

Signed by AustLII

ANNEXURE 1

FEDERAL COURT OF AUSTRALIA

Wik Peoples v State of Queensland [2000] FCA 1443

**McNAUGHT NGALLAMETTA ON HIS OWN BEHALF AND ON BEHALF OF THE
WIK AND WIK WAY PEOPLES v STATE OF QUEENSLAND, COUNCIL OF THE
SHIRE OF AURUKUN, NAPRANUM ABORIGINAL COUNCIL, PORMPURA
ABORIGINAL COUNCIL, COOK SHIRE COUNCIL, PORTS CORPORATION OF
QUEENSLAND, A NUMBER OF COMMERCIAL FISHING AUTHORITY
HOLDERS AND CAPE YORK LAND COUNCIL
QG 6001 OF 1998**

**DRUMMOND J
3 OCTOBER 2000
CAIRNS**

GENERAL DISTRIBUTION

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

QG 6001 OF 1998

**BETWEEN: McNAUGHT NGALLAMETTA ON HIS OWN BEHALF AND
ON BEHALF OF THE WIK AND WIK WAY PEOPLES
APPLICANTS**

**AND: STATE OF QUEENSLAND
COUNCIL OF THE SHIRE OF AURUKUN
NAPRANUM ABORIGINAL COUNCIL
PORMPURAAW ABORIGINAL COUNCIL
COOK SHIRE COUNCIL
PORTS CORPORATION OF QUEENSLAND
A NUMBER OF COMMERCIAL FISHING AUTHORITY
HOLDERS
CAPE YORK LAND COUNCIL
RESPONDENTS**

JUDGE: DRUMMOND J

DATE OF ORDER: 3 OCTOBER 2000

WHERE MADE: CAIRNS

THE COURT NOTES THAT:

- A. The applicants have brought Native Title Determination Application No QC94/3 ("the application") which relates to an area which includes the land and waters the subject of the proposed determination.
- B. The applicants, the State of Queensland, the Council of the Shire of Aurukun, the Pormpuraaw Aboriginal Council, the Napranum Aboriginal Council, the Cook Shire Council, the Ports Corporation of Queensland, a number of commercial fishing authority holders and the Cape York Land Council ("those parties") have reached an agreement as to the terms of a determination of native title to be made in relation to particular land and waters.
- C. Those parties have agreed to make application to the Federal Court of Australia for a consent order for a determination that native title exists in relation to the determination area, as defined in Schedule 1 to this Order.

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- D. Those parties have requested that the Court hear and determine separately that part of the proceeding that relates to the determination area.
- E. No nomination pursuant to s 56(2) of the *Native Title Act 1993* (Cth) in regard to the holding of native title in trust has been made.
- F. McNaught Ngallametta, as the registered native title claimant, is in the process of seeking to incorporate, pursuant to the *Aboriginal Councils and Associations Act 1976* (Cth), an Aboriginal association to be a prescribed body corporate and perform the functions mentioned in s 57(3) of the *Native Title Act 1993* (Cth).

THE COURT ORDERS, DECLARES AND DETERMINES BY CONSENT THAT:

- 1. Native title exists in relation to the determination area.
- 2. The native title is held by the Wik and Wik Way peoples for their respective communal, group and individual rights and interests in the determination area in accordance with the traditional laws acknowledged and traditional customs observed by them ("the native title holders") as common law holders.
- 3. The nature and extent of the native title rights and interests in relation to the determination area are that, subject to Orders 4 and 5, they confer possession, occupation, use and enjoyment of the determination area on the native title holders and, in particular, include rights, duties and responsibilities to do the following:
 - (a) speak for, on behalf of and authoritatively about the determination area and assert proprietary and possessory claims over the determination area;
 - (b) inherit and transmit the native title rights and interests;
 - (c) give or refuse, and determine the terms of any, permission to enter, remain on, use or occupy the determination area by others;
 - (d) as between Aboriginal people:

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- (i) resolve disputes about who is or who is not a Wik person or a Wik Way person;
 - (ii) determine as between native title holders what are the particular native title rights and interests that are held by particular native title holders in relation to particular parts of the determination area;
 - (iii) exclude particular native title holders from the exercise of particular native title rights and interests in relation to particular parts of the determination area;
 - (iv) resolve disputes between Aboriginal people concerning native title rights and interests in relation to the determination area, with the assistance of native title holders of adjoining areas where such assistance is necessary;
 - (v) uphold, regulate, monitor and enforce the customary laws of the native title holders in relation to the native title rights and interests in the determination area;
- (e) make use of the determination area by:
- (i) engaging in a way of life consistent with the traditional connection of the native title holders to the determination area;
 - (ii) physically occupying, using and enjoying the determination area;
 - (iii) living on and erecting residences and other infrastructure on the determination area;
 - (iv) protecting, managing and using the determination area;
 - (v) being buried on, and burying native title holders on, the determination area;

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- (f) take, use and enjoy the natural resources from the determination area for the purposes of:
 - (i) manufacturing artefacts, objects and other products;
 - (ii) disposing of those natural resources and manufactured items, by trade, exchange or gift save that the right of disposal of natural resources taken from the waterways (as that term is defined in the *Fisheries Act 1994* (Qld) as at the date of this determination) of the determination area is only a right to do so for non-commercial purposes;
- (g) maintain and protect places of importance under traditional laws, customs and practices in the determination area;
- (h) be acknowledged as the traditional Aboriginal owners of the land and waters within the determination area;
- (i) use and enjoy the determination area and its natural resources for the purposes of teaching, determining, maintaining, communicating and expanding cultural, social, natural, environmental, spiritual, cosmological and other knowledge, traditions, beliefs, customs, relationships, practices and institutions in relation to the determination area so as to ensure the continuing vitality of the culture and well-being of the native title holders, and

also include those rights, duties and responsibilities that are necessary for or ancillary to the full exercise and enjoyment of the native title and the native title rights and interests.

4. The native title rights and interests are and the native title is subject to and exercisable in accordance with:
- (a) the laws of the State and the Commonwealth; and

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- (b) traditional laws acknowledged and traditional customs observed by the native title holders.
5. Notwithstanding anything in this determination, in respect of tidal and flowing water the native title rights and interests only confer on the native title holders such rights and obligations as the common law recognises.
6. The nature and extent of any other interests in relation to the determination area are:
 - (a) the rights and interests of the lessee and others under the Lease (Aboriginal Lands) No. 1 dated 18 January 1979 comprising the land and waters in Lot 1 on Plan SC211 ("the Lease");
 - (b) the rights and interests of the grantee and others under the Deed of Grant in Trust dated 23 July 1987, being indefeasible Title Reference No 21345063 in respect of the land and waters delineated in Plan LK2;
 - (c) any rights and interests of a holder of an authority issued under the *Fisheries Act 1994 (Qld)* that authorises a commercial fishing operation in the waters of the determination area as may be current at the date of this determination;
 - (d) any other rights and interests held by or under the Crown by the force and operation of the laws of the State or the Commonwealth as may be current at the date of this determination.
7. The relationship between the native title rights and interests and the other rights and interests described in Order 6 is that:
 - (a) the other rights and interests continue to have effect and the rights conferred by or held under the other rights and interests may be exercised notwithstanding the existence of the native title rights and interests; and
 - (b) the other rights and interests and an activity done in exercise of the rights conferred by or held under the other rights and interests prevail over the native

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title rights and interests and any exercise of those native title rights and interests.

8. The native title rights and interests confer, subject to Orders 4 and 5, possession, occupation, use and enjoyment of the determination area on the native title holders to the exclusion of all others, except those having rights and interests identified in Order 6.
9. In the event at any time that that part of the determination area comprising the area covered by the waters of the Archer River seaward of the area referred to in paragraph (d) of the definition of "Determination Area", cease to be subject of the Lease, then the native title shall be subject to a right of ingress and egress by the Council of the Shire of Aurukun or any successor in title or function, for itself and for its servants or agents, by barge over the said waters for the purpose of transporting materials, provisions and supplies for the residents of Aurukun, the native title holders and as may be required by the Council of the Shire of Aurukun for the performance of its powers and functions.
10. The words and expressions used in this determination have the same meanings as they have in Part 15 of the *Native Title Act 1993* (Cth) except for the following defined words and expressions:

"natural resources" means:

- (a) plant, animal, fish, bird, amphibian, reptile, insect life, and any other flora and fauna, and shells and forest products found on, or in the lands and waters of the determination area from time to time, and water, flints, clays, soil, sand, gravel and rock on or below the surface of the determination area and all other matter comprising the determination area;

but does not include:

- (b) minerals as defined in the *Minerals Resources Act 1989* (Qld) and petroleum as defined in the *Petroleum Act 1923* (Qld);

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“fauna” has the meaning attributed to it in the *Fauna Conservation Act 1974* (Qld);

“fish” has the meaning attributed to it in the *Fisheries Act 1994* (Qld);

“forest products” has the meaning attributed to it in the *Forestry Act 1959* (Qld); and

“laws of the State and the Commonwealth” means the common law and the laws of the State and the Commonwealth of Australia, and includes regulations, statutory instruments, local government schemes and by-laws.

THE COURT FURTHER ORDERS THAT:

11. The native title is not to be held in trust.
12. Within six months of the date of this order the registered native title claimant is to nominate in writing given to the Federal Court of Australia a prescribed body corporate to:
 - (a) be the prescribed body corporate for the purposes of s 57(2) of the *Native Title Act 1993* (Cth); and
 - (b) perform the functions mentioned in s 57(3) of the *Native Title Act 1993* (Cth) after becoming a registered native title body corporate,as to which there is liberty to apply.
13. In the event that there is no nomination within the time specified in accordance with Order 12 or such later time as the Court may order, the applicants shall forthwith apply to the Court for further orders.
14. 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 native title holders, the native title claim group or the registered native title claimant may be served upon the solicitors for the applicants

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and the representative Aboriginal body for the determination area, and such service shall be deemed to be sufficient.

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

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GENERAL DISTRIBUTION

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

QG 6001 OF 1998

**BETWEEN: McNAUGHT NGALLAMETTA ON HIS OWN BEHALF AND
ON BEHALF OF THE WIK AND WIK WAY PEOPLES
APPLICANTS**

**AND: STATE OF QUEENSLAND
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COOK SHIRE COUNCIL
PORTS CORPORATION OF QUEENSLAND
A NUMBER OF COMMERCIAL FISHING AUTHORITY
HOLDERS
CAPE YORK LAND COUNCIL
RESPONDENTS**

JUDGE: DRUMMOND J

DATE: 3 OCTOBER 2000

PLACE: CAIRNS

REASONS FOR JUDGMENT

1 I have before me today an application for a consent determination in respect of part of the lands the subject of the native title claim brought on behalf of the Wik and Wik Way peoples ("the Wik peoples"). It is worth noting that, for present purposes, the proceeding commenced with an application filed under the *Native Title Act 1993* (Cth) on behalf of the Wik peoples in March 1994. Shortly thereafter, the National Native Title Tribunal gave public notification of the claim and by early September 1994, the Tribunal had commenced mediation. These things seemed to have come to something of an impasse for a very long period of time.

2 It was not until late last year that it appeared that a partial resolution by agreement of the claim might be achievable. Things moved along through the present year and ultimately I ordered that the Wik peoples claim be heard in two separate parts. It is the first of those parts, called Part A, which is the subject of the hearing today.

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3 Part A involves, in addition to the Wik peoples as claimants, eight respondent parties. The other part of the claim which is yet to be determined, Part B, involves a total of twenty-three parties, including the nine involved in today's matter. The case is complicated enough, but it is by no means the most complex native title case before the Court. The lands in Part A with which we are concerned today are confined to lands that have always been unallocated Crown lands or lands that have only ever been subject to forms of title granted for the benefit of Aboriginal peoples. That is subject to the qualification that there are interests in inland waters held by a small number of fishermen under permits issued under the Queensland fisheries legislation.

4 The lands in Part A do not include any lands the subject of pastoral or mining titles. It is Part B of the Wik peoples claim that contains lands held under seven pastoral and four mining titles. The determination today deals only with the simplest part of the Wik peoples claim, yet it has taken six and a half years to achieve this limited result. To date, the widely held view has been that the only practicable pathway for resolving the mass of native title claims before the Court is by negotiated outcomes. Yet the practicability of negotiation must be put into serious question when issues before the Court today that are relatively uncomplicated in comparison with many of the issues in the balance of the Wik peoples claim, and in the large number of other native title cases in the Court, have taken so long to be brought to an agreed result.

5 I still accept, at least for the moment, that an agreed resolution of the balance of the Wik peoples claim is preferable to a Court-imposed result. That is so because that is more likely to provide a more useful framework than a court decision limited to specific issues for dealing with the resolution of conflicting interests of the Wik peoples and particularly the pastoralists over the specific access and usage questions that are likely to arise in the future.

6 But the Court cannot allow the remainder of the Wik peoples claim to be the subject of yet more protracted negotiations. The cost benefits of such a negotiated resolution of a case, if that is ultimately achievable, in comparison with the costs of a Court-imposed decision are likely to be largely illusory. The uncertainty for all with interests in the Wik peoples lands, if allowed to continue for any extended further period, is unacceptable both to the public interest and to the interest of all the parties involved in this litigation.

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7 Long continued uncertainty may well destroy the willingness of the Wik claimants themselves and of one or more of the various respondents to engage in the process of compromising, by giving up part of what each considers to be their full legal rights, that is essential if there is to be an agreed rather than a Court-imposed result.

8 I regret I cannot agree with everything that has fallen from the Crown Solicitor. Today's determination is, in my opinion, not so much a cause for celebration by the Wik peoples as an occasion for all parties to this still unresolved case - the Wik peoples, the State of Queensland, the Commonwealth of Australia, the pastoralists and the miners - to resolve anew to co-operate with each other in an endeavour to achieve much more quickly than Part A of the claim has been resolved, a mutually acceptable accommodation of their various interests, though this may require each to give up part of what they may consider to be their full legal entitlements.

9 It is worthy of note that litigation rarely results in the complete vindication of the position of any one party. Much more commonly the Court, after having the opportunity to hear and consider all the evidence from all the parties, comes to the conclusion that there is at least some merit in the arguments put forward by each party. Few litigants win 100 per cent of their cases. I do not expect native title litigation to be any different in this respect.

10 All the Court can do today, it being satisfied as to the propriety of so acting, is to make determinations and orders in accordance with the draft determination Exhibit 1. There will be orders and declarations accordingly.

11 As I have said, further time must be allowed to the parties to Part B of the claim to try to reach a negotiated settlement, but the parties should anticipate that period will be measured in months rather than years. If a settlement cannot be reached promptly, the Court will consider fixing a date for the start in the first half of 2002 of the trial. This will require directions for the exchange of pleadings, and evidence to be given in about the middle of the coming year, 2001, at the latest. *Prima facie*, it is the Tribunal, rather than a Court appointed or a privately agreed mediator, who should have the opportunity to try to bring the parties to a final resolution of the outstanding claim. To enable the Court to have an informed opinion on the likely prospects of a prompt settlement of Part B of the claim, I intend to seek more frequent reports from the Tribunal as to the progress of mediation of the

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outstanding issues than has hitherto been done.

12 Initially, I will direct, pursuant to s 86E the *Native Title Act 1993* (Cth), that the Tribunal, which no doubt has accumulated fairly extensive information about the positions of all the parties, provide the Court with a report by 16 November 2000 setting out what it considers, after discussions with all parties, to be a practicable program for attempting to mediate to an agreed resolution Part B of the Wik peoples claim.

13 The Tribunal, in preparing this program, will bear in mind that, unless it is apparent by mid 2001 that there are good grounds for thinking that a settlement of all of the issues in Part B will be achieved in the latter half of 2001, the Court will give directions in about mid 2001 designed to make sure that the case will come to trial in the first half of 2002.

I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Drummond.

Associate:

Dated: 12 October 2000

Solicitor for the Applicants:	Ebsworth & Ebsworth
Counsel for the State of Queensland:	Mr C Lohe
Solicitor for the State of Queensland:	Crown Solicitor
Solicitor for the Cape York Land Council:	Ms Goodchild
Solicitor for the Pormpuraaw Aboriginal Council:	Farrallys Solicitors
Solicitor for the Napranum Aboriginal Council:	Suzette Coates
Solicitor for the Aurukun Shire Council:	Bottoms English

Signed by AustLII

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Queensland Seafood Industry Association	No appearance
Date of Hearing:	3 October 2000
Date of Judgment:	3 October 2000

Signed by AustLII

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

QG 6001 OF 1998

**BETWEEN: McNAUGHT NGALLAMETTA ON HIS OWN BEHALF AND
ON BEHALF OF THE WIK AND WIK WAY PEOPLES
APPLICANTS**

**AND: STATE OF QUEENSLAND
COUNCIL OF THE SHIRE OF AURUKUN
NAPRANUM ABORIGINAL COUNCIL
PORMPURAAW ABORIGINAL COUNCIL
COOK SHIRE COUNCIL
PORTS CORPORATION OF QUEENSLAND
A NUMBER OF COMMERCIAL FISHING AUTHORITY
HOLDERS
CAPE YORK LAND COUNCIL
RESPONDENTS**

SCHEDULE 1

"Determination Area" is the land and waters within the area described and shown on the plan in Annexure 1 and includes:

- (a) the land and waters inland of the high water mark at mean Spring tide of the main sea of the Gulf of Carpentaria;
- (b) the land and waters inland of lines drawn at such high water mark across the mouth of the bays, creeks and rivers of that area including but not limited to Archer Bay, Ward River, Watson River, Archer River, Love River, Kirke River, Knox Creek, Kendall River, Holroyd River (known locally as South Kendall River), Hersey Creek (known locally as Thugu or Thuuk River) and Christmas Creek (known locally as Holroyd River);

and also includes:

- (c) only such airspace over the land and waters and such subsoil under the land and waters as is necessary for the full exercise and enjoyment of the native title and the native title rights and interests;

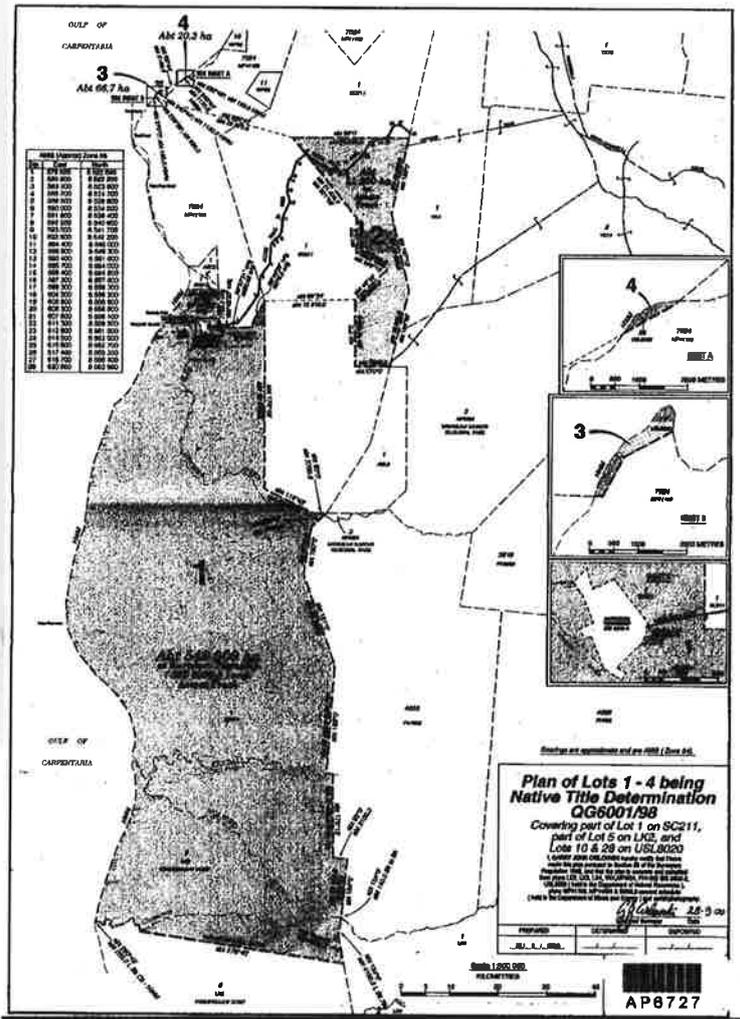
Signed by AustLII

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but does not include:

- (d) the land and waters in and around the town of Aurukun within the area described in and shown on the aerial photograph and plan in Annexure 2;
- (e) the land and waters within the area covered by a corridor 15 metres either side of the centre line of the present alignment of the existing road which connects the town of Aurukun to the Peninsula Development Road, commencing at point Z on the aerial plan in Annexure 2 and continuing on the present alignment of the existing road in an easterly and north-easterly direction to the junction of that road with the Peninsula Development Road as shown on the plan in Annexure 1; and
- (f) minerals as defined in the *Minerals Resources Act 1989* (Qld) or petroleum as defined in the *Petroleum Act 1923* (Qld).

Signed by AustLII



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FEDERAL COURT OF AUSTRALIA

Wik Peoples v State of Queensland [2004] FCA 1306

CORRIGENDUM

**ANTHONY KERINDUN, SILAS WOLMBY, VICTOR KUUKUMU LAWRENCE,
GLADYS TYBINGOOMPA, HOGAN SHORTJOE AND ROBERT BENON YEIUM
HOLROYD ON THEIR OWN BEHALF AND FOR AND ON BEHALF OF THE WIK
AND WIK WAY PEOPLES v STATE OF QUEENSLAND AND OTHERS**

No QG6001 of 1998

**COOPER J
AURUKUN
13 OCTOBER 2004 (CORRIGENDUM 15 OCTOBER 2004)**

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

QG6001 OF 1998

**BETWEEN: ANTHONY KERINDUN, SILAS WOLMBY, VICTOR
KUUKUMU LAWRENCE, GLADYS TYBINGOOMPA,
HOGAN SHORTJOE AND ROBERT BENON YEIUM
HOLROYD ON THEIR OWN BEHALF AND FOR AND ON
BEHALF OF THE WIK AND WIK WAY PEOPLES
APPLICANTS**

**AND: STATE OF QUEENSLAND
FIRST RESPONDENT**

**COMMONWEALTH OF AUSTRALIA
SECOND RESPONDENT**

**COUNCIL OF THE SHIRE OF AURUKUN
THIRD RESPONDENT**

**NAPRANUM ABORIGINAL COUNCIL
FOURTH RESPONDENT**

**PORMPURAAW ABORIGINAL COUNCIL
FIFTH RESPONDENT**

**COOK SHIRE COUNCIL
SIXTH RESPONDENT**

**PORTS CORPORATION OF QUEENSLAND
SEVENTH RESPONDENT**

**QUEENSLAND SEAFOOD INDUSTRY ASSOCIATION
EIGHTH RESPONDENT**

**CAPE YORK LAND COUNCIL
NINTH RESPONDENT**

**TELSTRA CORPORATION LIMITED
TENTH RESPONDENT**

**DARCY THOMAS BYRNES, RAYLEE FRANCES BYRNES,
VICTOR PATRICK BYRNES AND CAROLE LYN BYRNES
ELEVENTH RESPONDENT**

**ROBERT JOHN FRASER
TWELFTH RESPONDENT**

EDDIE HOLROYD

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FEDERAL COURT OF AUSTRALIA

Wik Peoples v State of Queensland [2004] FCA 1306

NATIVE TITLE – determination of – by consent – two determinations relating to exclusive areas and non-exclusive areas – whether order under s 87 of the *Native Title Act 1993* (Cth) appropriate

**ANTHONY KERINDUN, SILAS WOLMBY, VICTOR KUUKUMU LAWRENCE,
GLADYS TYBINGOOMPA, HOGAN SHORTJOE AND ROBERT BENON YEIUM
HOLROYD ON THEIR OWN BEHALF AND FOR AND ON BEHALF OF THE WIK
AND WIK WAY PEOPLES v STATE OF QUEENSLAND AND OTHERS**

No QG6001 of 1998

**COOPER J
AURUKUN
13 OCTOBER 2004**

Signed by AustLII

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

QG6001 OF 1998

**BETWEEN: ANTHONY KERINDUN, SILAS WOLMBY, VICTOR
KUUKUMU LAWRENCE, GLADYS TYBINGOOMPA,
HOGAN SHORTJOE AND ROBERT BENON YEIUM
HOLROYD ON THEIR OWN BEHALF AND FOR AND ON
BEHALF OF THE WIK AND WIK WAY PEOPLES
APPLICANTS**

**AND: STATE OF QUEENSLAND
FIRST RESPONDENT**

**COMMONWEALTH OF AUSTRALIA
SECOND RESPONDENT**

**COUNCIL OF THE SHIRE OF AURUKUN
THIRD RESPONDENT**

**NAPRANUM ABORIGINAL COUNCIL
FOURTH RESPONDENT**

**PORMPURAAW ABORIGINAL COUNCIL
FIFTH RESPONDENT**

**COOK SHIRE COUNCIL
SIXTH RESPONDENT**

**PORTS CORPORATION OF QUEENSLAND
SEVENTH RESPONDENT**

**QUEENSLAND SEAFOOD INDUSTRY ASSOCIATION
EIGHTH RESPONDENT**

**CAPE YORK LAND COUNCIL
NINTH RESPONDENT**

**TELSTRA CORPORATION LIMITED
TENTH RESPONDENT**

**DARCY THOMAS BYRNES, RAYLEE FRANCES BYRNES,
VICTOR PATRICK BYRNES AND CAROLE LYN BYRNES
ELEVENTH RESPONDENT**

**ROBERT JOHN FRASER
TWELFTH RESPONDENT**

**EDDIE HOLROYD
FOURTEENTH RESPONDENT**

**MERLUNA CATTLE STATION
FIFTEENTH RESPONDENT**

**RICHARD MATHEW PRICE
SIXTEENTH RESPONDENT**

**CAMERON CLIVE QUARTERMAINE AND DOREEN RUTH
QUARTERMAINE
SEVENTEENTH RESPONDENT**

JUDGE: COOPER J
DATE: 13 OCTOBER 2004
PLACE: AURUKUN

REASONS FOR JUDGMENT

Background

- 1 These proceedings seek a determination of native title under the *Native Title Act 1993* (Cth) ('the NTA'). The claim is made by the applicants for themselves and on behalf of the Wik and Wik Way Peoples. The original claim was filed on 24 March 1994.
- 2 In June 2000 it was ordered that the claim be determined in two parts: Parts A and B. The lands in Part A were confined to lands that had always been unallocated Crown lands or lands that had only ever been subject to forms of title granted for the benefit of Aboriginal peoples. On 3 October 2000 Drummond J determined by consent that native title existed in the lands and waters within Part A of the claim.
- 3 Part B of the claim comprised the balance of the lands and waters of the claim area. The lands and waters in Part B contained lands held under pastoral and mining titles.
- 4 To the credit of all parties to the claim, they have mediated the issues which arose under Part B to the point where they have agreed two consent determinations. Their agreement is subject to the Court being satisfied that it has the power to make the determinations sought and that it is proper to do so. One agreement concerns exclusive rights of possession, occupation, use and enjoyment of the lands and waters in certain parts of the claim area; the second concerns non-exclusive rights in other parts of the claim area.

