northwesterly and southwesterly passing through the following co-ordinate positions:

LATITUDE (SOUTH)	LONGITUDE (EAST)
21.498617	124.001319
21.081941	124.667979
21.498604	125.501314
21.653886	125.656597
21.653791	125.476965
21.759674	125.476966
21.498608	124.759649
21.665284	124.067986

thence northwesterly back to the commencement point,

the common law holders are:

- (a) the Martu people as defined in (1) above; and
- (b) the Ngurrara people as defined in (3) below.

3. The Ngurrara people are those Aboriginal people who, in accordance with their traditional laws and customs:

- (a) identify themselves and their forebears as:
 - (i) Jiwaliny;
 - (ii) Mangala;
 - (iii) Manyjilyjarra;
 - (iv) Walmajarri;
 - (v) Wangkajungka; or
 - (vi) any combination of (i), (ii), (iii), (iv) and (v) above; and
- (b) acknowledge the beliefs, practices, and protocols associated with the jilakalpuaratu rainmaking ritual complex.

16 I have observed previously that it is desirable that the membership class of a prescribed body corporate be textually aligned precisely with the definition of the native title holders in the relevant Native Title Determination. This is not a requirement of the regulations but will avoid any doubt as to compliance with them.

17 Although there is no reference in the Association's membership clause to the rainmaking ritual complex referred to in the description of the Ngurrara People, I am satisfied that this is a necessary element of the traditional laws and customs referred to in the membership clause. The consent determination to which the Ngurrara People were party so expressed it in item 3 of the Third Schedule by use of the words '... who, in accordance with their traditional laws and customs ... acknowledge the beliefs, practices and protocols associated with the jilakalpuaratu rainmaking ritual complex'. I am satisfied therefore that the requirements of reg 4(2)(a) are met.

18 The purposes of the Association include the purpose of being a registered native title body corporate. So the requirements of reg 4(2)(b) are satisfied.

- 19 The membership clause does not allow for the possibility of anyone other than a person falling within the class of members defined by the Rules of the Association becoming one of its members. I am satisfied therefore that the requirements of reg 4(2)(c) are met.
- 20 For the preceding reasons, I am satisfied that the requirements of the regulations have been met and that I should make the determination that the Association is to hold the native title rights and interests in trust for the native title holders identified in the Determination of 27 September 2002.

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

Associate:

Dated: 17 July 2003

Counsel for the Applicants: Mr M Rynne and Mr D O’Dea

Solicitor for the Applicants: Ngaanyatjarra Council

Counsel for the State of Western Australia: Mr J O’Halloran

Solicitor for the State of Western Australia: Crown Solicitor for the State of Western Australia

Counsel for the Second and Third Respondents: Mr G Gishubl

Solicitors for the Second and Third Respondents: Blake Dawson Waldron

Counsel for the Eighth and Ninth Respondents: Mr I Irving

Solicitors for the Eight and Ninth Respondents: Kimberley Land Council

Date of Judgment: 17 July 2003