Power of the Court

5 This Court has jurisdiction to hear and determine applications for a determination of native title in relation to an area for which there is no approved determination of native title: ss 13, 61 and 81 of the NTA. Division 1C of Part 4 of the NTA provides for agreements, to be made by some or all of the parties to an application, to settle the application or part of it.

6 Section 87 of the NTA provides that the Court may, if it is satisfied that such an order is within the power of the Court, make an order in, or consistent with, the terms of the parties' written agreement without holding a hearing.

7 Section 94A of the NTA requires that an order of this Court which makes a determination of native title must set out details of the matters mentioned in s 225 of that Act. Section 225 provides:

*'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.'

Original emphasis

Consideration of Agreements and Draft Determinations

8 In considering whether it is appropriate to make the orders which the parties seek, I have had the benefit of an affidavit and report of Dr Peter Sutton filed 15 September 2004. I have also read an earlier report dated 29 June 1997 prepared by Dr Sutton which was before Drummond J when his Honour made the consent determination in respect of Part A of the claim area. Dr Sutton is an Australian Research Council Professorial Fellow of the School of Social Sciences, University of Adelaide and the Division of Anthropology, South Australian Museum. He is also an Honorary Research Fellow of the Institute of Archaeology, University College, London. Dr Sutton has carried out studies of the Wik and Wik Way native title claimant group and worked with the members of that group and their predecessors since 1976. He is a specialist in the area of anthropological and linguistic research relating to Australian Aboriginal people and Aboriginal societies and he is eminently qualified to express the professional expert opinions which he does in his affidavit.

9 This is a case where there is a rich body of documented material which has been brought into existence over very many years. It establishes the existence of organised Aboriginal occupation and possession of the determination area extending back beyond the imposition of British sovereignty. It also establishes the continuity of an identifiable society of Aboriginal peoples having a connection with the lands and waters of the determination area in accordance with traditional laws which they acknowledged and traditional customs which they observed. Additionally, the content of these records, in terms of recorded Aboriginal names and language, enables the linguistic links to be made between the present claimants, their predecessors and the society which existed in the determination area at the time of sovereignty and the relationship of clan groups to particular parts of the determination area. There is also a history of long term field work and academic study in and of the determination area and its peoples which reveals a consistency and continuity in the research findings. This body of material enables the Court to make the findings as to the state of affairs which existed in the determination area at the time of sovereignty with greater confidence and to draw the inferences of connection and continuity between the present claimants and the state of affairs which existed at that earlier time.

10 The historical records of European contact with the claim area commence in 1606 with

Willem Jansz and the crew of the 'Duyfken' sailing down the west coast of Cape York Peninsula for about 350 kilometres and record the presence of, and contact with, Aboriginal peoples who inhabited the claim area. The record includes sightings and observations of Carstenz (1633), Matthew Flinders (1802), the Jardine brothers (1864), Pennefather (1880) and others leading up to the gold rushes in the mid 1870s.

11 In 1897 Archibald Meston, a Special Commissioner for Aborigines, visited the Embley River area and published an account of his visit and his contact with the various Aboriginal people he encountered in the area. The Weipa Mission was founded in 1898. The Aurukun Mission was established in 1904. In the same year, the Mitchell River Mission began at Trubanaman and in 1915 moved to Kowanyama. The Edward River Mission was commenced in 1938. The records kept by these missions, especially those kept by William and Geraldine MacKenzie at Aurukun from the 1920s to the 1960s, have enabled anthropologists to identify traditional clan estates within the claim area, to construct genealogies, and to demonstrate continuity of members of the claimant group to particular clan estates back to at least the early 1800s.

12 In his report Dr Sutton details the substantial anthropological work carried out in respect of the claim area and its peoples. The first active period of work was between 1927 and 1935. It included long term anthropological field work by McConnel based in Aurukun, Thomson also based in Aurukun and Sharp in the Mitchell River area and Edward River area. The second active period of anthropological study commenced in the 1960s. It has involved a considerable number of professional studies throughout the claim area and has been ongoing. The anthropological work has given rise to a substantial body of published and unpublished work spanning the period 1929 to 2000 which is referenced in Dr Sutton's reports. This work demonstrates that, despite European contact and the growth of the pastoral industry in the claim area, the predecessors of the claimant group and the members of the present claimant group continued their connection with their country and had cohesion as a social group with traditional laws and customs which they continued to acknowledge and observe. Indeed, it was the use of Aboriginal labour in the pastoral industry, which in part operated to keep together Aboriginal communities based on and around pastoral stations and to give to the young Aboriginal men and women the opportunity to travel over and learn about their country.

13 I accept the evidence and opinions contained in Dr Sutton's affidavit and in his two reports. I am satisfied that:

- (a) native title exists in relation to the lands and waters identified as Part B of the applicants' claim and being the areas identified as the Exclusive Areas and the Non-Exclusive Areas in the two draft determinations agreed to by the parties ('the Exclusive Areas and the Non-Exclusive Areas');
- (b) the members of the claimant group called the Wik and Wik Way Peoples are members of a society of peoples descended from the Aboriginal peoples who as a society at the time of sovereignty occupied the lands and waters identified as the Exclusive Areas and Non-Exclusive Areas in accordance with traditional laws and customs acknowledged and observed by them;
- (c) the laws and customs acknowledged and observed by the society at sovereignty are continued to be acknowledged and observed by the members of the claimant group and have been acknowledged and observed by their predecessors from the time of sovereignty to the present time;
- (d) the members of the claimant group and their predecessors through their continued acknowledgement and observance of the traditional laws and customs which existed at the time of sovereignty, have maintained since that time a connection to the Exclusive Areas and the Non-Exclusive Areas;
- (e) the native title rights and interests in the Exclusive Areas and the Non-Exclusive Areas are held by the persons who are or are entitled to be or become members of the claimant group called the Wik and Wik Way Peoples;
- (f) the nature and extent of the native title rights and interests in relation to the Exclusive Areas are as set out in pars 3, 4 and 5 of the agreed draft determination in respect of the Exclusive Areas; and
- (g) the nature and extent of the native title rights and interests in relation to the Non-Exclusive Areas are as set out in pars 3, 4, 5 and 6 of the agreed draft

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- 7 -

determination in respect of the Non-Exclusive Areas.

- 14 I am also satisfied on the materials that there are other interests in and in relation to the Exclusive Areas and the Non-Exclusive Areas. Those interests and their relationship with the native title interests are set out in pars 6, 7, 8 and 9 of the agreed draft determination in respect of the Exclusive Areas and pars 7, 8 and 9 of the agreed draft determination in respect of the Non-Exclusive Areas.

Orders and Determinations

- 15 The proposed Orders, which are consistent with the terms agreed by the parties, recognise that the Wik and Wik Way Peoples as the common law holders of the native title are entitled to possess, occupy, use and enjoy the land and waters of the Exclusive Areas and to enjoy the native title rights and interests in the Non-Exclusive Areas, in accordance with their traditional laws and customs. The proposed Orders also recognise the other interests in the lands and waters in the determination area and the relationship of those interests with the native title interests. The proposed Order contains the elements required by s 94A and s 225 of the NTA.

- 16 I am satisfied that it is within the power of the Court to make the Orders sought and that these Orders can appropriately be made to give effect to the parties' agreement without a full hearing of the applicants' claim. I therefore make the Orders and determinations attached as Schedules A and B to these reasons.

I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Cooper.

Associate:

Dated: 13 October 2004

Signed by AustLII

- 8 -

Counsel for the Applicants:	R Blowes SC
Solicitor for the Applicants:	Ebsworth & Ebsworth
Solicitor for the State of Queensland:	Crown Solicitor
Counsel for the Commonwealth of Australia:	The Honourable Phillip Ruddock MP, Attorney-General
Solicitor for the Commonwealth of Australia:	Australian Government Solicitor
Solicitor for the Shire of Aurukun:	Bottoms English Solicitors
Solicitor for the Napranum Aboriginal Council:	S Coates
Solicitor for the Pormpuraaw Aboriginal Council:	Farellys Lawyers
Solicitor for the Cook Shire Council:	MacDonnells Solicitors
Solicitor for the Ports Corporation of Queensland:	McCullough Robertson
Solicitor for the Queensland Seafood Industry Association:	Gore & Associates
Solicitor for the Cape York Land Council:	Cape York Land Council Aboriginal Corporation
Solicitor for the Telstra Corporation Limited:	Blake Dawson Waldron
Solicitor for Darcy Thomas Byrnes, Raylee Frances Byrnes, Victor Patrick Byrnes & Carole Lyn Byrnes:	Williams Love & Nicol Lawyers
Solicitor for Robert John Fraser:	Williams Love & Nicol Lawyers
Solicitor for Eddie Holroyd:	Williams Love & Nicol Lawyers
Solicitor for Merluna Cattle Station:	Thynne & Macartney
Solicitor for Richard Mathew Price:	Williams Love & Nicol Lawyers

Signed by AustLII

- 9 -

Solicitor for Cameron Clive
Quartermaine and Doreen Ruth
Quartermaine:

Thynne & Macartney

Date of Judgment:

13 October 2004

Signed by AustLII

10

SCHEDULE A

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION

No. QG 6001 of 1998

PARTIES:

ANTHONY KERINDUN, SILAS WOLMBY, VICTOR KUUKUMU LAWRENCE, GLADYS TYBINGOOMPA, HOGAN SHORTJOE and ROBERT BENON YEIUM HOLROYD on their own behalf and for and on behalf of the WIK and WIK WAY PEOPLES

APPLICANT

AND:

STATE OF QUEENSLAND

COMMONWEALTH OF AUSTRALIA

COUNCIL OF THE SHIRE OF AURUKUN

NAPRANUM ABORIGINAL COUNCIL

PORMPURAAW ABORIGINAL COUNCIL

EDDIE HOLROYD

CAMERON CLIVE QUARTERMAINE & DOREEN RUTH QUARTERMAINE

MERLUNA CATTLE STATION PTY LIMITED

RICHARD MATTHEW PRICE

ROBERT JOHN FRASER

COOK SHIRE COUNCIL

PORTS CORPORATION OF QUEENSLAND

DARCY THOMAS BYRNES, RAYLEE FRANCES BYRNES, VICTOR PATRICK BYRNES &

CAROLE LEIGH BYRNES

TELSTRA CORPORATION LIMITED

A NUMBER OF COMMERCIAL FISHING AUTHORITY HOLDERS

CAPE YORK LAND COUNCIL

RESPONDENT

[Exclusive Areas determination]

ORDER

WIK AND WIK WAY NATIVE TITLE DETERMINATION No. 2

JUDGE MAKING ORDER: JUSTICE COOPER

WHERE MADE: AURUKUN

DATE OF ORDER: 13 OCTOBER 2004

THE COURT NOTES THAT:

- A. The Applicant has brought Native Title Determination Application QG6001/98 (“the Application”) which relates to an area which includes the land and waters the subject of the proposed determination.
- B. On 3 October 2000 a determination that native title exists was made by consent by the Federal Court of Australia in relation to particular land and waters known as the “Aboriginal areas”, being Part A of the area covered by the Application.
- C. The Applicant, State of Queensland, Commonwealth of Australia, Council of the Shire of Aurukun, Napranum Aboriginal Council, Pormpuraaw Aboriginal Council, Cook Shire Council, Ports Corporation of Queensland, Eddie Holroyd, Telstra Corporation Limited, Cameron Clive Quartermaine and Doreen Ruth Quartermaine, Merluna Cattle Station Pty Limited, Richard Matthew Price, Robert John Fraser, Darcy Thomas Byrnes, Raylee Frances Byrnes, Victor Patrick Byrnes and Carole Leigh Byrnes, Cape York Land Council and a number of commercial fishing authority holders (“those parties”) have reached an agreement as to the terms of a determination of native title to be made in relation to particular land and waters covered by the Application.
- D. Those parties have agreed to the Federal Court of Australia making a consent order for a determination that native title exists in relation to the Determination Area, as defined in Schedule One to the attached Determination.
- E. Those parties have agreed that:
- (a) s.47A(1)(b)(ii) of the *Native Title Act 1993* (Cth) applies to the land and waters within the Determination Area the subject of the term lease for pastoral purposes dated 9 April 1959 known as Coen River Pastoral Holding, being Title Reference No. 17668093 comprising Lot 3819 on Crown Plan PH2262 (“the Merapah Lease”) in that when the Application was made, the Merapah Lease was held expressly for

the benefit of or was held on trust, expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders and one or more members of the native title claim group occupied the area;

- (b) s.47A(1)(b)(i) of the *Native Title Act 1993* (Cth) applies to the land and waters within the Determination Area the subject of the Lease (Aboriginal Lands) No.1 dated 18 January 1979 comprising Lot 1 on Plan SC211 ("the Aurukun Shire Lease") in that when the Application was made the Aurukun Shire Lease was in force over those areas under the *Local Government (Aboriginal Lands) Act 1978* that makes provision for the grant of such a lease only to or for the benefit of Aboriginal peoples or Torres Strait Islanders and one or more members of the native title claim group occupied the area;
- (c) s.47A(1)(b)(ii) of the *Native Title Act 1993* (Cth) applies to the land and waters within the Determination Area the subject of the Deed of Grant in Trust to the Napranum Aboriginal Council dated 27 October 1988, being Title Reference No. 21378037 comprising Lot 127 on Plan WP49, Lots 2, 4 to 11, 63, 65 and 66 on Plan WP50 and Lot 12 on Plan SP135863 ("the Napranum DOGIT") in that when the Application was made that area was held expressly for the benefit of Aboriginal peoples or Torres Strait Islanders and one or more members of the native title claim group occupied the area;
- (d) s.47B(1)(b) of the *Native Title Act 1993* (Cth) applies to the land and waters within the Determination Area comprising Lot 2 on Plan SP161882 in that when the Application was made that area was not covered by a freehold estate or a lease, or covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth or the State under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose, or subject to a resumption process, and one or more members of the native title claim group occupied the area; and
- (e) s.47A(1)(b)(ii) of the *Native Title Act 1993* (Cth) applies to the land and waters within the Determination Area the subject of the Deed of Grant in Trust to the Pormpuraaw Aboriginal Council dated 23 July 1987, being Title Reference No. 21345063 comprising Lot 5 on Plan LK2 and Lots 2 and 3 on Crown Plan KO8 ("the Pormpuraaw DOGIT") in that when the Application was made that area was held

expressly for the benefit of Aboriginal peoples or Torres Strait Islanders and one or more members of the native title claim group occupied the area.

- F. Those parties acknowledge that the effect of this Determination is that the Wik and Wik Way Peoples, in accordance with the traditional laws acknowledged and traditional customs observed by them, have a right as against the whole world to be acknowledged as the native title holders for the Determination Area.
- G. The traditional laws acknowledged and traditional customs observed by the Wik and Wik Way Peoples include the authority as between Aboriginal people to:
- (a) resolve disputes about who is or who is not a Wik person or a Wik Way person;
 - (b) determine as between Wik and Wik Way Peoples what are the particular native title rights and interests that are held by particular Wik and Wik Way Peoples in relation to particular parts of the Determination Area;
 - (c) exclude particular Wik and Wik Way Peoples from the exercise of particular native title rights and interests in relation to particular parts of the Determination Area; and
 - (d) resolve disputes between Aboriginal people concerning native title rights and interests in relation to the Determination Area, with the assistance of native title holders of adjoining areas where such assistance is necessary.
- H. Those parties have requested that the Court hear and determine that part of the proceeding that relates to the Determination Area.
- I. No nomination pursuant to s.56(2) of the *Native Title Act 1993* (Cth) in regard to the holding of native title in trust has been made.
- J. A representative of the Native Title Holders has nominated Ngan Aak Kunch Aboriginal Corporation, an Aboriginal association incorporated pursuant to the *Aboriginal Councils and Associations Act 1976* (Cth), to be a prescribed body corporate for the purposes of s.57(2) of the *Native Title Act 1993* (Cth) and, after becoming a registered native title body corporate, to perform the functions mentioned in s.57(3) of the *Native Title Act 1993* (Cth).

Being satisfied that a determination in the terms sought by those parties would be within the power of the Court and, it appearing to the Court appropriate to do so and by the consent of those parties:

THE COURT ORDERS, DECLARES AND DETERMINES THAT:

1. Native title exists in relation to the Determination Area.
2. The native title is held by the Wik and Wik Way Peoples in accordance with the traditional laws acknowledged and traditional customs observed by them ("the Native Title Holders") as common law holders.
3. The nature and extent of the native title rights and interests in relation to the Determination Area, other than the flowing, tidal and underground waters, are that, subject to paragraph 5 and but for the rights and interests identified in paragraph 6, they confer possession, occupation, use and enjoyment of the Determination Area on the Native Title Holders, including rights to do the following:
 - (a) speak for, on behalf of and authoritatively about the Determination Area;
 - (b) inherit and succeed to the native title rights and interests;
 - (c) give or refuse, and determine the terms of any permission to enter, remain on, use or occupy the Determination Area by others;
 - (d) make use of the Determination Area by:
 - (i) engaging in a way of life consistent with the traditional connection of the Native Title Holders to the Determination Area;
 - (ii) hunting and gathering on, in and from the Determination Area;
 - (iii) living on and erecting residences and other infrastructure on the Determination Area;
 - (iv) conducting ceremonies on the Determination Area;
 - (v) being buried on, and burying Native Title Holders on, the Determination Area;
 - (vi) maintaining and caring for springs, wells and other places in the Determination Area where underground water rises naturally, for the purpose of ensuring the free flow of water;
 - (e) take, use and enjoy the natural resources from the Determination Area;
 - (f) maintain and protect by lawful means those places of importance and areas of significance to the Native Title Holders under their traditional laws and customs in the Determination Area; and
 - (g) use and enjoy the Determination Area and its natural resources for the purposes of teaching, communicating and maintaining cultural, social, environmental, spiritual

and other knowledge, traditions, customs and practices of the Native Title Holders in relation to the Determination Area.

4. The nature and extent of the native title rights and interests in relation to the flowing, tidal and underground waters of the Determination Area are that, subject to paragraph 5 and the rights and interests identified in paragraph 6, they confer on the Native Title Holders non-exclusive rights to:

- (a) hunt, gather and fish on, in and from the flowing, tidal and underground waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs;
- (b) take, use and enjoy the flowing, tidal and underground waters and natural resources and fish in such waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs;

and, to avoid any doubt, the rights to take, use and enjoy the flowing, tidal and underground waters and natural resources and fish in such waters are only rights to do so for non-commercial purposes.

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

- (a) the laws of the State and the Commonwealth; and
- (b) the traditional laws acknowledged and traditional customs observed by the Native Title Holders.

6. The nature and extent of any other interests in relation to the Determination Area (or the respective parts thereof identified below) are:

- (a) the rights and interests of the lessee and others under a term lease for pastoral purposes dated 9 April 1959 known as Coen River Pastoral Holding, being Title Reference No. 17668093 comprising Lot 3819 on Crown Plan PH2262 ("the Merapah Lease");
- (b) the rights and interests of the lessee and others under Lease No 601426920, being former Special Lease No. 34/48011 dated 10 July 1986, comprising Lease A in Lot 5 on Plan LK2 as shown on Plan LK3;
- (c) the rights and interests of:
 - (i) the lessee and others under the Lease (Aboriginal Lands) No.1 dated 18 January 1979 comprising Lot 1 on Plan SC211 ("the Aurukun Shire Lease");

- (ii) the Council of the Shire of Aurukun as an entity exercising statutory powers in respect of the Aurukun Shire Lease, in particular, pursuant to the *Local Government (Aboriginal Lands) Act 1978* (Qld);
 - (iii) the grantee and others under the Deed of Grant in Trust dated 27 October 1988, being Title Reference No. 21378037 comprising Lot 127 on Plan WP49, Lots 2, 4 to 11, 63, 65 and 66 on Plan WP50 and Lot 12 on Plan SP135863 (“the Napranum DOGIT”);
 - (iv) the Napranum Aboriginal Council as an entity exercising statutory powers in respect of the Napranum DOGIT, in particular, pursuant to the *Community Services (Aborigines) Act 1984* (Qld) and the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld);
 - (v) the grantee and others under the Deed of Grant in Trust dated 23 July 1987, being Title Reference No. 21345063 comprising Lot 5 on Plan LK2 and Lots 2 and 3 on Crown Plan KO8 (“the Pormpuraaw DOGIT”);
 - (vi) the Pormpuraaw Aboriginal Council as an entity exercising statutory powers in respect of the Pormpuraaw DOGIT, in particular, pursuant to the *Community Services (Aborigines) Act 1984* (Qld) and the *Aboriginal and Torres Strait Islander (Land Holding) Act 1985* (Qld);
- (d) the rights and interests of Telstra Corporation Limited:
- (i) as the owner and operator of telecommunication facilities installed within the Determination Area;
 - (ii) created pursuant to the *Post and Telegraph Act 1901* (Cth), the *Telecommunications Act 1975* (Cth), the *Australian Telecommunications Corporation Act 1989* (Cth), the *Telecommunications Act 1991* (Cth) and the *Telecommunications Act 1997* (Cth); and
 - (iii) for its employees, agents or contractors to access its telecommunication facilities in, and in the vicinity of the Determination Area, in the performance of their duties;
- (e) the rights and interests of the Cook Shire Council under its local government jurisdiction and as an entity exercising statutory powers in respect of the land and waters comprising the Merapah Lease and Lot 2 on Plan SP161882 including its interests under an Indigenous Land Use Agreement dated 11 October 2004 between

the Native Title Holders and the Cook Shire Council;

- (f) any rights and interests of the holder of an authority issued under the *Fisheries Act 1994* (Qld) that authorises a commercial fishing operation in the waters of the Determination Area as may be current at the date of this Determination;
- (g) the rights and interests of the Ports Corporation of Queensland as an entity exercising statutory powers in respect of that part of the land and waters of the Determination Area within the limits of the Port of Weipa;
- (h) any rights of the public arising under the common law to fish and navigate in any tidal navigable river or tidal waters of the Determination Area; and
- (i) any other rights and interests held by or under the Crown by the force and operation of the laws of the State and the Commonwealth as may be current at the date of this Determination.

7. In relation to the following areas within the Determination Area:

- (a) section 47A(1)(b)(i) of the *Native Title Act 1993* (Cth) applies to the land and waters comprising the Aurukun Shire Lease;
- (b) section 47A(1)(b)(ii) of the *Native Title Act 1993* (Cth) applies to the land and waters comprising the Merapah Lease, the Pormpuraaw DOGIT and the Napranum DOGIT; and
- (c) section 47B(1)(b) of the *Native Title Act 1993* (Cth) applies to the land and waters comprising Lot 2 on Plan SP161882.

8. The relationship between the native title rights and interests and the other rights and interests described in paragraph 6 (“the other rights and interests”) is that:

- (a) to the extent that the other rights and interests are inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title continues to exist in its entirety but the native title rights and interests have no effect in relation to the other rights to the extent of the inconsistency for so long as the other rights and interests exist; and
- (b) for avoidance of doubt, any activity that is required or permitted by or under, and done in accordance with, the other rights and interests or any activity that is associated with or incidental to, such an activity, prevails over the native title rights and interests and any exercise of the native title rights and interests, but does not extinguish them.

9. The native title rights and interests confer, subject to paragraph 5 and the rights and interests identified in paragraph 6, possession, occupation, use and enjoyment of the Determination Area, other than the flowing, tidal and underground waters, on the Native Title Holders to the exclusion of all others.

10. The words and expressions used in this determination have the same meanings as they have in Part 15 of the *Native Title Act 1993* (Cth) except for the following defined expressions:

“Determination Area” means the land and waters within the area described and shown in Schedule One to this Determination;

“fish” has the meaning attributed to it in the *Fisheries Act 1994* (Qld);

“flowing, tidal and underground waters” means:

- (a) water in a watercourse, lake or spring;
- (b) underground water, being artesian water, sub-artesian water and water from an underground source of supply;
- (c) water forming part of the sea ordinarily within the ebb and flow of the tide at spring tides,

but, except where the phrase is used in paragraph 3, only extends to underground water accessed by traditional means.

“forest products” has the meaning attributed to it in the *Forestry Act 1959* (Qld);

“lake” means a natural collection of water including a lagoon, swamp or marsh whether permanent or intermittent;

“laws of the State and the Commonwealth” means the common law and the laws of the State and the Commonwealth of Australia, and includes legislation, regulations, statutory instruments, local planning instruments and local laws;

“natural resources” means:

- (a) any plant and animal (other than fish), including shells and forest products, found on, or in the land and waters of the Determination Area from time to time, and flints, clays, soil, sand, gravel and rock on or below the surface of Determination Area and all other matter comprising the Determination Area;

but does not include:

- (b) minerals as defined in the *Minerals Resources Act 1989* (Qld) and petroleum as defined in the *Petroleum Act 1923* (Qld); or
- (c) flowing, tidal and underground waters;

“plant” and **“animal”** have the meanings attributed to them in the *Nature Conservation Act*

1992 (Qld);

“**spring**” means the land to which water rises naturally from below the ground and the land over which the water then flows; and

“**watercourse**” means a river, creek or stream in which water flows permanently or intermittently.

AND THE COURT FURTHER ORDERS THAT

11. The native title is not to be held in trust.
12. Ngan Aak Kunch Aboriginal Corporation is to:
 - (a) be the prescribed body corporate for the purposes of s.57(2) of the *Native Title Act 1993* (Cth); and
 - (b) perform the functions mentioned in s.57(3) of the *Native Title Act 1993* (Cth) after becoming a registered native title body corporate.
13. This determination of native title is to take effect on the registration of the agreement referred to in paragraph 6(e) on the Register of Indigenous Land Use Agreements.
14. In the event that the agreement referred to in paragraph 6(e) is not registered on the Register of Indigenous Land Use Agreements within six (6) months of the date of this order or such later time as this Court may order, the matter is to be listed for further directions.

NATIVE TITLE DETERMINATION QG6001/98

(Wik and Wik Way Native Title Determination No. 2)

SCHEDULE ONE

(“Determination Area” – where native title is determined to exist)

“Determination Area” is the land and waters within the area described and shown on the plan in Annexure A, being Lots 1 to 6 (inclusive) on Crown Plan AP9682 covering Lot 3819 on PH2262, part of Lot 1 on SC211, part of Lot 5 on LK2, part of Lot 2 on WP50, Lot 10 on WP50, Lot 11 on WP50, Lot 12 on SP135863 and Lot 2 on SP161882, and includes the land and waters inland of the high water mark at mean Spring tide of the main sea of the Gulf of Carpentaria but does not include:

- (a) the land and waters described in Schedule Two;
- (b) that part of the land and waters comprising the Aurukun Shire Lease within the area covered by a corridor 15 metres either side of the centre line of the present alignment of the existing road which connects the town of Aurukun to the Peninsula Development Road as described and shown on Lot 4 on Crown Plan AP9682; and
- (c) minerals as defined in the *Minerals Resources Act 1989* (Qld) or petroleum as defined in the *Petroleum Act 1923* (Qld).

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NATIVE TITLE DETERMINATION QG6001/98

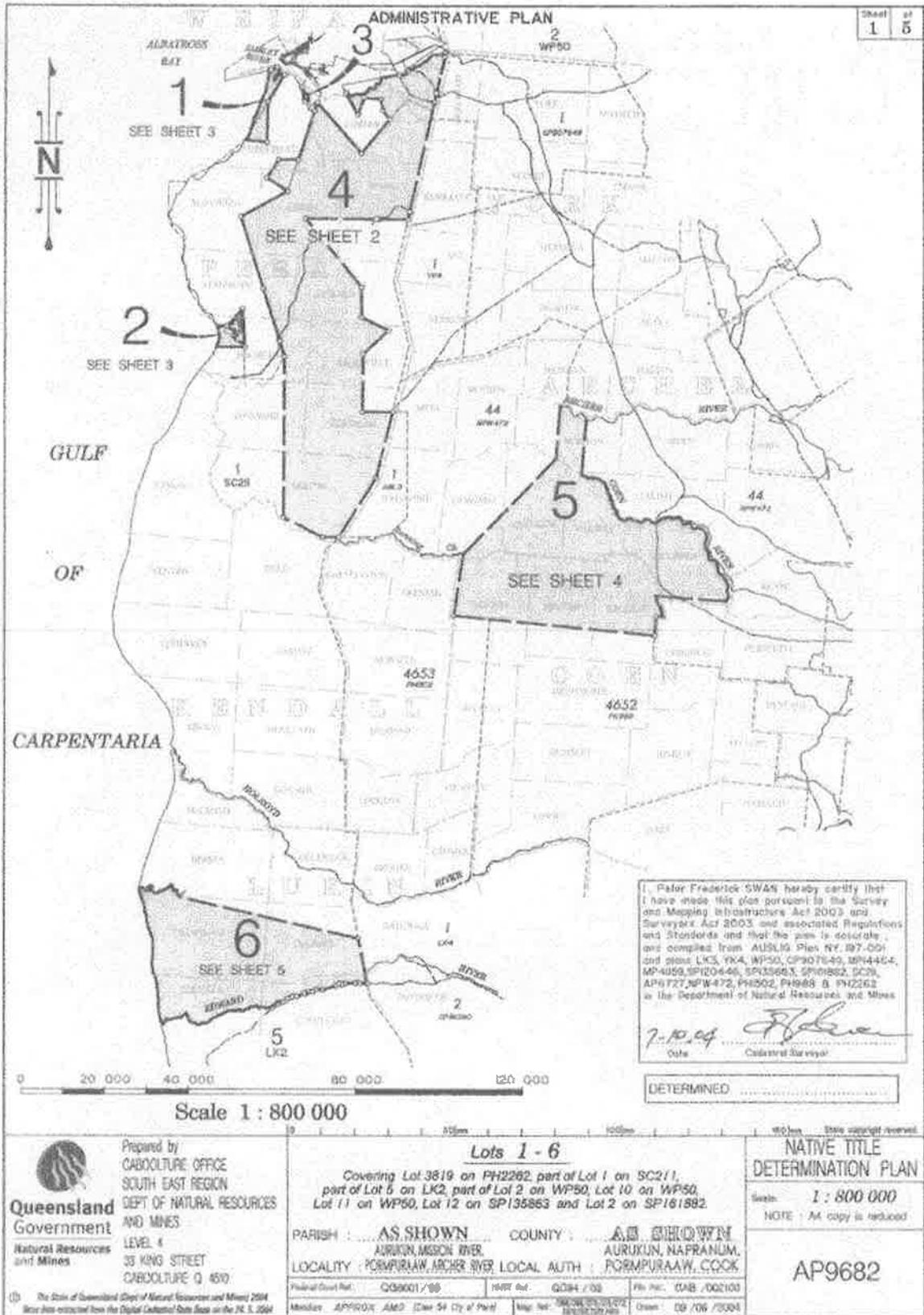
(Wik and Wik Way Native Title Determination No. 2)

ANNEXURE A

THE DETERMINATION AREA

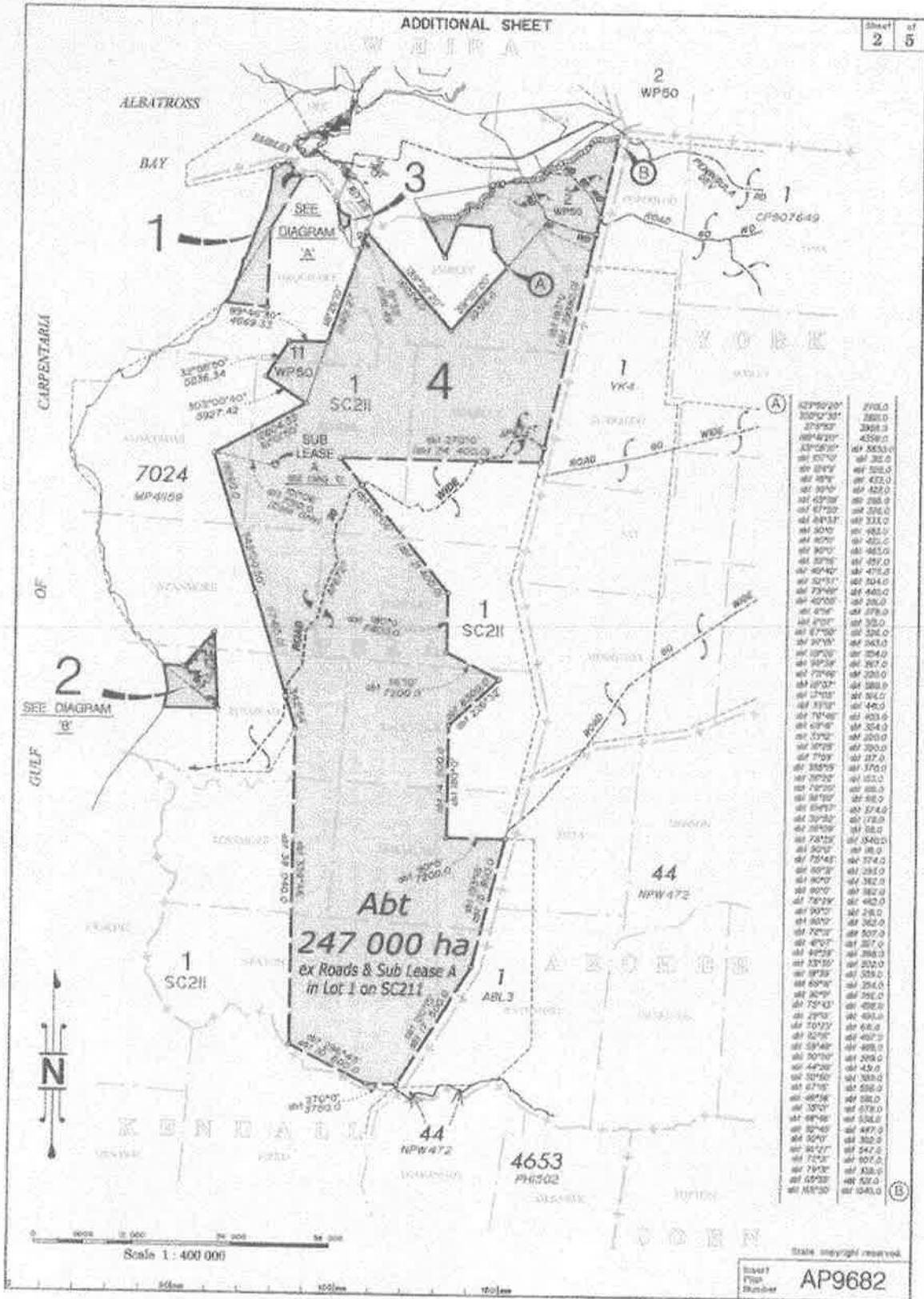
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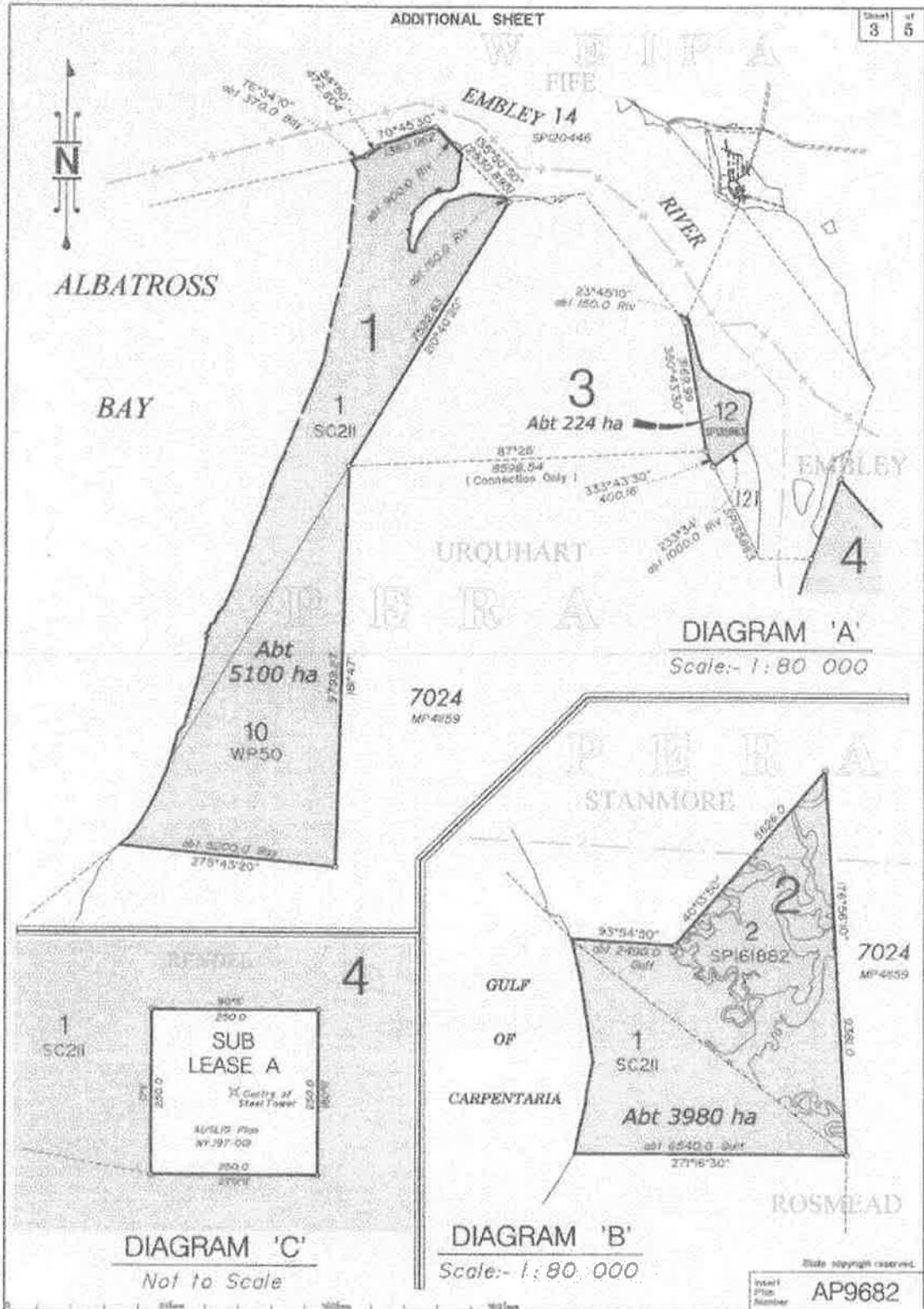


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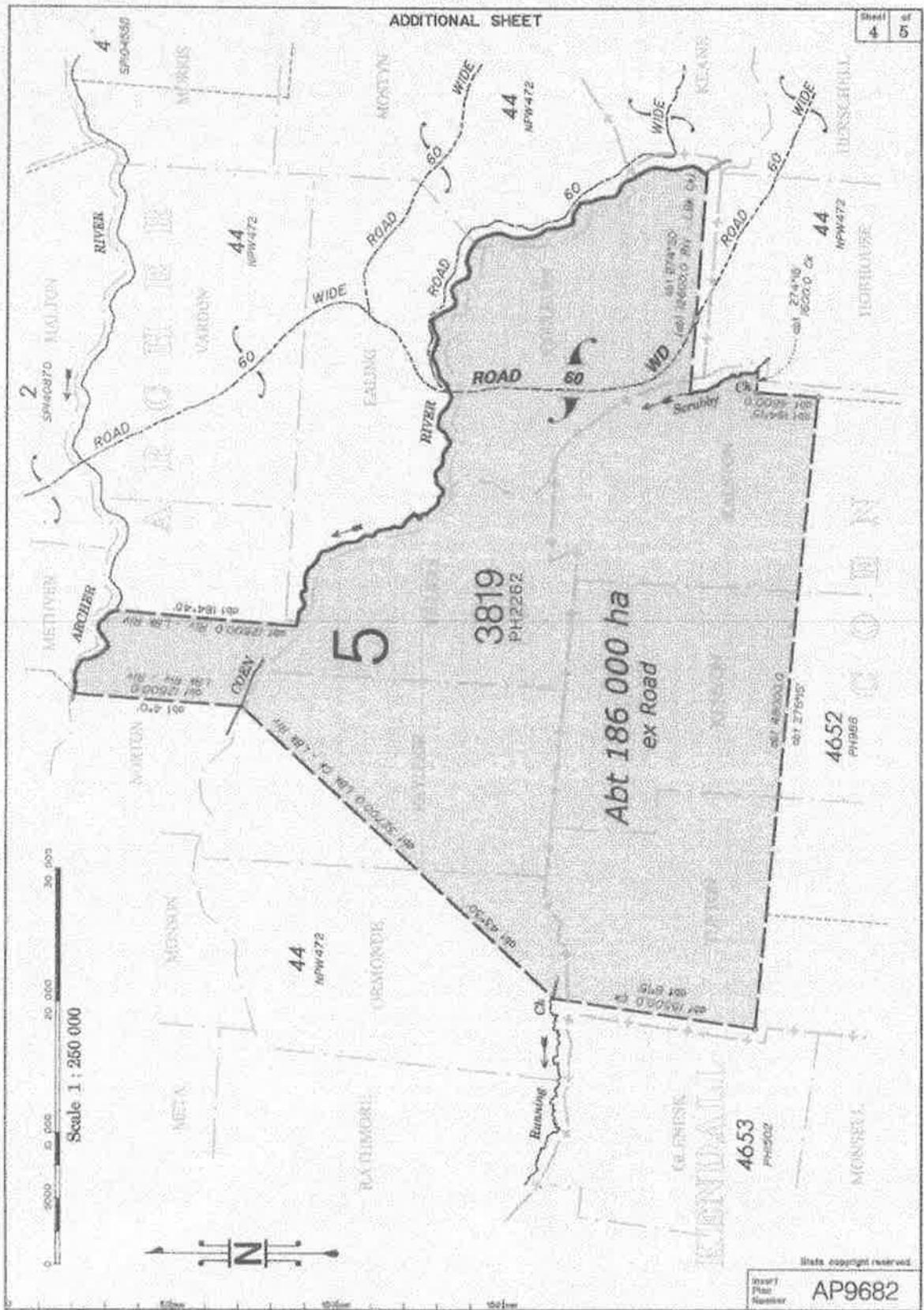
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NATIVE TITLE DETERMINATION QG6001/98

(Wik and Wik Way Native Title Determination No.2)

SCHEDULE TWO

(Areas excluded from the Determination Area)

The land and waters within the area the subject of the road traversing the Merapah Lease as described and shown on Lot 5 on Crown Plan AP9682, the two roads traversing part of the Napranum DOGIT as described and shown on the northerly section of Lot 4 on Crown Plan AP9682 and Sub-lease A on the Aurukun Shire Lease as described and shown on Lot 4 on Crown Plan AP9682 are excluded from the Determination Area in accordance with section 61A of the *Native Title Act 1993* (Cth) (and section 23B(7) of the *Native Title Act 1993* (Cth) and sections 20 and 21 of the *Native Title (Queensland) Act 1993* (Qld)) because they are areas where previous exclusive possession acts have occurred, native title has been extinguished in relation to the whole of these areas and no claimant application to these areas can be made.

Signed by AustLII

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SCHEDULE B

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION

No. QG 6001 of 1998

PARTIES:

ANTHONY KERINDUN, SILAS WOLMBY, VICTOR KUUKUMU LAWRENCE, GLADYS TYBINGOOMPA, HOGAN SHORTJOE and ROBERT BENON YEIUM HOLROYD on their own behalf and on behalf of the WIK and WIK WAY PEOPLES

Applicant

AND:

STATE OF QUEENSLAND

COMMONWEALTH OF AUSTRALIA

COUNCIL OF THE SHIRE OF AURUKUN

PORMPURAAW ABORIGINAL COUNCIL

NAPRANUM ABORIGINAL COUNCIL

EDDIE HOLROYD

CAMERON CLIVE QUARTERMAINE & DOREEN RUTH QUARTERMAINE

MERLUNA CATTLE STATION PTY LIMITED

RICHARD MATTHEW PRICE

ROBERT JOHN FRASER

COOK SHIRE COUNCIL

PORTS CORPORATION OF QUEENSLAND

DARCY THOMAS BYRNES, RAYLEE FRANCES BYRNES, VICTOR PATRICK BYRNES & CAROLE LEIGH BYRNES

TELSTRA CORPORATION LIMITED

A NUMBER OF COMMERCIAL FISHING AUTHORITY HOLDERS

CAPE YORK LAND COUNCIL

Respondents

[Non-exclusive Areas determination]

ORDER

WIK NATIVE TITLE DETERMINATION No. 3

JUDGE MAKING ORDER: JUSTICE COOPER

WHERE MADE: AURUKUN

DATE OF ORDER: 13 OCTOBER 2004

THE COURT NOTES THAT:

- A. The Applicant has brought Native Title Determination Application QG6001/98 (“the Application”) which relates to an area which includes the land and waters the subject of the proposed determination.
- B. On 3 October 2000 a determination that native title exists was made by consent by the Federal Court of Australia in relation to particular land and waters known as the “Aboriginal areas”, being Part A of the area covered by the Application.
- C. The Applicant, the State of Queensland, the Commonwealth of Australia, Darcy Thomas Byrnes, Raylee Frances Byrnes, Victor Patrick Byrnes and Carole Leigh Byrnes (“the Holroyd River Lessee”), Richard Matthew Price (“the Southwell Lessee”), Robert John Fraser, Cook Shire Council, Telstra Corporation Limited, Ports Corporation of Queensland, Napranum Aboriginal Council, Pormpuraaw Aboriginal Council, Council of the Shire of Aurukun, Cameron Clive Quartermaine and Doreen Ruth Quartermaine, Merluna Cattle Station Pty Limited, Cape York Land Council and a number of commercial fishing authority holders (“those parties”) have reached an agreement as to the terms of a determination of native title to be made in relation to particular land and waters covered by the Application.
- D. Those parties have agreed to the Federal Court of Australia making a consent order for a determination that native title exists in relation to the Determination Area, as defined in Schedule One to the attached Determination.
- E. Those parties acknowledge that the effect of this Determination is that the Wik and Wik Way Peoples, in accordance with the traditional laws acknowledged and traditional customs observed by them, have a right as against the whole world to be acknowledged as the

native title holders for the Determination Area.

- F. Those parties have agreed that the Determination Area has in the past been subject to acts which have partially extinguished native title rights and interests.
- G. The traditional laws acknowledged and traditional customs observed by the Wik and Wik Way Peoples include the authority as between Aboriginal people to:
- (e) resolve disputes about who is or who is not a Wik person or a Wik Way person;
 - (f) determine as between Wik and Wik Way Peoples what are the particular native title rights and interests that are held by particular Wik and Wik Way Peoples in relation to particular parts of the Determination Area;
 - (g) exclude particular Wik and Wik Way Peoples from the exercise of particular native title rights and interests in relation to particular parts of the Determination Area; and
 - (h) resolve disputes between Aboriginal people concerning native title rights and interests in relation to the Determination Area, with the assistance of native title holders of adjoining areas where such assistance is necessary.
- H. Those parties have requested that the Court hear and determine that part of the proceeding that relates to the Determination Area.
- I. No nomination pursuant to s.56(2) of the *Native Title Act 1993 (Cth)* in regard to the holding of native title in trust has been made.
- J. A representative of the Native Title Holders has nominated Ngan Aak Kunch Aboriginal Corporation, an Aboriginal association incorporated pursuant to the *Aboriginal Councils and Associations Act 1976 (Cth)*, to be a prescribed body corporate for the purposes of s.57(2) of the *Native Title Act 1993 (Cth)* and, after becoming a registered native title body corporate, to perform the functions mentioned in s.57(3) of the *Native Title Act 1993 (Cth)*.

Being satisfied that a determination in the terms sought by those parties would be within the power of the Court and, it appearing to the Court appropriate to do so and by the consent of those parties:

THE COURT ORDERS, DECLARES AND DETERMINES THAT:

1. Native title exists in relation to the Determination Area.
2. The native title is held by the Wik and Wik Way Peoples in accordance with the traditional laws acknowledged and traditional customs observed by them (“the Native Title Holders”)

as common law holders.

3. The nature and extent of the native title rights and interests in relation to the Determination Area, other than the flowing and underground waters, are, subject to paragraph 5 and the rights and interests identified in paragraph 7, non-exclusive rights to:

- (a) be present on, use and enjoy the Determination Area;
- (b) make use of the Determination Area by:
 - (i) hunting and gathering on, in and from the Determination Area;
 - (ii) conducting ceremonies on the Determination Area;
 - (iii) being buried on, and burying Native Title Holders on, the Determination Area;
 - (iv) maintaining springs and wells in the Determination Area where underground water rises naturally, for the sole purpose of ensuring the free flow of water;
- (c) take, use and enjoy the natural resources found on or within the Determination Area;
- (d) maintain and protect by lawful means those places of importance and areas of significance to the Native Title Holders under their traditional laws and customs in the Determination Area; and
- (e) use and enjoy the Determination Area and its natural resources for the purposes of teaching, communicating and maintaining cultural, social, environmental, spiritual and other knowledge, traditions, customs and practices of the Native Title Holders in relation to the Determination Area,

and the right to inherit and succeed to the native title rights and interests.

4. The nature and extent of the native title rights and interests in relation to the flowing and underground waters of the Determination Area are that, subject to paragraph 5 and the rights and interests identified in paragraph 7, they confer on the Native Title Holders non-exclusive rights to:

- (a) hunt, gather and fish on, in and from the flowing and underground waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs;

(b) take, use and enjoy the flowing and underground waters and natural resources and fish in such waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs;

and, to avoid any doubt, the rights to take, use and enjoy the flowing and underground waters and natural resources and fish in such waters are only rights to do so for non-commercial purposes.

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

- (a) the laws of the State and the Commonwealth; and
- (b) the traditional laws acknowledged and traditional customs observed by the Native Title Holders.

6. Notwithstanding anything in paragraphs 3 and 4, the native title rights and interests in relation to the Determination Area do not extend to a right to control access to or a right to control the use of the Determination Area.

7. The nature and extent of any other interests in relation to the Determination Area (or the respective parts thereof identified below) are:

- (a) the rights and interests of:
 - (i) the lessee and others under the term lease for pastoral purposes known as Strathburn Holding dated 23 January 1964, being Title Reference No. 17668099 comprising Lot 4149 on Crown Plan PH31 (“the Strathburn Lease”);
 - (ii) the lessee and the Native Title Holders under a deed of agreement dated 8 October 2004 between the Gregory Paul Jenkins and Margaret Glennie Atkinson as lessees of the Strathburn Lease, the State of Queensland and the Native Title Holders;
 - (iii) the lessee and others under the term lease for pastoral purposes known as Holroyd River Holding dated 27 March 1975, being Title Reference No. 17668104 comprising Lot 4652 on Crown Plan PH988 (“the Holroyd River Lease”);
 - (iv) the lessee and the Native Title Holders under a deed of agreement dated 8 October 2004 between the Holroyd River Lessee, the State of Queensland

- and the Native Title Holders;
- (v) the lessee and others under the term lease for pastoral purposes known as Southwell Pastoral Development Holding dated 19 February 1987, being Title Reference No. 17668135 comprising Lot 1 on Crown Plan LK4 (“the Southwell Lease”);
 - (vi) the lessee and the Native Title Holders under a deed of agreement dated 8 October 2004 between the Southwell Lessee, the State of Queensland and the Native Title Holders;
- (b) the rights and interests of Telstra Corporation Limited:
- (i) as the owner and operator of telecommunication facilities installed within the Determination Area;
 - (ii) created pursuant to the *Post and Telegraph Act 1901* (Cth), the *Telecommunications Act 1975* (Cth), the *Australian Telecommunications Corporation Act 1989* (Cth), the *Telecommunications Act 1991* (Cth) and the *Telecommunications Act 1997* (Cth); and
 - (iii) for its employees, agents or contractors to access its telecommunication facilities in, and in the vicinity of the Determination Area, in the performance of their duties;
- (c) the rights and interests of Cook Shire Council under its local government jurisdiction and functions and as an entity exercising statutory powers including its interests under an Indigenous Land Use Agreement dated 11 October 2004 between the Native Title Holders and Cook Shire Council;
- (d) any rights or interest of the holder of an authority issued under the *Fisheries Act 1994* (Qld) that authorises a commercial fishing operation in the waters of the Determination Area as may be current at the date of this Determination;
- (e) any other rights and interests held by or under the Crown by the force and operation of the laws of the State and the Commonwealth as may be current at the date of this Determination.

8. The relationship between the native title rights and interests and the other rights and interests described in paragraph 7 (“the other rights and interests”) is that:

- (a) the other rights and interests continue to have effect; and
- (b) for avoidance of doubt, any activity that is required or permitted by or under, and done in accordance with, the other rights and interests or any activity that is associated with or incidental to, such an activity, prevails over the native title rights and interests and any exercise of the native title rights and interests, but does not extinguish them.

9. The native title rights and interests do not confer possession, occupation, use and enjoyment of the Determination Area on the Native Title Holders to the exclusion of all others.

10. The words and expressions used in this determination have the same meanings as they have in Part 15 of the *Native Title Act 1993* (Cth) except for the following defined words and expressions:

“Determination Area” means the land and waters within the area described and shown in Schedule One;

“fish” has the meaning attributed to it in the *Fisheries Act 1994 (Qld)*;

“flowing and underground waters” means:

- (a) water in a watercourse, lake or spring;
- (b) underground water, being artesian water, sub-artesian water and water from an underground source of supply,

but, except where the phrase is used in paragraph 3, only extends to underground water accessed by traditional means;

“forest products” has the meaning attributed to it in the *Forestry Act 1959 (Qld)*;

“lake” means a natural collection of water including a lagoon, swamp or marsh whether permanent or intermittent;

“laws of the State and the Commonwealth” means the common law and the laws of the State and the Commonwealth of Australia, and includes regulations, statutory instruments, local planning instruments and local laws; and

“natural resources” means:

- (a) any plant and animal (other than fish), including shells and forest products,

found on, or in the land and waters of the Determination Area from time to time, and flints, clays, soil, sand, gravel and rock on or below the surface of the Determination Area and all other matter comprising the Determination Area;

but does not include:

- (b) minerals as defined in the *Minerals Resources Act 1989* (Qld) and petroleum as defined in the *Petroleum Act 1923* (Qld); and
- (c) flowing and underground waters;

“plant” and “animal” have the meanings attributed to them in the *Nature Conservation Act 1992* (Qld);

“spring” means the land to which water rises naturally from below the ground and the land over which the water then flows; and

“watercourse” means a river, creek or stream in which water flows permanently or intermittently.

AND THE COURT FURTHER ORDERS THAT

11. The native title is not to be held in trust.
12. Ngan Aak Kunch Aboriginal Corporation is to:
 - (a) be the prescribed body corporate for the purposes of s.57(2) of the *Native Title Act 1993* (Cth); and
 - (b) perform the functions mentioned in s.57(3) of the *Native Title Act 1993* (Cth) after becoming a registered native title body corporate.
13. This determination of native title is to take effect on the registration of the agreements referred to in paragraphs 7(a)(ii), 7(a)(iv), 7(a)(vi) and 7(c) on the Register of Indigenous Land Use Agreements.
14. In the event that the agreements referred to in paragraph 7(a)(ii), 7(a)(iv), 7(a)(vi) and 7(c) are not registered on the Register of Indigenous Land Use Agreements within six (6) months of the date of this order or such later time as this Court may order, the matter is to be listed for further directions.

Signed by AustLII

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Native Title Determination QG6001/98

(Wik Native Title Determination No. 3)

SCHEDULE ONE

("Determination Area" - where native title is determined to exist)

"Determination Area" is the land and waters within the area described and shown on the plan in Annexure A, being Lots 7 and 8 on Crown Plan AP9681 covering Lot 1 on ABL3, Lot 1 on LK4, Lot 4652 on PH988 and part of Lot 4149 on PH31, but does not include:

- (a) the land and waters described in Schedule Two; and
- (b) minerals as defined in the *Minerals Resources Act 1989* (Qld) or petroleum as defined in the *Petroleum Act 1923* (Qld).

Signed by AustLII

37

Native Title Determination QG6001/98

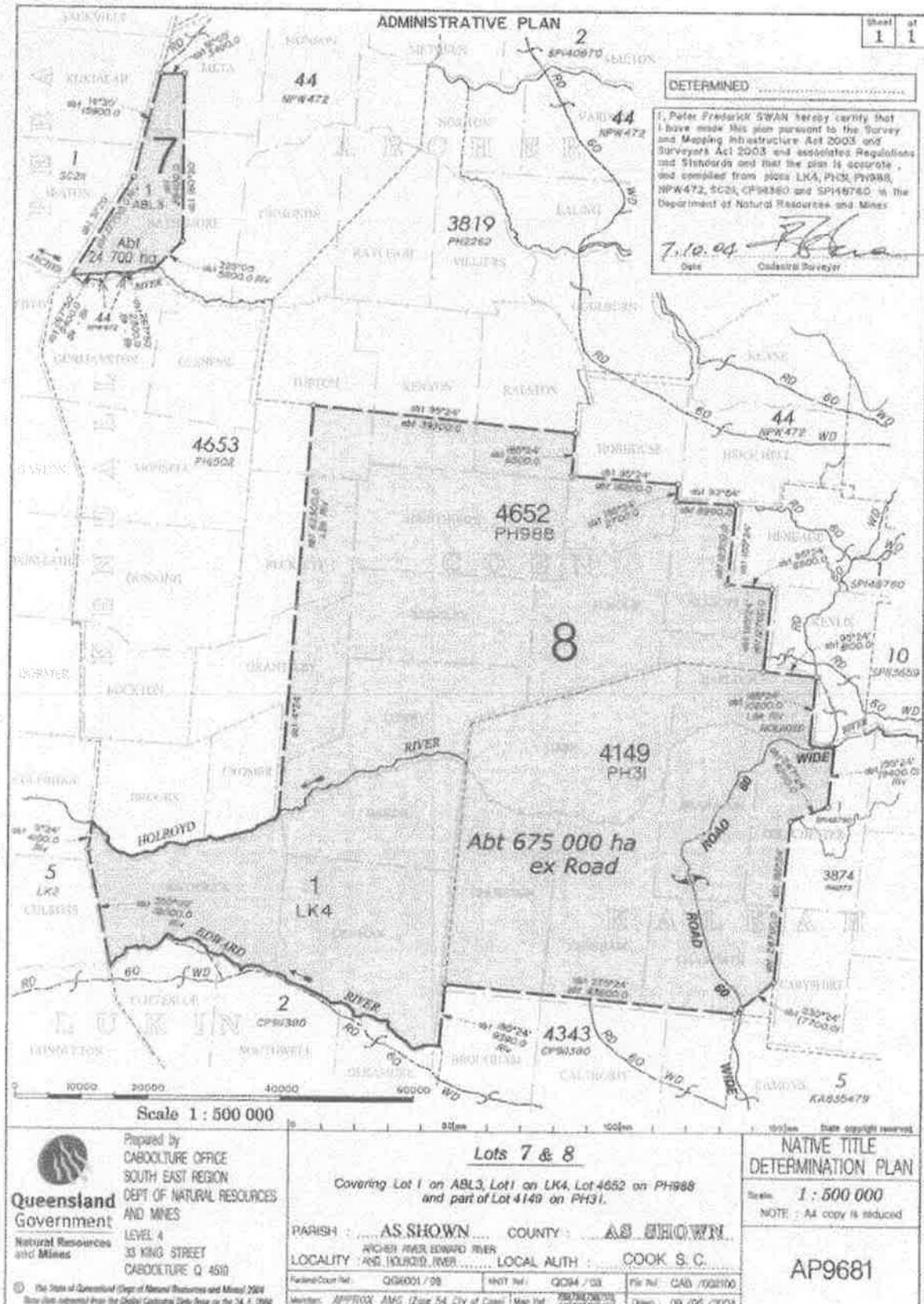
(Wik Native Title Determination No. 3)

ANNEXURE A to SCHEDULE ONE

DETERMINATION AREA

Signed by AustLII

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Signed by AustLII

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Native Title Determination QG6001/98
(Wik Native Title Determination No. 3)

SCHEDULE TWO

(Areas excluded from the Determination Area)

The land and waters within the area the subject of the road traversing the Strathburn Lease as described and shown on Lot 8 on Crown Plan AP9681 are excluded from the Determination Area in accordance with section 61A of the *Native Title Act 1993* (Cth) (and section 23B(7) of the *Native Title Act 1993* (Cth) and sections 20 and 21 of the *Native Title (Queensland) Act 1993* (Qld) because it is an area where previous exclusive possession acts have occurred, native title has been extinguished in relation to the whole of the area and no claimant application to the area can be made.

Signed by AustLII

FEDERAL COURT OF AUSTRALIA

Wik Peoples v State of Queensland [2004] FCA 1306

CORRIGENDUM

**ANTHONY KERINDUN, SILAS WOLMBY, VICTOR KUUKUMU LAWRENCE,
GLADYS TYBINGOOMPA, HOGAN SHORTJOE AND ROBERT BENON YEIUM
HOLROYD ON THEIR OWN BEHALF AND FOR AND ON BEHALF OF THE WIK
AND WIK WAY PEOPLES v STATE OF QUEENSLAND AND OTHERS**

No QG6001 of 1998

**COOPER J
AURUKUN
13 OCTOBER 2004 (CORRIGENDUM 15 OCTOBER 2004)**

- 2 -

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

QG6001 OF 1998

**BETWEEN: ANTHONY KERINDUN, SILAS WOLMBY, VICTOR
KUUKUMU LAWRENCE, GLADYS TYBINGOOMPA,
HOGAN SHORTJOE AND ROBERT BENON YEIUM
HOLROYD ON THEIR OWN BEHALF AND FOR AND ON
BEHALF OF THE WIK AND WIK WAY PEOPLES
APPLICANTS**

**AND: STATE OF QUEENSLAND
FIRST RESPONDENT**

**COMMONWEALTH OF AUSTRALIA
SECOND RESPONDENT**

**COUNCIL OF THE SHIRE OF AURUKUN
THIRD RESPONDENT**

**NAPRANUM ABORIGINAL COUNCIL
FOURTH RESPONDENT**

**PORMPURAAW ABORIGINAL COUNCIL
FIFTH RESPONDENT**

**COOK SHIRE COUNCIL
SIXTH RESPONDENT**

**PORTS CORPORATION OF QUEENSLAND
SEVENTH RESPONDENT**

**QUEENSLAND SEAFOOD INDUSTRY ASSOCIATION
EIGHTH RESPONDENT**

**CAPE YORK LAND COUNCIL
NINTH RESPONDENT**

**TELSTRA CORPORATION LIMITED
TENTH RESPONDENT**

**DARCY THOMAS BYRNES, RAYLEE FRANCES BYRNES,
VICTOR PATRICK BYRNES AND CAROLE LYN BYRNES
ELEVENTH RESPONDENT**

**ROBERT JOHN FRASER
TWELFTH RESPONDENT**

EDDIE HOLROYD

Signed by AustLII

- 3 -

FOURTEENTH RESPONDENT

**MERLUNA CATTLE STATION
FIFTEENTH RESPONDENT**

**RICHARD MATHEW PRICE
SIXTEENTH RESPONDENT**

**CAMERON CLIVE QUARTERMAINE AND DOREEN RUTH
QUARTERMAINE
SEVENTEENTH RESPONDENT**

JUDGE: COOPER J
DATE: 13 OCTOBER 2004 (CORRIGENDUM 15 OCTOBER 2004)
PLACE: AURUKUN

In the appearances section at the end of the judgment, delete:

'Counsel for the Commonwealth of
Australia:

The Honourable Phillip Ruddock MP,
Attorney-General'

I certify that the preceding paragraph
is a true copy of the Corrigendum to
the Reasons for Judgment of the
Honourable Justice Cooper.

Associate:

Dated: 15 October 2004

Signed by AustLII

FEDERAL COURT OF AUSTRALIA

Wik Peoples v State of Queensland [2004] FCA 1306

NATIVE TITLE – determination of – by consent – two determinations relating to exclusive areas and non-exclusive areas – whether order under s 87 of the *Native Title Act 1993* (Cth) appropriate

ANTHONY KERINDUN, SILAS WOLMBY, VICTOR KUUKUMU LAWRENCE, GLADYS TYBINGOOMPA, HOGAN SHORTJOE AND ROBERT BENON YEIUM HOLROYD ON THEIR OWN BEHALF AND FOR AND ON BEHALF OF THE WIK AND WIK WAY PEOPLES v STATE OF QUEENSLAND AND OTHERS

No QG6001 of 1998

**COOPER J
AURUKUN
13 OCTOBER 2004**

Signed by AustLII

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

QG6001 OF 1998

**BETWEEN: ANTHONY KERINDUN, SILAS WOLMBY, VICTOR
KUUKUMU LAWRENCE, GLADYS TYBINGOOMPA,
HOGAN SHORTJOE AND ROBERT BENON YEIUM
HOLROYD ON THEIR OWN BEHALF AND FOR AND ON
BEHALF OF THE WIK AND WIK WAY PEOPLES
APPLICANTS**

**AND: STATE OF QUEENSLAND
FIRST RESPONDENT**

**COMMONWEALTH OF AUSTRALIA
SECOND RESPONDENT**

**COUNCIL OF THE SHIRE OF AURUKUN
THIRD RESPONDENT**

**NAPRANUM ABORIGINAL COUNCIL
FOURTH RESPONDENT**

**PORMPURAAW ABORIGINAL COUNCIL
FIFTH RESPONDENT**

**COOK SHIRE COUNCIL
SIXTH RESPONDENT**

**PORTS CORPORATION OF QUEENSLAND
SEVENTH RESPONDENT**

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**RICHARD MATHEW PRICE
SIXTEENTH RESPONDENT**

**CAMERON CLIVE QUARTERMAINE AND DOREEN RUTH
QUARTERMAINE
SEVENTEENTH RESPONDENT**

JUDGE: COOPER J
DATE: 13 OCTOBER 2004
PLACE: AURUKUN

REASONS FOR JUDGMENT

Background

- 1 These proceedings seek a determination of native title under the *Native Title Act 1993* (Cth) ('the NTA'). The claim is made by the applicants for themselves and on behalf of the Wik and Wik Way Peoples. The original claim was filed on 24 March 1994.
- 2 In June 2000 it was ordered that the claim be determined in two parts: Parts A and B. The lands in Part A were confined to lands that had always been unallocated Crown lands or lands that had only ever been subject to forms of title granted for the benefit of Aboriginal peoples. On 3 October 2000 Drummond J determined by consent that native title existed in the lands and waters within Part A of the claim.
- 3 Part B of the claim comprised the balance of the lands and waters of the claim area. The lands and waters in Part B contained lands held under pastoral and mining titles.
- 4 To the credit of all parties to the claim, they have mediated the issues which arose under Part B to the point where they have agreed two consent determinations. Their agreement is subject to the Court being satisfied that it has the power to make the determinations sought and that it is proper to do so. One agreement concerns exclusive rights of possession, occupation, use and enjoyment of the lands and waters in certain parts of the claim area; the second concerns non-exclusive rights in other parts of the claim area.

Power of the Court

5 This Court has jurisdiction to hear and determine applications for a determination of native title in relation to an area for which there is no approved determination of native title: ss 13, 61 and 81 of the NTA. Division 1C of Part 4 of the NTA provides for agreements, to be made by some or all of the parties to an application, to settle the application or part of it.

6 Section 87 of the NTA provides that the Court may, if it is satisfied that such an order is within the power of the Court, make an order in, or consistent with, the terms of the parties' written agreement without holding a hearing.

7 Section 94A of the NTA requires that an order of this Court which makes a determination of native title must set out details of the matters mentioned in s 225 of that Act. Section 225 provides:

*'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.'

Original emphasis

Signed by AustLII

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Consideration of Agreements and Draft Determinations

- 8 In considering whether it is appropriate to make the orders which the parties seek, I have had the benefit of an affidavit and report of Dr Peter Sutton filed 15 September 2004. I have also read an earlier report dated 29 June 1997 prepared by Dr Sutton which was before Drummond J when his Honour made the consent determination in respect of Part A of the claim area. Dr Sutton is an Australian Research Council Professorial Fellow of the School of Social Sciences, University of Adelaide and the Division of Anthropology, South Australian Museum. He is also an Honorary Research Fellow of the Institute of Archaeology, University College, London. Dr Sutton has carried out studies of the Wik and Wik Way native title claimant group and worked with the members of that group and their predecessors since 1976. He is a specialist in the area of anthropological and linguistic research relating to Australian Aboriginal people and Aboriginal societies and he is eminently qualified to express the professional expert opinions which he does in his affidavit.
- 9 This is a case where there is a rich body of documented material which has been brought into existence over very many years. It establishes the existence of organised Aboriginal occupation and possession of the determination area extending back beyond the imposition of British sovereignty. It also establishes the continuity of an identifiable society of Aboriginal peoples having a connection with the lands and waters of the determination area in accordance with traditional laws which they acknowledged and traditional customs which they observed. Additionally, the content of these records, in terms of recorded Aboriginal names and language, enables the linguistic links to be made between the present claimants, their predecessors and the society which existed in the determination area at the time of sovereignty and the relationship of clan groups to particular parts of the determination area. There is also a history of long term field work and academic study in and of the determination area and its peoples which reveals a consistency and continuity in the research findings. This body of material enables the Court to make the findings as to the state of affairs which existed in the determination area at the time of sovereignty with greater confidence and to draw the inferences of connection and continuity between the present claimants and the state of affairs which existed at that earlier time.
- 10 The historical records of European contact with the claim area commence in 1606 with

Willem Jansz and the crew of the 'Duyfken' sailing down the west coast of Cape York Peninsula for about 350 kilometres and record the presence of, and contact with, Aboriginal peoples who inhabited the claim area. The record includes sightings and observations of Carstenz (1633), Matthew Flinders (1802), the Jardine brothers (1864), Pennefather (1880) and others leading up to the gold rushes in the mid 1870s.

- 11 In 1897 Archibald Meston, a Special Commissioner for Aborigines, visited the Embley River area and published an account of his visit and his contact with the various Aboriginal people he encountered in the area. The Weipa Mission was founded in 1898. The Aurukun Mission was established in 1904. In the same year, the Mitchell River Mission began at Trubanaman and in 1915 moved to Kowanyama. The Edward River Mission was commenced in 1938. The records kept by these missions, especially those kept by William and Geraldine MacKenzie at Aurukun from the 1920s to the 1960s, have enabled anthropologists to identify traditional clan estates within the claim area, to construct genealogies, and to demonstrate continuity of members of the claimant group to particular clan estates back to at least the early 1800s.
- 12 In his report Dr Sutton details the substantial anthropological work carried out in respect of the claim area and its peoples. The first active period of work was between 1927 and 1935. It included long term anthropological field work by McConnel based in Aurukun, Thomson also based in Aurukun and Sharp in the Mitchell River area and Edward River area. The second active period of anthropological study commenced in the 1960s. It has involved a considerable number of professional studies throughout the claim area and has been ongoing. The anthropological work has given rise to a substantial body of published and unpublished work spanning the period 1929 to 2000 which is referenced in Dr Sutton's reports. This work demonstrates that, despite European contact and the growth of the pastoral industry in the claim area, the predecessors of the claimant group and the members of the present claimant group continued their connection with their country and had cohesion as a social group with traditional laws and customs which they continued to acknowledge and observe. Indeed, it was the use of Aboriginal labour in the pastoral industry, which in part operated to keep together Aboriginal communities based on and around pastoral stations and to give to the young Aboriginal men and women the opportunity to travel over and learn about their country.

13 I accept the evidence and opinions contained in Dr Sutton's affidavit and in his two reports. I am satisfied that:

- (a) native title exists in relation to the lands and waters identified as Part B of the applicants' claim and being the areas identified as the Exclusive Areas and the Non-Exclusive Areas in the two draft determinations agreed to by the parties ('the Exclusive Areas and the Non-Exclusive Areas');
- (b) the members of the claimant group called the Wik and Wik Way Peoples are members of a society of peoples descended from the Aboriginal peoples who as a society at the time of sovereignty occupied the lands and waters identified as the Exclusive Areas and Non-Exclusive Areas in accordance with traditional laws and customs acknowledged and observed by them;
- (c) the laws and customs acknowledged and observed by the society at sovereignty are continued to be acknowledged and observed by the members of the claimant group and have been acknowledged and observed by their predecessors from the time of sovereignty to the present time;
- (d) the members of the claimant group and their predecessors through their continued acknowledgement and observance of the traditional laws and customs which existed at the time of sovereignty, have maintained since that time a connection to the Exclusive Areas and the Non-Exclusive Areas;
- (e) the native title rights and interests in the Exclusive Areas and the Non-Exclusive Areas are held by the persons who are or are entitled to be or become members of the claimant group called the Wik and Wik Way Peoples;
- (f) the nature and extent of the native title rights and interests in relation to the Exclusive Areas are as set out in pars 3, 4 and 5 of the agreed draft determination in respect of the Exclusive Areas; and
- (g) the nature and extent of the native title rights and interests in relation to the Non-Exclusive Areas are as set out in pars 3, 4, 5 and 6 of the agreed draft

Signed by AustLII

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determination in respect of the Non-Exclusive Areas.

- 14 I am also satisfied on the materials that there are other interests in and in relation to the Exclusive Areas and the Non-Exclusive Areas. Those interests and their relationship with the native title interests are set out in pars 6, 7, 8 and 9 of the agreed draft determination in respect of the Exclusive Areas and pars 7, 8 and 9 of the agreed draft determination in respect of the Non-Exclusive Areas.

Orders and Determinations

- 15 The proposed Orders, which are consistent with the terms agreed by the parties, recognise that the Wik and Wik Way Peoples as the common law holders of the native title are entitled to possess, occupy, use and enjoy the land and waters of the Exclusive Areas and to enjoy the native title rights and interests in the Non-Exclusive Areas, in accordance with their traditional laws and customs. The proposed Orders also recognise the other interests in the lands and waters in the determination area and the relationship of those interests with the native title interests. The proposed Order contains the elements required by s 94A and s 225 of the NTA.
- 16 I am satisfied that it is within the power of the Court to make the Orders sought and that these Orders can appropriately be made to give effect to the parties' agreement without a full hearing of the applicants' claim. I therefore make the Orders and determinations attached as Schedules A and B to these reasons.

I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Cooper.

Associate:

Dated: 13 October 2004

Signed by AustLII

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Counsel for the Applicants:	R Blowes SC
Solicitor for the Applicants:	Ebsworth & Ebsworth
Solicitor for the State of Queensland:	Crown Solicitor
Counsel for the Commonwealth of Australia:	The Honourable Phillip Ruddock MP, Attorney-General
Solicitor for the Commonwealth of Australia:	Australian Government Solicitor
Solicitor for the Shire of Aurukun:	Bottoms English Solicitors
Solicitor for the Napranum Aboriginal Council:	S Coates
Solicitor for the Pormpuraaw Aboriginal Council:	Farellys Lawyers
Solicitor for the Cook Shire Council:	MacDonnells Solicitors
Solicitor for the Ports Corporation of Queensland:	McCullough Robertson
Solicitor for the Queensland Seafood Industry Association:	Gore & Associates
Solicitor for the Cape York Land Council:	Cape York Land Council Aboriginal Corporation
Solicitor for the Telstra Corporation Limited:	Blake Dawson Waldron
Solicitor for Darcy Thomas Byrnes, Raylee Frances Byrnes, Victor Patrick Byrnes & Carole Lyn Byrnes:	Williams Love & Nicol Lawyers
Solicitor for Robert John Fraser:	Williams Love & Nicol Lawyers
Solicitor for Eddie Holroyd:	Williams Love & Nicol Lawyers
Solicitor for Merluna Cattle Station:	Thynne & Macartney
Solicitor for Richard Mathew Price:	Williams Love & Nicol Lawyers

Signed by AustLII

- 9 -

Solicitor for Cameron Clive
Quartermaine and Doreen Ruth
Quartermaine:

Thynne & Macartney

Date of Judgment:

13 October 2004

Signed by AustLII

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SCHEDULE A

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION

No. QG 6001 of 1998

PARTIES:

ANTHONY KERINDUN, SILAS WOLMBY, VICTOR KUUKUMU LAWRENCE, GLADYS TYBINGOOMPA, HOGAN SHORTJOE and ROBERT BENON YEIUM HOLROYD on their own behalf and for and on behalf of the WIK and WIK WAY PEOPLES

APPLICANT

AND:

STATE OF QUEENSLAND

COMMONWEALTH OF AUSTRALIA

COUNCIL OF THE SHIRE OF AURUKUN

NAPRANUM ABORIGINAL COUNCIL

PORMPURAAW ABORIGINAL COUNCIL

EDDIE HOLROYD

CAMERON CLIVE QUARTERMAINE & DOREEN RUTH QUARTERMAINE

MERLUNA CATTLE STATION PTY LIMITED

RICHARD MATTHEW PRICE

ROBERT JOHN FRASER

COOK SHIRE COUNCIL

PORTS CORPORATION OF QUEENSLAND

DARCY THOMAS BYRNES, RAYLEE FRANCES BYRNES, VICTOR PATRICK BYRNES &
CAROLE LEIGH BYRNES

TELSTRA CORPORATION LIMITED

A NUMBER OF COMMERCIAL FISHING AUTHORITY HOLDERS

CAPE YORK LAND COUNCIL

RESPONDENT

[Exclusive Areas determination]

ORDER

WIK AND WIK WAY NATIVE TITLE DETERMINATION No. 2

JUDGE MAKING ORDER: JUSTICE COOPER

WHERE MADE: AURUKUN

DATE OF ORDER: 13 OCTOBER 2004

THE COURT NOTES THAT:

- A. The Applicant has brought Native Title Determination Application QG6001/98 (“the Application”) which relates to an area which includes the land and waters the subject of the proposed determination.
- B. On 3 October 2000 a determination that native title exists was made by consent by the Federal Court of Australia in relation to particular land and waters known as the “Aboriginal areas”, being Part A of the area covered by the Application.
- C. The Applicant, State of Queensland, Commonwealth of Australia, Council of the Shire of Aurukun, Napranum Aboriginal Council, Pormpuraaw Aboriginal Council, Cook Shire Council, Ports Corporation of Queensland, Eddie Holroyd, Telstra Corporation Limited, Cameron Clive Quartermaine and Doreen Ruth Quartermaine, Merluna Cattle Station Pty Limited, Richard Matthew Price, Robert John Fraser, Darcy Thomas Byrnes, Raylee Frances Byrnes, Victor Patrick Byrnes and Carole Leigh Byrnes, Cape York Land Council and a number of commercial fishing authority holders (“those parties”) have reached an agreement as to the terms of a determination of native title to be made in relation to particular land and waters covered by the Application.
- D. Those parties have agreed to the Federal Court of Australia making a consent order for a determination that native title exists in relation to the Determination Area, as defined in Schedule One to the attached Determination.
- E. Those parties have agreed that:
- (a) s.47A(1)(b)(ii) of the *Native Title Act 1993* (Cth) applies to the land and waters within the Determination Area the subject of the term lease for pastoral purposes dated 9 April 1959 known as Coen River Pastoral Holding, being Title Reference No. 17668093 comprising Lot 3819 on Crown Plan PH2262 (“the Merapah Lease”) in that when the Application was made, the Merapah Lease was held expressly for

the benefit of or was held on trust, expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders and one or more members of the native title claim group occupied the area;

- (b) s.47A(1)(b)(i) of the *Native Title Act 1993* (Cth) applies to the land and waters within the Determination Area the subject of the Lease (Aboriginal Lands) No.1 dated 18 January 1979 comprising Lot 1 on Plan SC211 ("the Aurukun Shire Lease") in that when the Application was made the Aurukun Shire Lease was in force over those areas under the *Local Government (Aboriginal Lands) Act 1978* that makes provision for the grant of such a lease only to or for the benefit of Aboriginal peoples or Torres Strait Islanders and one or more members of the native title claim group occupied the area;
- (c) s.47A(1)(b)(ii) of the *Native Title Act 1993* (Cth) applies to the land and waters within the Determination Area the subject of the Deed of Grant in Trust to the Napranum Aboriginal Council dated 27 October 1988, being Title Reference No. 21378037 comprising Lot 127 on Plan WP49, Lots 2, 4 to 11, 63, 65 and 66 on Plan WP50 and Lot 12 on Plan SP135863 ("the Napranum DOGIT") in that when the Application was made that area was held expressly for the benefit of Aboriginal peoples or Torres Strait Islanders and one or more members of the native title claim group occupied the area;
- (d) s.47B(1)(b) of the *Native Title Act 1993* (Cth) applies to the land and waters within the Determination Area comprising Lot 2 on Plan SP161882 in that when the Application was made that area was not covered by a freehold estate or a lease, or covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth or the State under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose, or subject to a resumption process, and one or more members of the native title claim group occupied the area; and
- (e) s.47A(1)(b)(ii) of the *Native Title Act 1993* (Cth) applies to the land and waters within the Determination Area the subject of the Deed of Grant in Trust to the Pormpuraaw Aboriginal Council dated 23 July 1987, being Title Reference No. 21345063 comprising Lot 5 on Plan LK2 and Lots 2 and 3 on Crown Plan KO8 ("the Pormpuraaw DOGIT") in that when the Application was made that area was held

expressly for the benefit of Aboriginal peoples or Torres Strait Islanders and one or more members of the native title claim group occupied the area.

- F. Those parties acknowledge that the effect of this Determination is that the Wik and Wik Way Peoples, in accordance with the traditional laws acknowledged and traditional customs observed by them, have a right as against the whole world to be acknowledged as the native title holders for the Determination Area.
- G. The traditional laws acknowledged and traditional customs observed by the Wik and Wik Way Peoples include the authority as between Aboriginal people to:
- (a) resolve disputes about who is or who is not a Wik person or a Wik Way person;
 - (b) determine as between Wik and Wik Way Peoples what are the particular native title rights and interests that are held by particular Wik and Wik Way Peoples in relation to particular parts of the Determination Area;
 - (c) exclude particular Wik and Wik Way Peoples from the exercise of particular native title rights and interests in relation to particular parts of the Determination Area; and
 - (d) resolve disputes between Aboriginal people concerning native title rights and interests in relation to the Determination Area, with the assistance of native title holders of adjoining areas where such assistance is necessary.
- H. Those parties have requested that the Court hear and determine that part of the proceeding that relates to the Determination Area.
- I. No nomination pursuant to s.56(2) of the *Native Title Act 1993* (Cth) in regard to the holding of native title in trust has been made.
- J. A representative of the Native Title Holders has nominated Ngan Aak Kunch Aboriginal Corporation, an Aboriginal association incorporated pursuant to the *Aboriginal Councils and Associations Act 1976* (Cth), to be a prescribed body corporate for the purposes of s.57(2) of the *Native Title Act 1993* (Cth) and, after becoming a registered native title body corporate, to perform the functions mentioned in s.57(3) of the *Native Title Act 1993* (Cth).

Being satisfied that a determination in the terms sought by those parties would be within the power of the Court and, it appearing to the Court appropriate to do so and by the consent of those parties:

THE COURT ORDERS, DECLARES AND DETERMINES THAT:

1. Native title exists in relation to the Determination Area.
2. The native title is held by the Wik and Wik Way Peoples in accordance with the traditional laws acknowledged and traditional customs observed by them ("the Native Title Holders") as common law holders.
3. The nature and extent of the native title rights and interests in relation to the Determination Area, other than the flowing, tidal and underground waters, are that, subject to paragraph 5 and but for the rights and interests identified in paragraph 6, they confer possession, occupation, use and enjoyment of the Determination Area on the Native Title Holders, including rights to do the following:
 - (a) speak for, on behalf of and authoritatively about the Determination Area;
 - (b) inherit and succeed to the native title rights and interests;
 - (c) give or refuse, and determine the terms of any permission to enter, remain on, use or occupy the Determination Area by others;
 - (d) make use of the Determination Area by:
 - (i) engaging in a way of life consistent with the traditional connection of the Native Title Holders to the Determination Area;
 - (ii) hunting and gathering on, in and from the Determination Area;
 - (iii) living on and erecting residences and other infrastructure on the Determination Area;
 - (iv) conducting ceremonies on the Determination Area;
 - (v) being buried on, and burying Native Title Holders on, the Determination Area;
 - (vi) maintaining and caring for springs, wells and other places in the Determination Area where underground water rises naturally, for the purpose of ensuring the free flow of water;
 - (e) take, use and enjoy the natural resources from the Determination Area;
 - (f) maintain and protect by lawful means those places of importance and areas of significance to the Native Title Holders under their traditional laws and customs in the Determination Area; and
 - (g) use and enjoy the Determination Area and its natural resources for the purposes of teaching, communicating and maintaining cultural, social, environmental, spiritual

and other knowledge, traditions, customs and practices of the Native Title Holders in relation to the Determination Area.

4. The nature and extent of the native title rights and interests in relation to the flowing, tidal and underground waters of the Determination Area are that, subject to paragraph 5 and the rights and interests identified in paragraph 6, they confer on the Native Title Holders non-exclusive rights to:

- (a) hunt, gather and fish on, in and from the flowing, tidal and underground waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs;
- (b) take, use and enjoy the flowing, tidal and underground waters and natural resources and fish in such waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs;

and, to avoid any doubt, the rights to take, use and enjoy the flowing, tidal and underground waters and natural resources and fish in such waters are only rights to do so for non-commercial purposes.

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

- (a) the laws of the State and the Commonwealth; and
- (b) the traditional laws acknowledged and traditional customs observed by the Native Title Holders.

6. The nature and extent of any other interests in relation to the Determination Area (or the respective parts thereof identified below) are:

- (a) the rights and interests of the lessee and others under a term lease for pastoral purposes dated 9 April 1959 known as Coen River Pastoral Holding, being Title Reference No. 17668093 comprising Lot 3819 on Crown Plan PH2262 ("the Merapah Lease");
- (b) the rights and interests of the lessee and others under Lease No 601426920, being former Special Lease No. 34/48011 dated 10 July 1986, comprising Lease A in Lot 5 on Plan LK2 as shown on Plan LK3;
- (c) the rights and interests of:
 - (i) the lessee and others under the Lease (Aboriginal Lands) No.1 dated 18 January 1979 comprising Lot 1 on Plan SC211 ("the Aurukun Shire Lease");

- (ii) the Council of the Shire of Aurukun as an entity exercising statutory powers in respect of the Aurukun Shire Lease, in particular, pursuant to the *Local Government (Aboriginal Lands) Act 1978* (Qld);
 - (iii) the grantee and others under the Deed of Grant in Trust dated 27 October 1988, being Title Reference No. 21378037 comprising Lot 127 on Plan WP49, Lots 2, 4 to 11, 63, 65 and 66 on Plan WP50 and Lot 12 on Plan SP135863 ("the Napranum DOGIT");
 - (iv) the Napranum Aboriginal Council as an entity exercising statutory powers in respect of the Napranum DOGIT, in particular, pursuant to the *Community Services (Aborigines) Act 1984* (Qld) and the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld);
 - (v) the grantee and others under the Deed of Grant in Trust dated 23 July 1987, being Title Reference No. 21345063 comprising Lot 5 on Plan LK2 and Lots 2 and 3 on Crown Plan KO8 ("the Pormpuraaw DOGIT");
 - (vi) the Pormpuraaw Aboriginal Council as an entity exercising statutory powers in respect of the Pormpuraaw DOGIT, in particular, pursuant to the *Community Services (Aborigines) Act 1984* (Qld) and the *Aboriginal and Torres Strait Islander (Land Holding) Act 1985* (Qld);
- (d) the rights and interests of Telstra Corporation Limited:
- (i) as the owner and operator of telecommunication facilities installed within the Determination Area;
 - (ii) created pursuant to the *Post and Telegraph Act 1901* (Cth), the *Telecommunications Act 1975* (Cth), the *Australian Telecommunications Corporation Act 1989* (Cth), the *Telecommunications Act 1991* (Cth) and the *Telecommunications Act 1997* (Cth); and
 - (iii) for its employees, agents or contractors to access its telecommunication facilities in, and in the vicinity of the Determination Area, in the performance of their duties;
- (e) the rights and interests of the Cook Shire Council under its local government jurisdiction and as an entity exercising statutory powers in respect of the land and waters comprising the Merapah Lease and Lot 2 on Plan SP161882 including its interests under an Indigenous Land Use Agreement dated 11 October 2004 between

the Native Title Holders and the Cook Shire Council;

- (f) any rights and interests of the holder of an authority issued under the *Fisheries Act 1994* (Qld) that authorises a commercial fishing operation in the waters of the Determination Area as may be current at the date of this Determination;
- (g) the rights and interests of the Ports Corporation of Queensland as an entity exercising statutory powers in respect of that part of the land and waters of the Determination Area within the limits of the Port of Weipa;
- (h) any rights of the public arising under the common law to fish and navigate in any tidal navigable river or tidal waters of the Determination Area; and
- (i) any other rights and interests held by or under the Crown by the force and operation of the laws of the State and the Commonwealth as may be current at the date of this Determination.

7. In relation to the following areas within the Determination Area:

- (a) section 47A(1)(b)(i) of the *Native Title Act 1993* (Cth) applies to the land and waters comprising the Aurukun Shire Lease;
- (b) section 47A(1)(b)(ii) of the *Native Title Act 1993* (Cth) applies to the land and waters comprising the Merapah Lease, the Pormpuraaw DOGIT and the Napranum DOGIT; and
- (c) section 47B(1)(b) of the *Native Title Act 1993* (Cth) applies to the land and waters comprising Lot 2 on Plan SP161882.

8. The relationship between the native title rights and interests and the other rights and interests described in paragraph 6 (“the other rights and interests”) is that:

- (a) to the extent that the other rights and interests are inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title continues to exist in its entirety but the native title rights and interests have no effect in relation to the other rights to the extent of the inconsistency for so long as the other rights and interests exist; and
- (b) for avoidance of doubt, any activity that is required or permitted by or under, and done in accordance with, the other rights and interests or any activity that is associated with or incidental to, such an activity, prevails over the native title rights and interests and any exercise of the native title rights and interests, but does not extinguish them.

9. The native title rights and interests confer, subject to paragraph 5 and the rights and interests identified in paragraph 6, possession, occupation, use and enjoyment of the Determination Area, other than the flowing, tidal and underground waters, on the Native Title Holders to the exclusion of all others.

10. The words and expressions used in this determination have the same meanings as they have in Part 15 of the *Native Title Act 1993* (Cth) except for the following defined expressions:

“Determination Area” means the land and waters within the area described and shown in Schedule One to this Determination;

“fish” has the meaning attributed to it in the *Fisheries Act 1994* (Qld);

“flowing, tidal and underground waters” means:

- (a) water in a watercourse, lake or spring;
- (b) underground water, being artesian water, sub-artesian water and water from an underground source of supply;
- (c) water forming part of the sea ordinarily within the ebb and flow of the tide at spring tides,

but, except where the phrase is used in paragraph 3, only extends to underground water accessed by traditional means.

“forest products” has the meaning attributed to it in the *Forestry Act 1959* (Qld);

“lake” means a natural collection of water including a lagoon, swamp or marsh whether permanent or intermittent;

“laws of the State and the Commonwealth” means the common law and the laws of the State and the Commonwealth of Australia, and includes legislation, regulations, statutory instruments, local planning instruments and local laws;

“natural resources” means:

- (a) any plant and animal (other than fish), including shells and forest products, found on, or in the land and waters of the Determination Area from time to time, and flints, clays, soil, sand, gravel and rock on or below the surface of Determination Area and all other matter comprising the Determination Area;

but does not include:

- (b) minerals as defined in the *Minerals Resources Act 1989* (Qld) and petroleum as defined in the *Petroleum Act 1923* (Qld); or
- (c) flowing, tidal and underground waters;

“plant” and **“animal”** have the meanings attributed to them in the *Nature Conservation Act*

1992 (Qld);

“spring” means the land to which water rises naturally from below the ground and the land over which the water then flows; and

“watercourse” means a river, creek or stream in which water flows permanently or intermittently.

AND THE COURT FURTHER ORDERS THAT

11. The native title is not to be held in trust.
12. Ngan Aak Kunch Aboriginal Corporation is to:
 - (a) be the prescribed body corporate for the purposes of s.57(2) of the *Native Title Act 1993* (Cth); and
 - (b) perform the functions mentioned in s.57(3) of the *Native Title Act 1993* (Cth) after becoming a registered native title body corporate.
13. This determination of native title is to take effect on the registration of the agreement referred to in paragraph 6(e) on the Register of Indigenous Land Use Agreements.
14. In the event that the agreement referred to in paragraph 6(e) is not registered on the Register of Indigenous Land Use Agreements within six (6) months of the date of this order or such later time as this Court may order, the matter is to be listed for further directions.

NATIVE TITLE DETERMINATION QG6001/98

(Wik and Wik Way Native Title Determination No. 2)

SCHEDULE ONE

(“Determination Area” – where native title is determined to exist)

“Determination Area” is the land and waters within the area described and shown on the plan in Annexure A, being Lots 1 to 6 (inclusive) on Crown Plan AP9682 covering Lot 3819 on PH2262, part of Lot 1 on SC211, part of Lot 5 on LK2, part of Lot 2 on WP50, Lot 10 on WP50, Lot 11 on WP50, Lot 12 on SP135863 and Lot 2 on SP161882, and includes the land and waters inland of the high water mark at mean Spring tide of the main sea of the Gulf of Carpentaria but does not include:

- (a) the land and waters described in Schedule Two;
- (b) that part of the land and waters comprising the Aurukun Shire Lease within the area covered by a corridor 15 metres either side of the centre line of the present alignment of the existing road which connects the town of Aurukun to the Peninsula Development Road as described and shown on Lot 4 on Crown Plan AP9682; and
- (c) minerals as defined in the *Minerals Resources Act 1989* (Qld) or petroleum as defined in the *Petroleum Act 1923* (Qld).

Signed by AustLII

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NATIVE TITLE DETERMINATION QG6001/98

(Wik and Wik Way Native Title Determination No. 2)

ANNEXURE A

THE DETERMINATION AREA

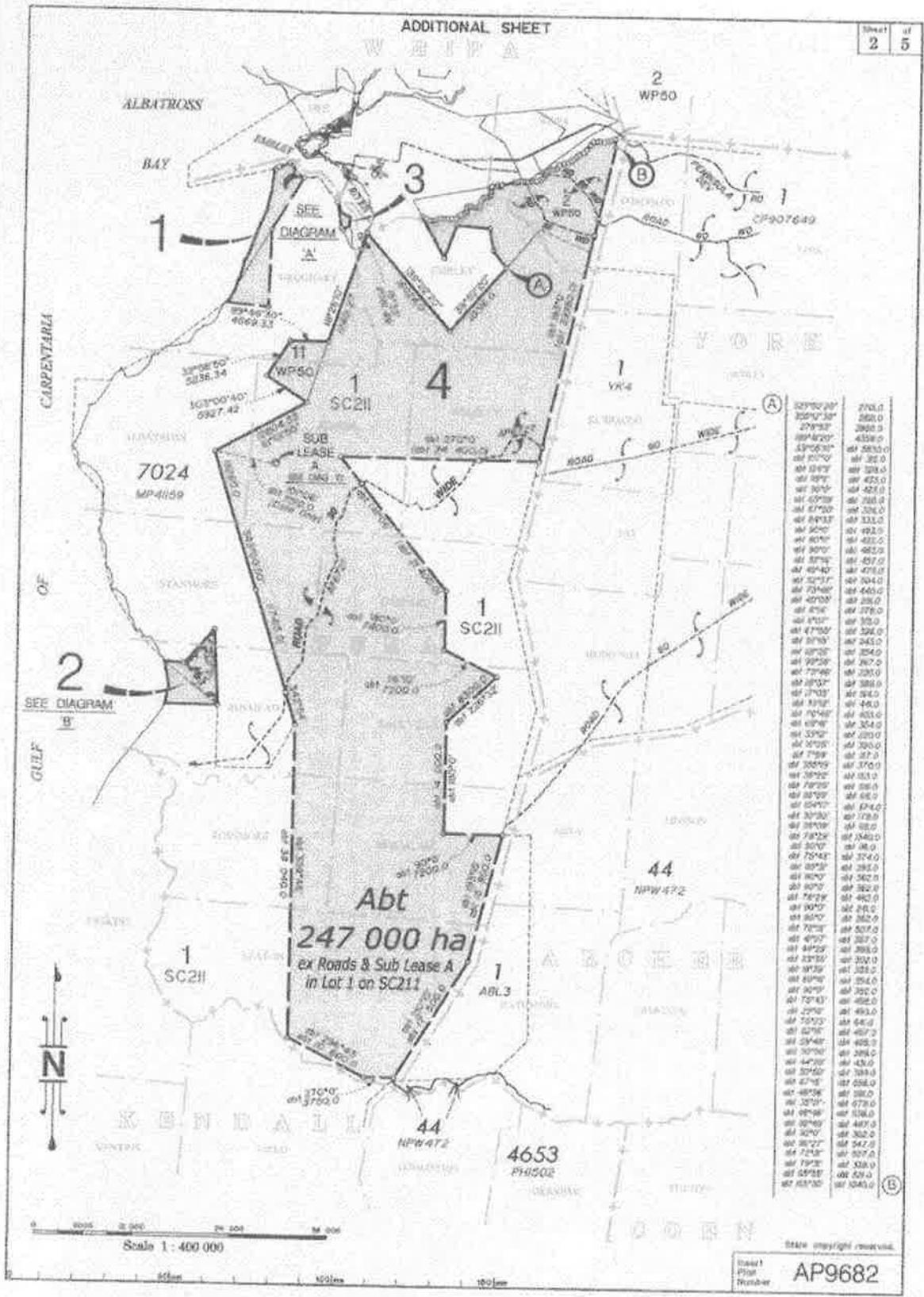
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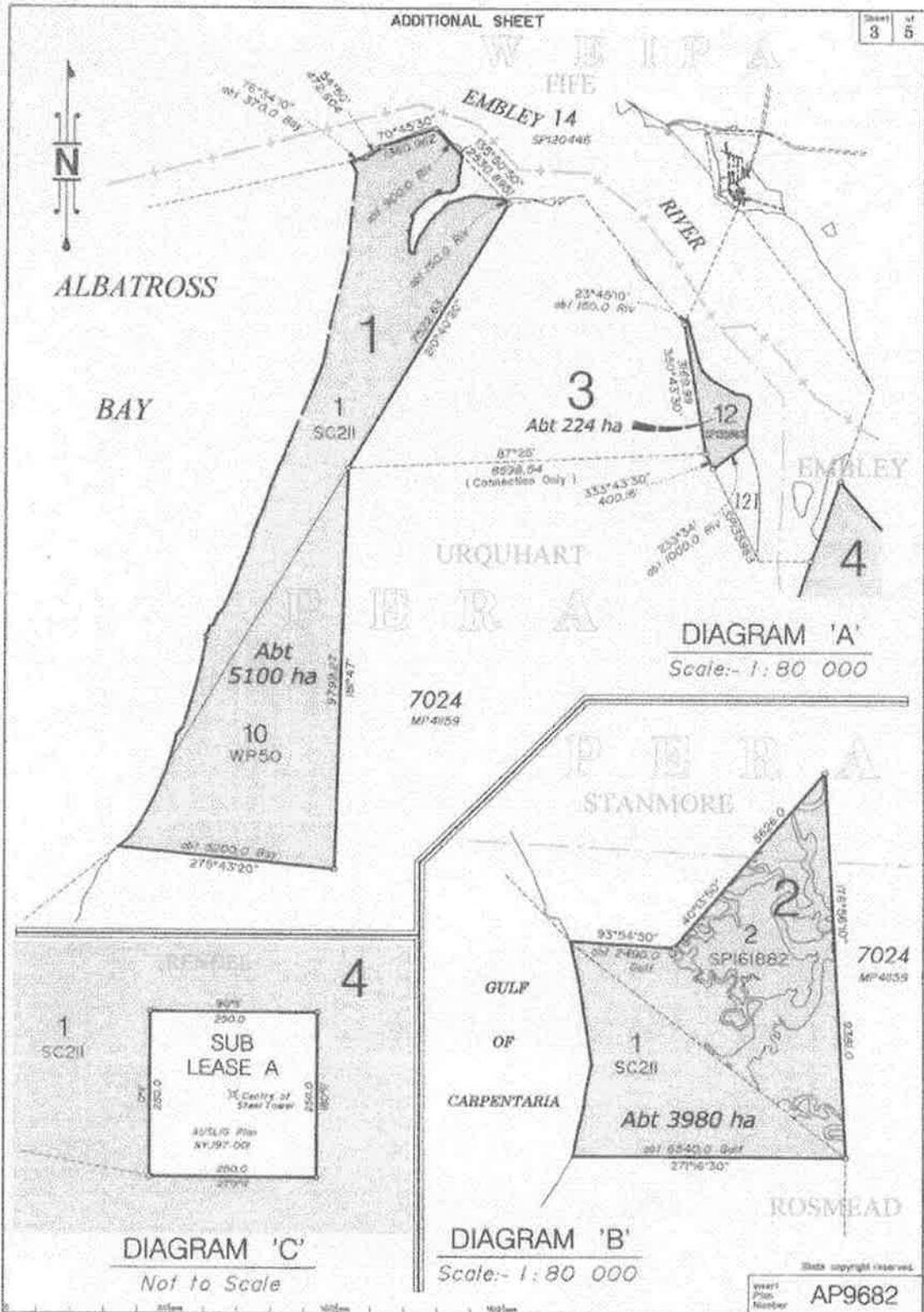
Signed by AustLII

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Signed by AustLII

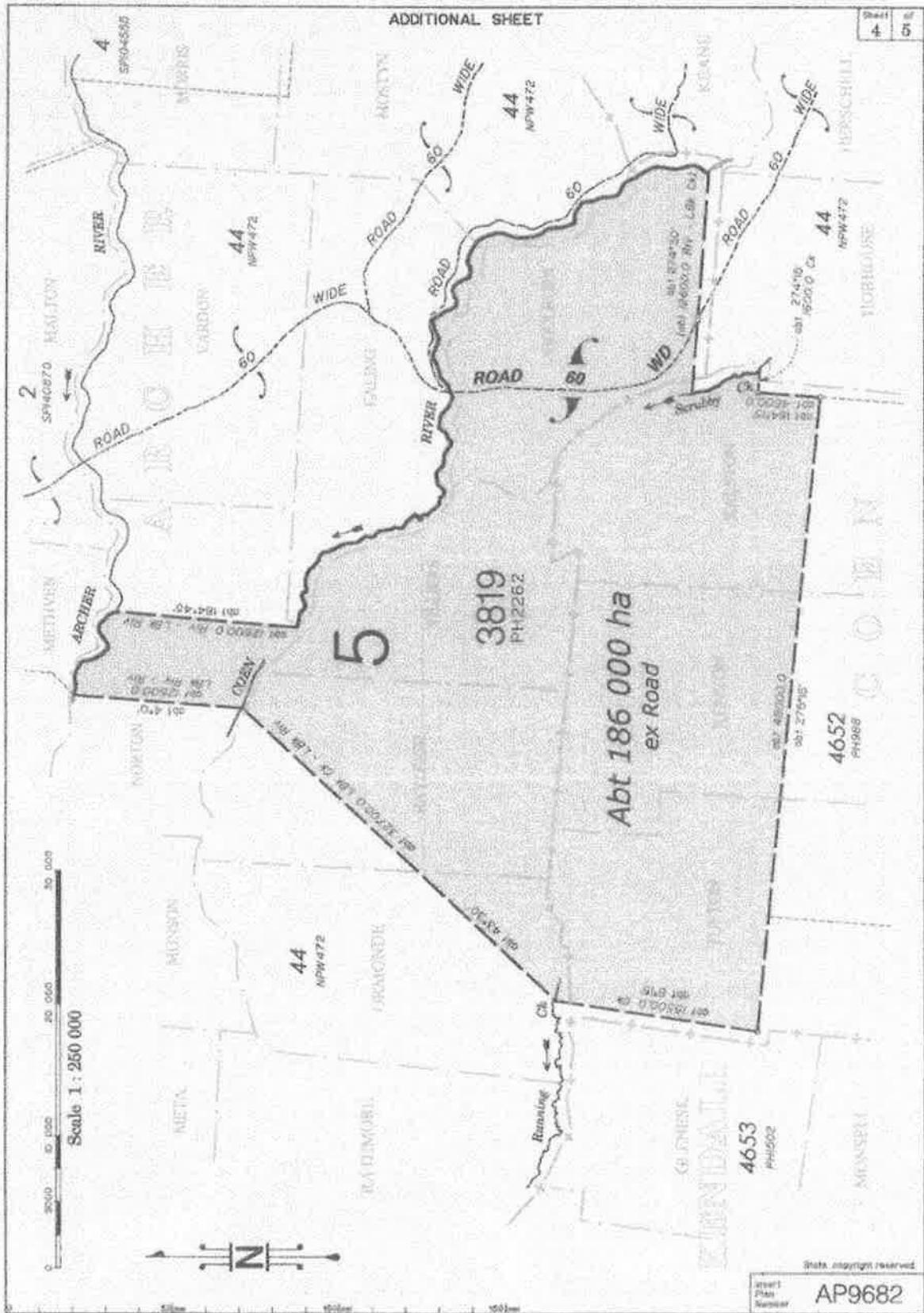
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Signed by AustLII

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NATIVE TITLE DETERMINATION QG6001/98

(Wik and Wik Way Native Title Determination No.2)

SCHEDULE TWO

(Areas excluded from the Determination Area)

The land and waters within the area the subject of the road traversing the Merapah Lease as described and shown on Lot 5 on Crown Plan AP9682, the two roads traversing part of the Napranum DOGIT as described and shown on the northerly section of Lot 4 on Crown Plan AP9682 and Sub-lease A on the Aurukun Shire Lease as described and shown on Lot 4 on Crown Plan AP9682 are excluded from the Determination Area in accordance with section 61A of the *Native Title Act 1993* (Cth) (and section 23B(7) of the *Native Title Act 1993* (Cth) and sections 20 and 21 of the *Native Title (Queensland) Act 1993* (Qld)) because they are areas where previous exclusive possession acts have occurred, native title has been extinguished in relation to the whole of these areas and no claimant application to these areas can be made.

Signed by AustLII

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SCHEDULE B

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION

No. QG 6001 of 1998

PARTIES:

ANTHONY KERINDUN, SILAS WOLMBY, VICTOR KUUKUMU LAWRENCE, GLADYS TYBINGOOMPA, HOGAN SHORTJOE and ROBERT BENON YEIUM HOLROYD on their own behalf and on behalf of the WIK and WIK WAY PEOPLES

Applicant

AND:

STATE OF QUEENSLAND

COMMONWEALTH OF AUSTRALIA

COUNCIL OF THE SHIRE OF AURUKUN

PORMPURA AW ABORIGINAL COUNCIL

NAPRANUM ABORIGINAL COUNCIL

EDDIE HOLROYD

CAMERON CLIVE QUARTERMAINE & DOREEN RUTH QUARTERMAINE

MERLUNA CATTLE STATION PTY LIMITED

RICHARD MATTHEW PRICE

ROBERT JOHN FRASER

COOK SHIRE COUNCIL

PORTS CORPORATION OF QUEENSLAND

DARCY THOMAS BYRNES, RAYLEE FRANCES BYRNES, VICTOR PATRICK BYRNES & CAROLE LEIGH BYRNES

TELSTRA CORPORATION LIMITED

A NUMBER OF COMMERCIAL FISHING AUTHORITY HOLDERS

CAPE YORK LAND COUNCIL

Respondents

[Non-exclusive Areas determination]

ORDER

WIK NATIVE TITLE DETERMINATION No. 3

JUDGE MAKING ORDER: JUSTICE COOPER

WHERE MADE: AURUKUN

DATE OF ORDER: 13 OCTOBER 2004

THE COURT NOTES THAT:

- A. The Applicant has brought Native Title Determination Application QG6001/98 ("the Application") which relates to an area which includes the land and waters the subject of the proposed determination.
- B. On 3 October 2000 a determination that native title exists was made by consent by the Federal Court of Australia in relation to particular land and waters known as the "Aboriginal areas", being Part A of the area covered by the Application.
- C. The Applicant, the State of Queensland, the Commonwealth of Australia, Darcy Thomas Byrnes, Raylee Frances Byrnes, Victor Patrick Byrnes and Carole Leigh Byrnes ("the Holroyd River Lessee"), Richard Matthew Price ("the Southwell Lessee"), Robert John Fraser, Cook Shire Council, Telstra Corporation Limited, Ports Corporation of Queensland, Napranum Aboriginal Council, Pormpuraaw Aboriginal Council, Council of the Shire of Aurukun, Cameron Clive Quartermaine and Doreen Ruth Quartermaine, Merluna Cattle Station Pty Limited, Cape York Land Council and a number of commercial fishing authority holders ("those parties") have reached an agreement as to the terms of a determination of native title to be made in relation to particular land and waters covered by the Application.
- D. Those parties have agreed to the Federal Court of Australia making a consent order for a determination that native title exists in relation to the Determination Area, as defined in Schedule One to the attached Determination.
- E. Those parties acknowledge that the effect of this Determination is that the Wik and Wik Way Peoples, in accordance with the traditional laws acknowledged and traditional customs observed by them, have a right as against the whole world to be acknowledged as the

native title holders for the Determination Area.

- F. Those parties have agreed that the Determination Area has in the past been subject to acts which have partially extinguished native title rights and interests.
- G. The traditional laws acknowledged and traditional customs observed by the Wik and Wik Way Peoples include the authority as between Aboriginal people to:
- (e) resolve disputes about who is or who is not a Wik person or a Wik Way person;
 - (f) determine as between Wik and Wik Way Peoples what are the particular native title rights and interests that are held by particular Wik and Wik Way Peoples in relation to particular parts of the Determination Area;
 - (g) exclude particular Wik and Wik Way Peoples from the exercise of particular native title rights and interests in relation to particular parts of the Determination Area; and
 - (h) resolve disputes between Aboriginal people concerning native title rights and interests in relation to the Determination Area, with the assistance of native title holders of adjoining areas where such assistance is necessary.
- H. Those parties have requested that the Court hear and determine that part of the proceeding that relates to the Determination Area.
- I. No nomination pursuant to s.56(2) of the *Native Title Act 1993 (Cth)* in regard to the holding of native title in trust has been made.
- J. A representative of the Native Title Holders has nominated Ngan Aak Kunch Aboriginal Corporation, an Aboriginal association incorporated pursuant to the *Aboriginal Councils and Associations Act 1976 (Cth)*, to be a prescribed body corporate for the purposes of s.57(2) of the *Native Title Act 1993 (Cth)* and, after becoming a registered native title body corporate, to perform the functions mentioned in s.57(3) of the *Native Title Act 1993 (Cth)*.

Being satisfied that a determination in the terms sought by those parties would be within the power of the Court and, it appearing to the Court appropriate to do so and by the consent of those parties:

THE COURT ORDERS, DECLARES AND DETERMINES THAT:

1. Native title exists in relation to the Determination Area.
2. The native title is held by the Wik and Wik Way Peoples in accordance with the traditional laws acknowledged and traditional customs observed by them (“the Native Title Holders”)

as common law holders.

3. The nature and extent of the native title rights and interests in relation to the Determination Area, other than the flowing and underground waters, are, subject to paragraph 5 and the rights and interests identified in paragraph 7, non-exclusive rights to:

- (a) be present on, use and enjoy the Determination Area;
- (b) make use of the Determination Area by:
 - (i) hunting and gathering on, in and from the Determination Area;
 - (ii) conducting ceremonies on the Determination Area;
 - (iii) being buried on, and burying Native Title Holders on, the Determination Area;
 - (iv) maintaining springs and wells in the Determination Area where underground water rises naturally, for the sole purpose of ensuring the free flow of water;
- (c) take, use and enjoy the natural resources found on or within the Determination Area;
- (d) maintain and protect by lawful means those places of importance and areas of significance to the Native Title Holders under their traditional laws and customs in the Determination Area; and
- (e) use and enjoy the Determination Area and its natural resources for the purposes of teaching, communicating and maintaining cultural, social, environmental, spiritual and other knowledge, traditions, customs and practices of the Native Title Holders in relation to the Determination Area,

and the right to inherit and succeed to the native title rights and interests.

4. The nature and extent of the native title rights and interests in relation to the flowing and underground waters of the Determination Area are that, subject to paragraph 5 and the rights and interests identified in paragraph 7, they confer on the Native Title Holders non-exclusive rights to:

- (a) hunt, gather and fish on, in and from the flowing and underground waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs;

- (b) take, use and enjoy the flowing and underground waters and natural resources and fish in such waters for personal, domestic, social, cultural, religious, spiritual, ceremonial or communal needs;

and, to avoid any doubt, the rights to take, use and enjoy the flowing and underground waters and natural resources and fish in such waters are only rights to do so for non-commercial purposes.

5. The native title rights and interests are subject to and exercisable in accordance with:
 - (a) the laws of the State and the Commonwealth; and
 - (b) the traditional laws acknowledged and traditional customs observed by the Native Title Holders.
6. Notwithstanding anything in paragraphs 3 and 4, the native title rights and interests in relation to the Determination Area do not extend to a right to control access to or a right to control the use of the Determination Area.
7. The nature and extent of any other interests in relation to the Determination Area (or the respective parts thereof identified below) are:
 - (a) the rights and interests of:
 - (i) the lessee and others under the term lease for pastoral purposes known as Strathburn Holding dated 23 January 1964, being Title Reference No. 17668099 comprising Lot 4149 on Crown Plan PH31 (“the Strathburn Lease”);
 - (ii) the lessee and the Native Title Holders under a deed of agreement dated 8 October 2004 between the Gregory Paul Jenkins and Margaret Glennie Atkinson as lessees of the Strathburn Lease, the State of Queensland and the Native Title Holders;
 - (iii) the lessee and others under the term lease for pastoral purposes known as Holroyd River Holding dated 27 March 1975, being Title Reference No. 17668104 comprising Lot 4652 on Crown Plan PH988 (“the Holroyd River Lease”);
 - (iv) the lessee and the Native Title Holders under a deed of agreement dated 8 October 2004 between the Holroyd River Lessee, the State of Queensland

- and the Native Title Holders;
- (v) the lessee and others under the term lease for pastoral purposes known as Southwell Pastoral Development Holding dated 19 February 1987, being Title Reference No. 17668135 comprising Lot 1 on Crown Plan LK4 (“the Southwell Lease”);
- (vi) the lessee and the Native Title Holders under a deed of agreement dated 8 October 2004 between the Southwell Lessee, the State of Queensland and the Native Title Holders;
- (b) the rights and interests of Telstra Corporation Limited:
 - (i) as the owner and operator of telecommunication facilities installed within the Determination Area;
 - (ii) created pursuant to the *Post and Telegraph Act 1901* (Cth), the *Telecommunications Act 1975* (Cth), the *Australian Telecommunications Corporation Act 1989* (Cth), the *Telecommunications Act 1991* (Cth) and the *Telecommunications Act 1997* (Cth); and
 - (iii) for its employees, agents or contractors to access its telecommunication facilities in, and in the vicinity of the Determination Area, in the performance of their duties;
- (c) the rights and interests of Cook Shire Council under its local government jurisdiction and functions and as an entity exercising statutory powers including its interests under an Indigenous Land Use Agreement dated 11 October 2004 between the Native Title Holders and Cook Shire Council;
- (d) any rights or interest of the holder of an authority issued under the *Fisheries Act 1994* (Qld) that authorises a commercial fishing operation in the waters of the Determination Area as may be current at the date of this Determination;
- (e) any other rights and interests held by or under the Crown by the force and operation of the laws of the State and the Commonwealth as may be current at the date of this Determination.

8. The relationship between the native title rights and interests and the other rights and interests described in paragraph 7 (“the other rights and interests”) is that:

- (a) the other rights and interests continue to have effect; and
- (b) for avoidance of doubt, any activity that is required or permitted by or under, and done in accordance with, the other rights and interests or any activity that is associated with or incidental to, such an activity, prevails over the native title rights and interests and any exercise of the native title rights and interests, but does not extinguish them.

9. The native title rights and interests do not confer possession, occupation, use and enjoyment of the Determination Area on the Native Title Holders to the exclusion of all others.

10. The words and expressions used in this determination have the same meanings as they have in Part 15 of the *Native Title Act 1993* (Cth) except for the following defined words and expressions:

“Determination Area” means the land and waters within the area described and shown in Schedule One;

“fish” has the meaning attributed to it in the *Fisheries Act 1994* (Qld);

“flowing and underground waters” means:

- (a) water in a watercourse, lake or spring;
- (b) underground water, being artesian water, sub-artesian water and water from an underground source of supply,

but, except where the phrase is used in paragraph 3, only extends to underground water accessed by traditional means;

“forest products” has the meaning attributed to it in the *Forestry Act 1959* (Qld);

“lake” means a natural collection of water including a lagoon, swamp or marsh whether permanent or intermittent;

“laws of the State and the Commonwealth” means the common law and the laws of the State and the Commonwealth of Australia, and includes regulations, statutory instruments, local planning instruments and local laws; and

“natural resources” means:

- (a) any plant and animal (other than fish), including shells and forest products,

found on, or in the land and waters of the Determination Area from time to time, and flints, clays, soil, sand, gravel and rock on or below the surface of the Determination Area and all other matter comprising the Determination Area;

but does not include:

- (b) minerals as defined in the *Minerals Resources Act 1989* (Qld) and petroleum as defined in the *Petroleum Act 1923* (Qld); and
- (c) flowing and underground waters;

“plant” and “animal” have the meanings attributed to them in the *Nature Conservation Act 1992* (Qld);

“spring” means the land to which water rises naturally from below the ground and the land over which the water then flows; and

“watercourse” means a river, creek or stream in which water flows permanently or intermittently.

AND THE COURT FURTHER ORDERS THAT

11. The native title is not to be held in trust.
12. Ngan Aak Kunch Aboriginal Corporation is to:
 - (a) be the prescribed body corporate for the purposes of s.57(2) of the *Native Title Act 1993* (Cth); and
 - (b) perform the functions mentioned in s.57(3) of the *Native Title Act 1993* (Cth) after becoming a registered native title body corporate.
13. This determination of native title is to take effect on the registration of the agreements referred to in paragraphs 7(a)(ii), 7(a)(iv), 7(a)(vi) and 7(c) on the Register of Indigenous Land Use Agreements.
14. In the event that the agreements referred to in paragraph 7(a)(ii), 7(a)(iv), 7(a)(vi) and 7(c) are not registered on the Register of Indigenous Land Use Agreements within six (6) months of the date of this order or such later time as this Court may order, the matter is to be listed for further directions.

Native Title Determination QG6001/98
(Wik Native Title Determination No. 3)

SCHEDULE ONE

(“Determination Area” - where native title is determined to exist)

“Determination Area” is the land and waters within the area described and shown on the plan in Annexure A, being Lots 7 and 8 on Crown Plan AP9681 covering Lot 1 on ABL3, Lot 1 on LK4, Lot 4652 on PH988 and part of Lot 4149 on PH31, but does not include:

- (a) the land and waters described in Schedule Two; and
- (b) minerals as defined in the *Minerals Resources Act 1989* (Qld) or petroleum as defined in the *Petroleum Act 1923* (Qld).

Signed by AustLII

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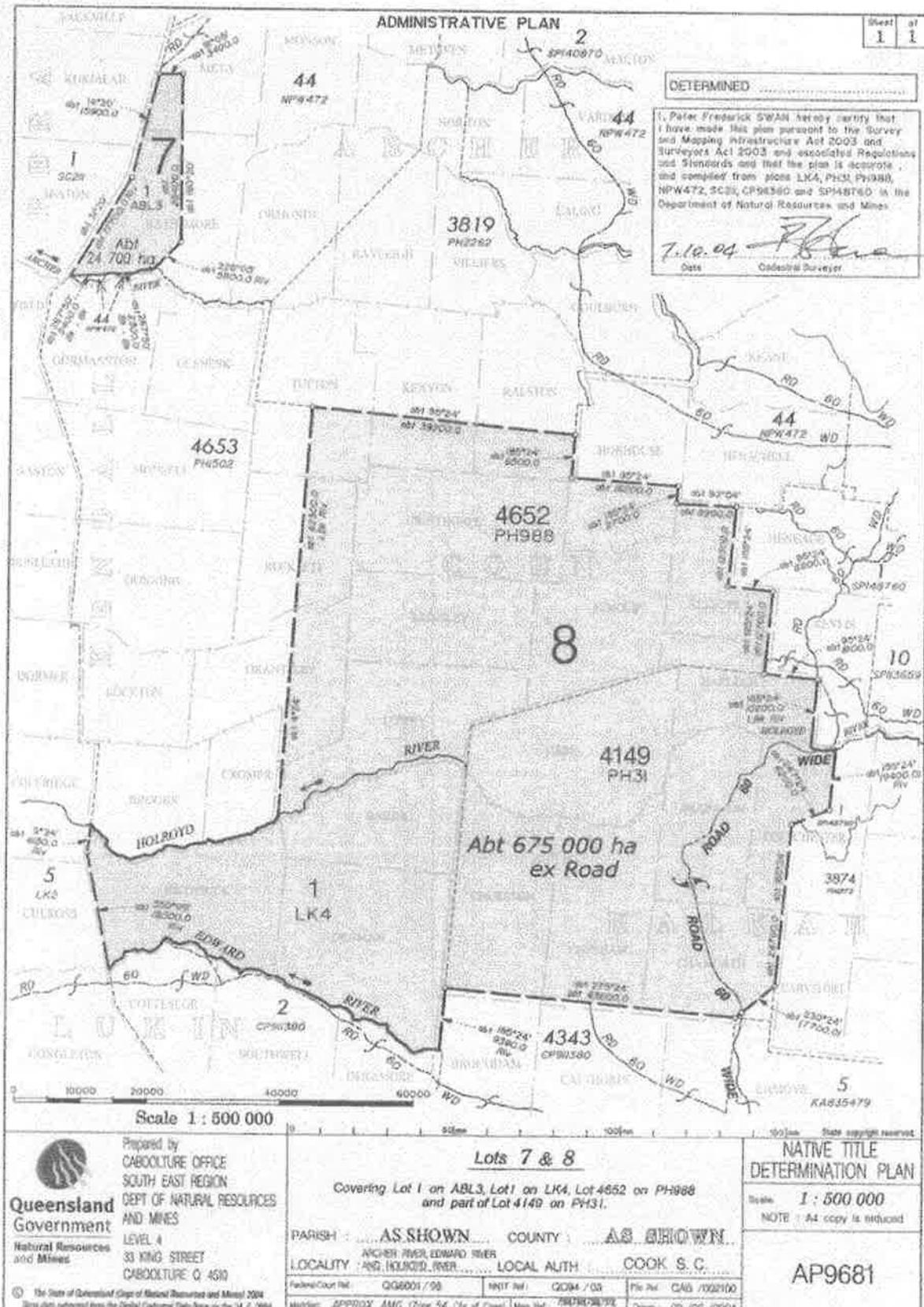
Native Title Determination QG6001/98

(Wik Native Title Determination No. 3)

ANNEXURE A to SCHEDULE ONE

DETERMINATION AREA

Signed by AustLII



Native Title Determination QG6001/98
(Wik Native Title Determination No. 3)

SCHEDULE TWO

(Areas excluded from the Determination Area)

The land and waters within the area the subject of the road traversing the Strathburn Lease as described and shown on Lot 8 on Crown Plan AP9681 are excluded from the Determination Area in accordance with section 61A of the *Native Title Act 1993* (Cth) (and section 23B(7) of the *Native Title Act 1993* (Cth) and sections 20 and 21 of the *Native Title (Queensland) Act 1993* (Qld) because it is an area where previous exclusive possession acts have occurred, native title has been extinguished in relation to the whole of the area and no claimant application to the area can be made.

Signed by AustLII

FEDERAL COURT OF AUSTRALIA

Wik and Wik Way Native Title Claim Group v State of Queensland [2009] FCA 789

NATIVE TITLE – consideration of an application for orders supported by an agreement for a consent determination of native title rights and interests in the land and waters of the Determination Area – consideration of s 87 of the *Native Title Act* 1993 (Cth) – consideration of whether proposed orders appear “appropriate” to the Court and whether orders ought to be made as sought determining native title rights and interests in the Wik and Wik Way Peoples in land and waters broadly described as the land and waters on the western side of Cape York Peninsula landward of the high water mark at mean spring tide of the sea of the Gulf of Carpentaria, bounded to the north by the Embley River and to the south by the Edward River and extending in the east to the upper reaches of the watercourses that drain into the Gulf of Carpentaria

Native Title Act 1993 (Cth), ss 13, 61, 57, 87, 94A, 223, 225

Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth, Reg 4

Wik Peoples v State of Queensland [2000] FCA 1443 – cited

Wik Peoples v State of Queensland [2004] FCA 1306 – cited

Members of the Yorta Yorta Aboriginal Community v State of Victoria (2002) 214 CLR 422 - cited

Other Material

“*Native Title – A Constitutional Shift?*”, University of Melbourne Law School, JD Lecture Series, Chief Justice French, 24 March 2009

**ANTHONY KERINDUN, JANINE CHEVATHUN AND ALISON WOOLLA AS THE APPLICANT ON THEIR OWN BEHALF AND FOR AND ON BEHALF OF THE MEMBERS OF THE WIK AND WIK WAY NATIVE TITLE CLAIM GROUP v STATE OF QUEENSLAND, RIO TINTO ALUMINIUM LIMITED (FORMERLY COMALCO ALUMINIUM LIMITED), PORTS CORPORATION OF QUEENSLAND, COOK SHIRE COUNCIL, ALBATROSS HIRE PTY LTD T/AS WEIPA HOUSEBOATS, A NUMBER OF COMMERCIAL FISHING AUTHORITY HOLDERS
QUD 6029 of 2001**

GREENWOOD J

29 JULY 2009

AURUKUN, CAPE YORK PENINSULA

Signed by AustLII

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION**

QUD 6029 of 2001

**BETWEEN: ANTHONY KERINDUN, JANINE CHEVATHUN AND
ALISON WOOLLA AS THE APPLICANT ON THEIR OWN
BEHALF AND FOR AND ON BEHALF OF THE MEMBERS
OF THE WIK AND WIK WAY NATIVE TITLE CLAIM
GROUP
Applicant**

**AND: STATE OF QUEENSLAND, RIO TINTO ALUMINIUM
LIMITED (FORMERLY COMALCO ALUMINIUM
LIMITED), PORTS CORPORATION OF QUEENSLAND,
COOK SHIRE COUNCIL, ALBATROSS HIRE PTY LTD
T/AS WEIPA HOUSEBOATS, A NUMBER OF
COMMERCIAL FISHING AUTHORITY HOLDERS
Respondent**

**JUDGE: GREENWOOD J
DATE OF ORDER: 29 JULY 2009
WHERE MADE: AURUKUN, CAPE YORK PENINSULA**

THE COURT NOTES THAT:

- A. The parties to the Application have reached an agreement as to the terms of a determination of native title to be made in relation to the Determination Area.
- B. The Applicant, the State of Queensland and Rio Tinto Aluminium Limited (formerly Comalco Aluminium Limited) are parties to an agreement known as the Western Cape Communities Co-existence Agreement dated 14 March 2001 ("the WCCCA") which was registered as the Comalco ILUA on the Register of Indigenous Land Use Agreements on 24 August 2001, an extract of the relevant parts of which is annexed to this Determination and marked "Schedule Two".
- C. Pursuant to the terms of the WCCCA, the Applicant has brought Native Title Determination Application No. QUD6029/01 ("the Application") which relates to an area of land and waters the subject of the proposed determination.

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- D. The traditional laws acknowledged and traditional customs observed by the Wik and Wik Way Peoples includes the authority as between Aboriginal people to:
- (a) resolve disputes about who is or who is not a Wik person or a Wik Way person;
 - (b) determine as between Wik and Wik Way Peoples what are the particular native title rights and interests that are held by particular Wik and Wik Way Peoples in relation to particular parts of the Determination Area;
 - (c) exclude particular Wik and Wik Way Peoples from the exercise of particular native title rights and interests in relation to particular parts of the Determination Area; and
 - (d) resolve disputes between Aboriginal people concerning native title rights and interests in relation to the Determination Area, with the assistance of native title holders of adjoining areas where such assistance is necessary.

AND BEING SATISFIED THAT a determination of native title in the terms that follow would be within the power of the Court and, it appearing to the Court appropriate to do so, the Court, pursuant to section 87 of the *Native Title Act 1993* (Cth) and by the consent of the parties:

THE COURT DETERMINES BY CONSENT THAT:

1. Native title exists in relation to the Determination Area.
2. The native title is held by the Wik and Wik Way Peoples ("**the Native Title Holders**") in accordance with the traditional laws acknowledged and traditional customs observed by them as common law holders.
3. The nature and extent of native title rights and interests in relation to the Determination Area, other than in relation to Water and subject to paragraphs 5, 6 and 7, are non-exclusive rights to:
 - (a) live on the Determination Area, to camp, erect shelters and other structures;
 - (b) access, be present on, move about in and on and use the Determination Area;

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- (c) take and use the Natural Resources of the Determination Area for the purpose of satisfying the personal, domestic or non-commercial communal needs of the Native Title Holders;
- (d) maintain and protect from harm by lawful means sites and places of significance in the Determination Area;
- (e) conduct social, religious, cultural, spiritual and ceremonial activities on the Determination Area;
- (f) hunt and gather in, on and from the Determination Area for the purpose of satisfying the personal, domestic or non-commercial communal needs of the Native Title Holders,

and the right to inherit and succeed to the native title rights and interests.

4. Subject to paragraphs 5, 6 and 7, the nature and extent of native title rights and interests in relation to Water are non-exclusive rights to:

- (a) hunt and fish in or on, and gather from Water for the purpose of satisfying the personal, domestic or non-commercial communal needs of the Native Title Holders; and
- (b) take, use and enjoy the Water for the purpose of satisfying the personal, domestic or non-commercial communal needs of the Native Title Holders.

5. There is no native title in Minerals and Petroleum.

6. The native title is subject to and exercisable in accordance with:

- (a) the Laws of the Commonwealth and the State of Queensland; and
- (b) the traditional laws acknowledged and traditional customs observed by the Native Title Holders.

7. Notwithstanding anything in paragraphs 3, 4, 5 and 6, the native title rights and interests:

- (a) do not confer possession, occupation, use and enjoyment of the Determination Area on the Native Title Holders to the exclusion of all others; and

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(b) do not extend to a right to control access to or a right to control the use of the Determination Area.

8. The nature and extent of any other rights and interests in relation to the Determination Area are:

(a) the rights and interests of Rio Tinto Aluminium Limited under:

(i) the *Commonwealth Aluminium Corporation Pty Limited Agreement Act 1957* (Qld) ("**the Comalco Act**") and the Commonwealth Aluminium Corporation Pty Limited Agreement (which is given statutory force by the Comalco Act) ("**the Comalco Agreement**") to mine and/or perform other activities on the Determination Area, including the Comalco Interests and the rights to perform the Comalco Activities; and

(ii) the WCCCA between it, representatives of the Native Title Holders and other parties;

(iii) Mining Lease No. 7024;

(iv) Mining Lease No. 6024; and

(b) the following rights and interests in relation to the Determination Area as they exist at the date of this determination:

(i) any rights and interests of the holder of an authority issued under the *Fisheries Act 1994* (Qld) that authorises a commercial fishing operation in the waters of the Determination Area;

(ii) the rights and interests of the Cook Shire Council under its local government jurisdiction and as an entity exercising statutory powers in respect of land and waters within the Determination Area including its interests under an Indigenous Land Use Agreement dated 27 April 2009 between the Native Title Holders and Cook Shire Council;

(iii) the rights and interests of the Napranum Aboriginal Shire Council under its local government jurisdiction and as an entity exercising

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statutory powers in respect of land and waters within the Determination Area;

- (iv) the rights and interests of the North Queensland Bulk Ports Corporation Limited as an entity exercising statutory powers in respect of that part of the land and waters of the Determination Area within the limits of the Port of Weipa;
- (v) any rights of the public:
 - (A) whether granted by Rio Tinto Aluminium Limited or otherwise, to travel through or across the Determination Area;
 - (B) arising under the common law to fish and navigate in any Tidal Navigable River or Tidal Water of the Determination Area;
- (vi) any other rights or interests held by the Crown or by reason of the force and operation of Laws of the Commonwealth of Australia and the State of Queensland.

9. The relationship between the native title rights and interests in paragraphs 3 and 4 and the other rights and interests in relation to the Determination Area in paragraph 8 is that:

- (a) in relation to the rights and interests of Rio Tinto Aluminium Limited in paragraph 8(a) - on the enactment of the Comalco Act in 1957, the making of the Comalco Agreement, the grant of Special Bauxite Mining Lease 1 or the registration of the WCCCA, the Comalco Act, the Comalco Agreement, the conferral of the Comalco Interests, the performance of the Comalco Activities or the WCCCA, whether done before or after the date of this Determination, prevail over the native title rights and interests to the extent of any inconsistency;
- (b) in relation to the other rights and interests in sub-paragraphs 8(b)(i), (ii), (iii), (iv) and (vi):

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- (i) the other rights and interests continue to have effect and the rights conferred by or held under those rights and interests may be exercised notwithstanding the existence of the native title rights and interests; and
 - (ii) for avoidance of doubt, any activity that is required or permitted by or held under, and done in accordance with, the other rights and interests or any activity that is associated with or incidental to, such an activity, prevails over the native title rights and interests and any exercise of the native title rights and interests, but, subject to any application of section 24JA of the *Native Title Act 1993* (Cth), does not extinguish them;
- (c) in relation to the other rights and interests in sub-paragraph 8(b)(v), those rights and interests co-exist with the native title rights and interests and, to the extent of any inconsistency with the native title rights and interests, will prevail over the native title rights and interests but will not extinguish them; and
- (d) the native title is subject to extinguishment by:
- (i) the lawful powers of the Commonwealth and of the State of Queensland; and/or
 - (ii) the lawful grant or creation of interests pursuant to the Laws of the Commonwealth and the State of Queensland.

10. If a word or expression is not defined in this paragraph, but is defined in the *Native Title Act 1993* (Cth) then it has the meaning given to it in the *Native Title Act 1993* (Cth). In addition:

"Animal" and **"Plant"** have the meanings given to them in the *Nature Conservation Act 1992* (Qld);

"Comalco Activities" has the meaning given to it in the WCCCA;

"Comalco Interests" has the meaning given to it in the WCCCA;

"Determination Area" means the land and waters within the area described in Annexure A to Schedule One and shown on the plan in Annexure B to Schedule

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One, except that to the extent of any inconsistency between the written description and the plan, the written description prevails;

“**Fish**” has the meaning given to it in the *Fisheries Act 1994* (Qld);

“**High Water Mark**” has the meaning given to it in the *Land Act 1994* (Qld);

“**Laws of the Commonwealth and the State of Queensland**” means the common law and the laws of the Commonwealth of Australia and the State of Queensland, and includes legislation, regulations, statutory instruments, local planning instruments and local laws;

“**Minerals**” has the meaning given to it in the *Mineral Resources Act 1989* (Qld);

“**Natural Resources**” means:

- (a) any Plant and Animal, including Fish and bird life found on, or in, the lands and waters of the Determination Area from time to time;
- (b) flints, clays, ochres, stones and soils found on or below the surface of the Determination Area,

but does not include:

- (c) Minerals or Petroleum;

“**Petroleum**” has the meaning given to it in the *Petroleum Act 1923* (Qld) and the *Petroleum and Gas (Production and Safety) Act 2004* (Qld);

“**Tidal Navigable River**” has the meaning given to it in the *Land Act 1994* (Qld);

“**Tidal Water**” has the meaning given to it in the *Land Act 1994* (Qld);

“**Water**” means water as defined in the *Water Act 2000* (Qld) and Tidal Water.

AND THE COURT ORDERS

11. Native title is not to be held in trust.
12. Ngan Aak-Kunch Aboriginal Corporation RNTBC (formerly Ngan Aak Kunch Aboriginal Corporation) is to:
 - (a) be the prescribed body corporate for the purposes of s.57(2) of the Native Title Act 1993 (Cth); and

Signed by AustLII

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- (b) perform the functions mentioned in s.57(3) of the Native Title Act 1993 (Cth) after becoming a registered native title body corporate.
13. The determination of native title is to take effect on the registration of the agreement referred to in sub-paragraph 8(b)(ii) on the Register of Indigenous Land Use Agreements.
14. In the event that the agreement referred to in sub-paragraph 8(b)(ii) is not registered on the Register of Indigenous Land Use Agreements within six months of the date of this order or such later time as this Court may order, the matter is to be listed for further directions.
15. There be no order as to costs.

DEPUTY DISTRICT REGISTRAR

Date Entered:

Signed by AustLII

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Schedule One

(Determination Area)

The "**Determination Area**" means the land and waters within the area described in Annexure A to Schedule One and shown on the plan in Annexure B to Schedule One, except that to the extent of any inconsistency between the written description and the plan, the written description prevails.

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Annexure A to Schedule One

(Description of the Determination Area)

Area 1 (shown as Lot 1 on the plan in Annexure B to Schedule One)

Unless otherwise stated, monument numbers referred to in the following description are derived from Plan MP41159 that is registered in the Department of Environment and Resource Management. The description is derived from the following plans which are available from the Department of Environment and Resource Management: MP31643, MP41159, SP120446 and SP135863.

Commencing at monument 047 P₁ of ML 7024, proceed along the mining lease boundary through monuments 046 O₁, 198, 199 and then along the boundary of ML 7024 towards 045 L₁ until the boundary intersects with the High Water Mark; then generally north westerly and generally north easterly along that High Water Mark to its intersection with the ML 7024 boundary defined by station 038 DB and monument 037 DA, proceed along the boundary of ML 7024 through monuments 037 DA, 036 D₁ and along the boundary of ML 7024 towards 035 C₁ until it intersects with the High Water Mark; then generally north easterly along the High Water Mark until it intersects with the boundary of ML 7024 defined by monuments 036 D₁ and 035 C₁ then along the boundary of ML7024 through monument 035 C₁ and towards 034 B₁ until it intersects with the High Water Mark then generally north easterly along the High Water Mark until it intersects with the boundary of ML 7024 defined by monuments 035 C₁ and 034 B₁ then along the boundary of ML 7024 through monuments 034 B₁, 224, 223, 058 AR, 057 AQ, 056 AP, 055 AU, 226 (defined on Plan MP31643), then along the boundary of ML 6024 towards monument 225 (defined on MP31643) until the intersection of High Water Mark then along the High Water Mark in a general north westerly direction around Lot 12 on Plan SP135863 until the intersection of the boundary of Lot 14 on Plan SP120446 defined by monuments 056 AP and 083 AO, then north easterly along the eastern boundary of that Lot 14 on Plan SP120446 towards monument 083 AO to the centreline of Embley River; then generally south easterly along the centreline of the Embley River to the boundary of ML 7024 defined by monuments 216 and 105, then along the boundary of ML 7024 through monuments 105, 104, 106, 107, 217, 002 B₃, 001 C₃, 053 AW, 220, 221, 222, 052 D₃, 051 U₁, 050 T₁, 049 R₁, 048 Q₁ back to the point of commencement.

Area 2 (shown as Lot 2 on the plan in Annexure B to Schedule One)

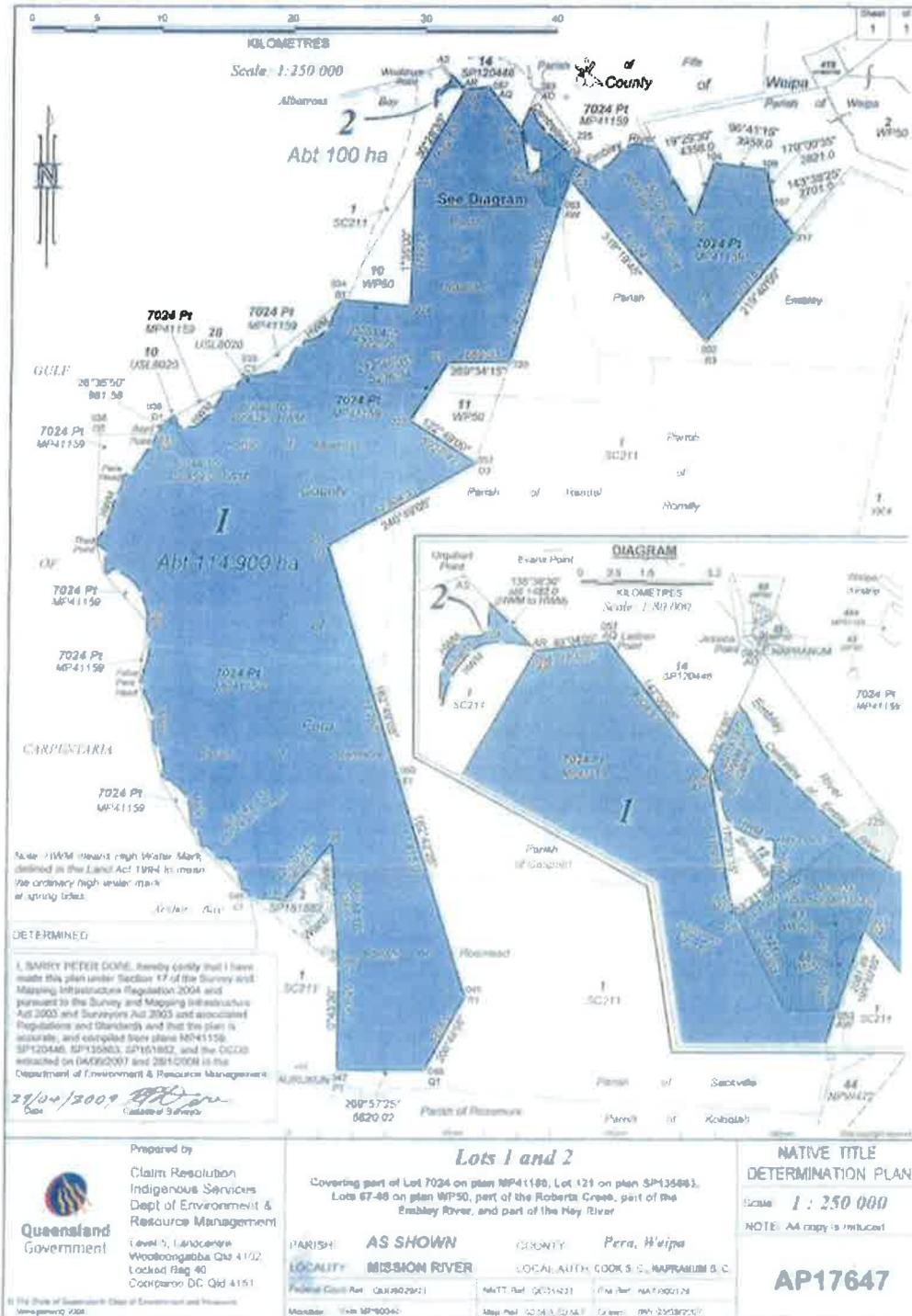
Unless otherwise stated, monument numbers referred to in the following description are derived from Plan SP120446 which is registered in the Department of Environment and Resource Management. The description is derived from the following plans which are available from the Department of Environment and Resource Management: SP120446 and SC211.

Commencing at the point where High Water Mark intersects the boundary of Lot 14 on Plan SP120446 which is located generally northwest of monument AR along the boundary to monument AS proceed along the High Water Mark around Roberts Creek to the intersection of the boundary of Lot 14 on Plan SP120446 defined by monuments AS and AR, then follow the boundary of Lot 14 on Plan SP120446 back to the point of commencement.

Signed by AustLII

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Annexure B to Schedule One



(Plan of the Determination Area)

Schedule Two

**(Extracts of the Western Cape Communities Co-existence Agreement
dated 14 March 2001)**

Extracts of the Western Cape Communities Co-existence Agreement relevant to this Determination are as follows:

"1. **DEFINITIONS AND INTERPRETATION**

1.1 **Definitions**

When used in this Agreement, including the Recitals, the following terms will have the following meanings unless the subject or the context otherwise requires:

Term	Meaning
	...
Additional Native Title Parties	The applicants in Non-conforming Applications or Conforming Applications in respect of any part of the ILUA Area who as at the Commencement Date have not signed this Agreement.
	...
Associate	An employee, servant, agent or contractor of, or person providing or receiving goods or services to or from, Comalco, a Related Body Corporate of Comalco, a person having any right or interest in relation to any Comalco Interest that is derived from, or granted by, Comalco (for example, a sublessee of part of ML 7024), or a person exercising rights with the permission or authority of Comalco and includes a Comalco Contractor.
Aurukun Community	Aboriginal people who are ordinarily resident in or around the Shire of Aurukun.
	...
Claim	In relation to any person, a demand, claim, action, proceeding, damage, loss, cost, expense or liability incurred by or to or made or recovered by or against the person, however arising and whether present, unascertained, immediate, future or contingent.
Claim Area	The land the subject of a Conforming Application.
Comalco	Comalco Aluminium Limited (ACN 009 679 127).

Term	Meaning
Comalco Act	The <i>Commonwealth Aluminium Corporation Pty. Limited Agreement Act 1957</i> (Qld)
Comalco Activities	Any activity or operation authorised, reasonably contemplated, permitted or required by the Comalco Interests and includes the Weipa Operations.
Comalco Agreement	The agreement between Queensland and Comalco referred to in s2 of the Comalco Act, as varied from time to time pursuant to s4 of that Act.
	...
Comalco Interests	Each of the following as they relate to the ILUA Area: <ul style="list-style-type: none">(a) the Comalco Act;(b) the Comalco Agreement;(c) the Mining Leases;(d) various property interests held by Comalco now or, as of right pursuant to any other interest listed in paragraphs (a)-(c) and (e)-(l) of this definition, in the future (for example, SPMPLs) located inside the boundaries of ML 7024;(e) land within the ILUA Area leased by Comalco from the Ports Corporation;(f) any area of land within the ILUA Area over which Comalco has any continuing right or interest and which land has been excised from ML 7024 (since its grant), including Other Interests;(g) any area of land (not subject to a Mining Lease) on which Comalco or an Associate has a right to place plant, facilities, infrastructure or property in connection with the Weipa Operations (for example, the wharves and related structures at Lorim Point, Humbug Point and Evans Landing);(h) any past act (as the term is defined in the NTA), or any Pre-Existing Right-Based Act the basis for which is the Comalco Act or the Comalco Agreement or any other Comalco Interest and which is conferred on Comalco;

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Term

Meaning

- (i) any right of Comalco under the Comalco Act or the Comalco Agreement to obtain a further right or interest;
- (j) any right or interest of Comalco under any law in connection with any other Comalco Interest;
- (k) any other right or interest that Comalco is entitled to exercise, or have granted to it, in accordance with or as permitted by this Agreement; and
- (l) any right of renewal, extension, regrant or replacement of the Comalco Interests, and the renewals, extensions, regrants and replacements so obtained.

...

Communities

Each of the following:

- (a) the signatories to this Agreement other than Comalco, Queensland and CYLC;
- (b) Possible Native Title Holders (including the Native Title Parties);
- (c) Traditional Owners;
- (d) members of the following Aboriginal peoples, traditional owner groups, associations and communities (which are believed to comprise all the Aboriginal communities with traditional or historic connections to lands within the ILUA Area) and Aboriginal communities in the vicinity of such lands:
 - (i) the Aurukun Community;
 - (ii) the Mapoon Community;
 - (ii) the Napranum Community; and
 - (iii) the New Mapoon Community; and
- (e) all other Aboriginal persons who ordinarily reside in and around the land the subject of the Mining Leases.

Term	Meaning
Conforming Application	A claimant application made or to be made pursuant to this Agreement by a Native Title Party or other applicants on behalf of a Traditional Owner Group for a Model Determination to part of the ILUA Area and certified by CYLC pursuant to s203BE of the NTA, a proforma for which appears as Schedule 13.
	...
CYLC	Any entity that is determined to be a representative Aboriginal body under the NTA for any part, or all, of the ILUA Area, which at the Commencement Date is Cape York Land Council Aboriginal Corporation.
	...
Designated Minerals	Bauxite and kaolin and does not include minerals that are subsequently designated pursuant to clause 1 of the Comalco Agreement.
	...
Hindering Action	An act or omission of a Traditional Owner Group or a Traditional Owner or any person on their behalf which causes or contributes to, directly or indirectly, the cessation of the registration of this Agreement or the non-registration of this Agreement (whichever is relevant).
	...
ILUA	An indigenous land use agreement (area agreement) under subdivision C, division 3 of part 2 of the NTA to which the Native Title Parties are parties as registered native title claimants, applicants or proposed applicants in relation to areas totalling the ILUA Area, but a reference to a separate ILUA is taken to be a reference to such an agreement to which the Native Title Parties are the registered native title claimants, applicants or proposed applicants to the "Claim Area or such other area within the ILUA Area determined by Comalco" as referred to in clause 2.5.1.
ILUA Area	The land within the area shown on the map in Attachment 1, subject to the area being decreased under clauses 2.5 or 5.5.
ILUA Area B	The area marked as area B in the plan of the ILUA Area.
	...

Term	Meaning
	...
Mining Leases	ML 6024 (formerly ML 3), ML 7024, any other mining lease (or lease that is ancillary to mining) granted to Comalco in accordance with the Comalco Act and the Comalco Agreement and any renewal, extension, regrant or replacement of any of them within the ILUA Area.
Model Determination	A native title determination in favour of a Native Title Party in the terms of the draft determination set out in Schedule 1. ...
Native Title Application	An application, claim or proceedings in relation to native title (including any application claiming native title or seeking a native title determination), whether under the NTA or otherwise.
Native Title Parties	Those Possible Native Title Holders who: <ul style="list-style-type: none">(a) are authorised, in accordance with s251A of the NTA, by the Possible Native Title Holders in each of the Traditional Owner Groups to make and sign this Agreement as an ILUA on behalf of each of the Traditional Owner Groups;(b) pursuant to obligations contained in this Agreement:<ul style="list-style-type: none">(i) either are or will be the applicants in Conforming Applications; or(ii) must endeavour to procure other applicants to amend their Non-conforming Applications to render them Conforming Applications; and

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Term	Meaning
	(c) have signed this Agreement on the Commencement Date namely: <ul style="list-style-type: none">(i) the current registered native title claimants; and(ii) authorised signatories for each Traditional Owner Group, being those persons named in Schedule 16; and
	(d) from their respective dates of signing, those Additional Native Title Parties who sign this Agreement pursuant to clause 2.4.5.
	...
New SP MPL	Any SP MPL granted or purported to be granted, on or after 23 December 1996, or to be granted in the future, for any land within the Weipa Township.
	...
Non-conforming Application	A claimant application which is: <ul style="list-style-type: none">(a) made on behalf of a Traditional Owner Group;(b) not a Conforming Application; and(c) made before the registration of this Agreement.
NTA	<i>Native Title Act 1993 (Cth).</i>
Other Interests	Any SP MPL granted for any land within the Weipa Township and any title into which it may have been converted, whether held by Comalco or not.
	...
Parties	Comalco, the State of Queensland, CYLC and each other person signing this Agreement, every member of the Communities and all persons to whom s24EA(1)(b) of the NTA applies.
	...
Ports Corporation	The Ports Corporation of Queensland.

Term	Meaning
Possible Native Title Holders	All persons who hold or may hold native title in the ILUA Area.
Pre-Existing Right-Based Act	Has the meaning in s24IB of the NTA, and to the extent they are not covered by that definition, includes the acts under the Comalco Act or the Comalco Agreement as they relate to the ILUA Area which are listed in Schedule 12.
...	
Procedural Requirements	The procedural rights (as that term is defined in s253 of the NTA) set out in s241D of the NTA but excluding those relating to compensation.
...	
SBML 1	Special Bauxite Mining Lease 1 granted pursuant to the Comalco Act and the Comalco Agreement .
Short Term Non-registration Event	Where there has been a Hindering Action relating to the non-registration of this Agreement and this Agreement has not been registered within 12 months from the Commencement Date.
...	
SPMPL	A Special Perpetual Mining Purposes Lease granted or to be granted pursuant to clause 27 of the Comalco Agreement.
...	
Traditional Owner Groups	The native title claim groups of the ILUA Area on whose behalf Conforming Applications have been made or are required to be made pursuant to the obligations in the Agreement, namely: (a) the Alngith People; (b) the Anathangayth People; (c) the Ankamuthi People; (d) the Peppan People; (e) the Taepadhighi People; (f) the Thanikwithi People; (g) the Tjungundji People; (h) the Warranggu People; (i) the Wathayn People; (j) the Wik and Wik-Way Peoples; and (k) the Yupungathi People.
Trustee	The trustee of the WCCT.
...	

Term	Meaning
Weipa Operations	The activities and operations carried on and things done, from time to time, by Comalco or an Associate: (a) within the ILUA Area pursuant to or in connection with any of the Comalco Interests; or (b) outside the ILUA Area, but which relate to the matters referred to in (a) including shipping cargo and minerals to and from the ILUA Area and use of the Port of Weipa or any other port within the ILUA Area and shipping channels.

...

1.2 Interpretation

In this Agreement, including the Recitals, except to the extent that the subject or the context otherwise requires:

1.2.1 the following terms have the meanings respectively assigned to them in the NTA:

1.2.1.1 applicant;

1.2.1.2 claimant application;

1.2.1.3 native title claim group;

1.2.1.4 registered native title claimant;

1.2.1.5 representative body;

1.2.1.6 native title;

1.2.1.7 native title group;

1.2.1.8 native title holder;

1.2.1.9 native title rights and interests; and

1.2.1.10 for the purposes of any provisions in this Agreement concerning native title or native title rights and interests:

1.2.1.10.1 land; and

1.2.1.10.2 waters.

1.2.2 a reference to Aborigines, Aboriginal People or Aboriginals is a reference to Aboriginal peoples as defined in s253 of the NTA;

1.2.3 reference to any legislation or to any provision of any legislation includes any modification or re-enactment of, or any legislative

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provision substituted for, and all legislation and statutory instruments issued under, such legislation or such provision and includes the corresponding legislation in such other State or Territory of the Commonwealth of Australia as may be relevant from time to time;

1.2.4 words (including words defined in this Agreement) denoting the singular number include the plural and vice versa;

1.2.5 words importing natural persons (where appropriate) include corporations, firms, unincorporated associations, partnerships, trusts and any other entities recognised by law and vice versa;

1.2.6 words denoting any gender include all genders;

1.2.7 words "written" and "in writing" include any means of visible reproduction of words in a tangible and permanently viable form;

1.2.8 reference to a "right" includes an entitlement, remedy, discretion and power;

1.2.9 reference to "interest" includes any estate or interest, legal or beneficial, and whether real or personal;

1.2.10 reference to "permit" includes consent to, authorise and allow;

1.2.11 reference to "valid" includes having full force and effect and reference to "invalid" includes not having full force and effect;

1.2.12 reference to a "People" in the list of the Parties on page 1 of this Agreement is a reference to the Native Title Parties for those People, as detailed in the definition of Native Title Parties in clause 1.1;

1.2.13 reference to a "native title determination" means a native title determination as defined in s225 of the NTA;

1.2.14 reference to "registration" in relation to applications for native title determinations refers to registration on the Register of Native Title Claims and in relation to this Agreement refers to registration on the Register;

1.2.15 when referring to native title, "affects" has the same meaning as in s227 of the NTA;

1.2.16 when referring to native title or native title rights and interests, a "surrender" takes place on the later of:

1.2.16.1 immediately after the registration of this Agreement; or

1.2.16.2 the event on the occurrence of which the Parties have agreed the surrender is to occur,

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and means a surrender of those native title rights and interests to Queensland;

- 1.2.17 reference to "consent" to an act after the Registration Date by the Communities or the Native Title Parties means that the Communities or the Native Title Parties also give that consent from the Commencement Date by virtue of the operation of this Agreement at common law;
- 1.2.18 if an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing;
- 1.2.19 reference to anything (including a right, obligation or concept) includes each part of it;
- 1.2.20 where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning;
- 1.2.21 reference to a Schedule or an Attachment is a reference to a schedule or attachment to this Agreement;
- 1.2.22 reference to a sub-clause is a reference to the sub-clause of the clause in which it appears, reference to a paragraph is a reference to a paragraph of the sub-clause in which it appears and reference to a sub-paragraph is a reference to a sub-paragraph of a paragraph in which it appears;
- 1.2.23 reference to a document or agreement, or provision of a document or agreement, is to that document, agreement or provision as novated, supplemented, varied or replaced from time to time;
- 1.2.24 a recital, schedule, annexure or a description of the Parties forms part of this Agreement;
- 1.2.25 a reference to any party to this Agreement or any other document or arrangement or other party identified in this Agreement or any other document or arrangement includes that party's executors, administrators, substitutes, successors and permitted assigns and agents;
- 1.2.26 a reference to a Minister, Department, authority, body or person includes the Minister, Department, authority, body or person for the time being performing the functions performed by the Minister, Department, authority, body or person at the Commencement Date;
- 1.2.27 unless otherwise stated, a reference to "dollars" or "\$" is to Australian currency;
- 1.2.28 a reference in the body of this Agreement or in a Schedule to a clause is a reference to a clause in the body of this Agreement or that Schedule, respectively;

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1.2.29 ...

1.2.30 where under this Agreement, Comalco commits to discriminate positively in favour of Aboriginal persons, Comalco will use its best endeavours to obtain such authorisations, if any, as may be necessary to allow it to lawfully discriminate in the manner outlined in this Agreement but Comalco's commitments are only activated once Comalco has obtained those authorisations;

1.2.31 a reference to "relevant Traditional Owner Groups" is to those Traditional Owner Groups whose Claim Areas include the land to which the operation of a provision applies and if there is uncertainty as to their identity those nominated by the Co-ordinating Committee;

1.2.32 a reference to land is to be taken to be also a reference to waters;

1.2.33 ...

1.2.34 "extension" refers to an extension of term; and

1.2.35 consents in this Agreement when given on behalf of a native title holder are deemed to have been authorised in accordance with s251A of the NTA.

1.3 Headings

The headings in this Agreement are for the purpose of more convenient reference only and will not form part of this Agreement or affect its construction or interpretation.

1.4 Parts of agreement applying to Queensland

1.4.1 Queensland will not be:

1.4.1.1 bound by any obligations under this Agreement expressed to be obligations of a Party or the Parties; and

1.4.1.2 entitled to exercise any rights under this Agreement expressed to be a right of a Party or the Parties,

unless they are expressly stated to apply to Queensland. Further, Queensland is not entitled to rely on any acknowledgment in this Agreement unless it is expressly stated to be for the benefit of Queensland.

1.4.2 Queensland is bound by, entitled to exercise rights under, and receives the benefits of clauses 1, 2 (but it is not bound by any provisions, including clauses 2.3.11, 2.4, 2.7, 2.8, 2.9 and 2.11.1, to the extent those provisions require it to accept the terms of the Model Determination or its operation), 4, 5, 11.4, 19, 20, 21, 22 and 26 to 46 inclusive and the corresponding schedules.

1.5 Interpretation for Native Title

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1.5.1 Despite any other provision of this Agreement, the provisions of this Agreement which deal with the co-existence of native title and the Comalco Interests, the Other Interests, or the performance of the Comalco Activities on any land the subject of SBML 1 when it was originally granted apply only to those parts of the ILUA Area where native title was not extinguished by:

1.5.1.1 the enactment of the Comalco Act in 1957, the making of the Comalco Agreement, or the grant of SBML 1; or

1.5.1.2 any other rights or interests granted pursuant to the Comalco Act, the Comalco Agreement or SBML 1; or

1.5.1.3 any other legislation,

and nothing in this Agreement compromises the rights of any Party to contend that native title has been extinguished, either fully or partially, in all or any part of the ILUA Area but Comalco will only contend such extinguishment if any member of the Communities or any person on their behalf makes a Claim contending that native title survives to:

1.5.1.4 the Designated Minerals within or taken from the Mining Leases; or

1.5.1.5 New SPMPs or Other Interests.

1.5.2 Neither Comalco nor any other Party may rely on the surrenders or extinguishments referred to in clauses 2.2.3 and 2.2.4 in any court proceedings:

1.5.2.1 prior to the Registration Date in relation to surrenders within clause 1.2.16.1; and

1.5.2.2 prior to the date of surrender in relation to surrenders within clause 1.2.16.2 except for the specified purposes of the surrender,

except in proceedings relating to the enforcement of this Agreement or any native title determination or claimant application to the extent that it relates to the ILUA Area.

1.5.3 Where this Agreement states that the native title rights and interests have "no effect", it means that the traditional rights and interests comprising native title are not able to be enjoyed or exercised but, where applicable and subject to the other provisions of this Agreement,

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the Communities are able to exercise the rights given to them under the NTA, such as the right to negotiate¹ and the right to be consulted about various activities.

1.5.4 Where this Agreement provides that native title rights and interests have "no effect" in relation to the Comalco Interests or the performance of the Comalco Activities, but "again have effect", the Communities have no cause of action against Comalco:

1.5.4.1 for the lawful performance of the Comalco Activities; and

1.5.4.2 for things lawfully done under the authority of the Comalco Interests,

regardless of whether the Comalco Activities could have been done in a manner which would have had a lesser effect on the native title rights and interests, either temporarily or permanently.

....

2 NATIVE TITLE

2.1 Agreement Procedures

2.1.1 The Communities are making this Agreement as occupants and residents of western Cape York Peninsula and, to the extent that they hold or may hold native title, they have authorised the making of this Agreement for the purpose of it constituting an ILUA for the whole of the ILUA Area, and as separate ILUAs as contemplated under clause 2.5.

2.1.2 The Parties agree that this Agreement is to be registered as one ILUA or separate ILUAs.

2.2 Acknowledgments of Past Matters and Present and Future Consents

The Parties make the following acknowledgments and agree to the stated effects of the acknowledgments and, subject to this Agreement, give the stated consents.

2.2.1 The Comalco Interests, the Other Interests, and the performance of the Comalco Activities to the Registration Date are valid. If any of the Comalco Interests and Other Interests, or the performance of any of the Comalco Activities, have ever been invalid to any extent, the Parties

¹ The "right to negotiate" procedures are set out in subdivision P, division 3 of part 2 of the NTA.

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agree to their validation, and that they are taken to be valid and always to have been valid.

2.2.2 On the enactment of the Comalco Act in 1957, the making of the Comalco Agreement, or the grant of SBML 1, any native title rights which may have existed yielded to the extent of any inconsistency between them and the Comalco Act, the Comalco Agreement, the conferral of any of the Comalco Interests and the performance of the Comalco Activities, whether done before or after the Registration Date. The yielded native title rights therefore do not and would not affect, by preventing, inhibiting, restricting, or otherwise qualifying, the conferral of the Comalco Interests or the performance of the Comalco Activities in any way at any time.

2.2.3 In relation to Other Interests and New SPMPLs:

2.2.3.1 at the times of the grants, or purported grants of any Other Interests or any New SPMPLs prior to the Registration Date; and

2.2.3.2 at the time of the grants of any New SPMPLs after the Registration Date,

native title has been, or will be, whichever is relevant, extinguished to the land the subject of the grants, and any that has otherwise survived or would otherwise have survived, is surrendered with that intention. The Communities consent to the grant of any New SPMPLs after the Registration Date.

2.2.4 In recognition of the benefits Comalco and Queensland has agreed to make available to the Communities under this Agreement and the position Comalco is adopting regarding the possible survival of native title to the ILUA Area, to allay doubt, if any native title rights presently subsist to all, or a portion of, the Designated Minerals either presently within, or previously taken from, the Mining Leases, those native title rights are surrendered with the intention that they be extinguished. The effect of this clause applies notwithstanding any decision of any Court regarding the extinguishment or otherwise of native title in minerals generally. The Communities will not contend the existence or survival of native title to any of the Designated Minerals, or a portion of the Designated Minerals as resources taken from the Mining Leases, either presently within, or previously taken from, the Mining Leases, from the enactment of the Comalco Act in 1957, the making of the Comalco Agreement, or the grant of SBML 1. Comalco and Queensland may plead this clause in bar to any Claim brought by the Communities, any member of the Communities or any person on or for their behalf, so contending the existence or survival of native title to the Designated Minerals. The Communities by entering into this Agreement consent to Comalco or Queensland becoming a party in any matter where such a Claim is made.

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2.2.5 For resources taken by Comalco under the authority of the Comalco Interests from the ILUA Area (other than the Designated Minerals), the Communities' native title rights and interests do not include a right to a portion of those resources. However to allay doubt, if any native title rights and interests comprise those rights, the Communities waive any entitlement to enforce those native title rights which may have arisen on or before the Commencement Date as against Comalco or Queensland and agree not to exercise such rights after the Commencement Date against Comalco or Queensland.

2.2.6 The Communities consent to all acts conferring upon Comalco any of the Comalco Interests listed in subparagraphs (c), (d) and (g) to (l) inclusive of the definition of "Comalco Interests" in clause 1.1 after the Registration Date and the performance of the Comalco Activities, regardless of whether those acts affect, or would but for this Agreement, affect native title.

2.2.7 If, but for this Agreement, Procedural Requirements would have applied to the conferral of a Comalco Interest, Comalco must perform those Procedural Requirements as if they still applied.

2.2.8 In relation to the Ports Corporation, the Communities consent to, after the Registration Date:

2.2.8.1 the vesting or grant of any land within the ILUA Area to the Ports Corporation; and

2.2.8.2 the conferral on the Ports Corporation or Comalco of all rights necessary to enable:

2.2.8.2.1 the grant of the Comalco Interests, including the grant of any such interest by the Ports Corporation; and

2.2.8.2.2 Comalco to perform the Comalco Activities,

and nothing in this clause is intended to preclude the application of any law concerned with the protection of Aboriginal cultural heritage or environmental protection.

2.2.9 After the Registration Date, the Communities consent to the shipping of goods in and out of Weipa, and to any other points in the Comalco Interests near or adjacent to the sea or any waterway, but only pursuant to the Comalco Interests or for the performance of the Comalco Activities and nothing in this clause is intended to preclude the application of any law concerned with the protection of Aboriginal cultural heritage or environmental protection.

2.2.10 Public Services for Weipa Township

2.2.10.1 The Communities consent to:

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2.2.10.1.1 the construction, operation, use, maintenance or repair of; and

2.2.10.1.2 the conferral of rights or interests on any person with respect to

facilities (including but not limited to the facilities listed in Schedule 2) for public purposes in Weipa Township.

2.2.10.2 For the purposes of Queensland, the Director-General, Department of Natural Resources and Mines will be responsible for the administration of this clause.

2.3 Acknowledgments – Present and Future Matters

The Parties also make the following acknowledgments and agree to the stated effects of the acknowledgments.

2.3.1 Subject to this Agreement, Comalco is entitled to exercise all rights and interests conferred by the Comalco Interests and to perform the Comalco Activities lawfully in the manner Comalco, in its absolute discretion, deems fit and without incurring any liability to the Communities.

2.3.2 The Comalco Activities constitute activities for the purposes of s44H of the NTA.

2.3.3 Comalco is entitled to exercise a right to exclude any persons from those parts of the ILUA Area required by Comalco in exercise of the rights conferred by the Comalco Interests, the performance of the Comalco Activities, or this Agreement from time to time for operational, safety or security reasons or as required by any law.

2.3.4 For the areas where Comalco exercises a right to exclude persons:

2.3.4.1 any native title rights and interests are wholly inconsistent with the performance of the Comalco Activities and the exercise of rights under the Comalco Interests and may not be exercised by the Communities for the duration of the inconsistency;

2.3.4.2 despite any invitations or licences given by Comalco to others to enter those areas, Comalco's right to exclusive possession includes an entitlement to exclude all others from those areas; and

2.3.4.3 the native title rights and interests will continue to exist in their entirety but will have no effect in relation to the exercise of rights under the Comalco Interests or the performance of the Comalco Activities.

2.3.5 For the areas where Comalco does not exercise a right to exclude persons as acknowledged in this Agreement:

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- 2.3.5.1 where any Comalco Interest or the performance of any Comalco Activity is partly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title continues to exist in its entirety but the native title rights and interests have no effect on the exercise of rights pursuant to the Comalco Interests or the performance of the Comalco Activities to the extent of any inconsistency; and
- 2.3.5.2 to the extent that the native title rights and interests are not inconsistent with the Comalco Interests or the performance of the Comalco Activities, the native title rights and interests are exercisable to their full extent in respect of the ILUA Area.
- 2.3.6 After land ceased or ceases to be subject to the Comalco Interests, native title rights and interests again had effect or can again have effect to the extent possible having regard to the effect of the Comalco Interests and the performance of the Comalco Activities. This clause is not intended to limit the operation of ss 47, 47A or 47B of the NTA.
- 2.3.7 Despite the acknowledgments by the Communities in clause 2.2, to the extent that native title rights and interests continue to exist, the interaction between them and the Comalco Interests and the performance of the Comalco Activities is as described in this Agreement.
- 2.3.8 Subdivision P, division 3 of part 2 of the NTA² is not intended to apply, and does not apply, to any of the acts consented to or supported in this Agreement including to the renewal, regrant, extension or replacement of the Mining Leases, the grant of any Comalco Interests, or any alterations to any "right to mine" (as the term is used in subdivision P) resulting from environmental requirements, after the Registration Date.
- 2.3.9 Subject to clause 2.3.10, Comalco has the right (subject to obtaining any necessary Government approvals) to permit (including by way of lease, sublease, licence, delegation, assignment, invitation, or any other dealing) third parties to do any or all of the following:
- 2.3.9.1 exercise any of the rights conferred by the Comalco Interests or this Agreement;
- 2.3.9.2 perform the Comalco Activities; or
- 2.3.9.3 enter and remain on any area of the Comalco Interests for any purpose related to the maintenance or promotion by Comalco of its business interests, and

²

This is the subdivision which provides the "right to negotiate" procedures of the NTA.

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in exercising the rights described in this clause, Comalco will be mindful of the cultural sensitivities of the Communities.

2.3.10 In permitting third parties to carry out the activities referred to in clause 2.3.9, Comalco must require the third parties to abide by the provisions of this Agreement which would apply to Comalco if it was carrying out the activities, including the provisions dealing with cultural heritage. Comalco will remain liable to the Communities for the performance of Comalco's obligations under this Agreement by such third parties as though the acts or omissions of such third parties were the acts or omissions of Comalco.

2.3.11 Subject to this Agreement and the rights under the Comalco Interests, the native title rights and interests to the ILUA Area that might be possessed by the Possible Native Title Holders for the duration of the Comalco Interests are as specified in Order 3 in the Model Determination.

2.3.12 In relation to the ILUA Area, until the termination of the Comalco Interests the native title rights and interests of the Possible Native Title Holders do not confer possession, occupation, use and enjoyment of the land of any part of the ILUA Area to the exclusion of all others.

2.4 Registering this Agreement as an ILUA

2.4.1 In addition to all other effects that this Agreement may have at law, it constitutes an ILUA, and by execution of this Agreement, the Parties agree to its registration and to take the following steps as applicable to each of them.

2.4.1.1 As soon as practicable after the Commencement Date, the Native Title Parties who are not applicants in relation to any part of the ILUA Area at the Commencement Date will either:

2.4.1.1.1 lodge Conforming Applications in which they are the applicants; or

2.4.1.1.2 procure applicants from their respective Traditional Owner Groups to lodge Conforming Applications,

so that, subject to clause 2.4.1.2 and to the extent permitted by law, all parts of the ILUA Area are subject to Conforming Applications.

2.4.1.2 As soon as practicable, but in any event no later than 6 months after the Commencement Date, the Native Title Parties who are applicants in relation to any part of the ILUA Area at the Commencement Date or who have been Additional Native Title Parties will either amend their claimant applications, in respect of the ILUA Area, to render

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them Conforming Applications or withdraw that part of their claimant application, in respect of the ILUA Area, and lodge Conforming Applications in accordance with clause 2.4.1.1.

2.4.1.3 A failure by a Native Title Party to comply with clause 2.4.1.2 will be deemed to give rise to a Determination that there has been a Short Term Non-registration Event and Comalco may exercise its rights under clause 2.6.3.1 accordingly.

2.4.1.4 The Native Title Parties must use their best endeavours to procure:

2.4.1.4.1 the applicants in any Non-conforming Applications to amend their Non-conforming Application to render them Conforming Applications; and

2.4.1.4.2 any Additional Native Title Parties who become registered native title claimants to sign and agree to be bound by the terms of this Agreement.

2.4.1.5 The Native Title Parties will ensure that the applicants have, in accordance with s251B of the NTA, proper authorisation for the making of their Conforming Applications.

2.4.1.6 If a Conforming Application is not registered on the Register of Native Title Claims, then the Native Title Parties must use their best endeavours to ensure that the claimant applications made on behalf of their respective Traditional Owner Groups are registered on the Register of Native Title Claims, including by making such amendments, as agreed by Comalco, as may be necessary for registration; providing such material in support of the amended application as the Registrar or the Federal Court may require; and making such application to the Federal Court as may be necessary to achieve registration.

...

2.4.1.11 The Communities will not object to the registration of this Agreement, will use their best endeavours to have an objector withdraw any objection to registration of this Agreement and, once this Agreement is registered, will not apply to any Court, under the NTA or otherwise, to have this Agreement removed from the Register.

2.4.1.12 CYLC and the Communities will each use their best endeavours to ensure that this Agreement remains registered.

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2.4.1.13 Notwithstanding clause 2.4.1.1 but subject to clause 2.4.1.14, the Native Title Parties will not be required to lodge a Conforming Application for ILUA Area B.

2.4.1.14 If a person other than a Native Title Party or an applicant authorised by a Traditional Owner Group lodges a claimant application that includes any part of the ILUA Area, then the Native Title Parties, who are the Possible Native Title Holders for that part of the ILUA Area, must, as soon as practicable after the claimant application is made, lodge or procure the lodgement of, on behalf of their Traditional Owner Group, a Conforming Application in relation to that area in accordance with this clause 2.4.1.

...

2.4.5 The Parties acknowledge that some Additional Native Title Parties might agree to be bound by the terms of this Agreement after the Commencement Date. The Parties agree to the amendment of this Agreement:

2.4.5.1 by the addition of the names of those Additional Native Title Parties in Schedule 16; and

2.4.5.2 the signing of this Agreement by those Additional Native Title Parties,

without the necessity for the Parties, other than the Additional Native Title Parties whose names are being added, to sign the amendment. On signing this Agreement as amended in accordance with this clause 2.4.5, an Additional Native Title Party is bound by, entitled to exercise rights under, and receives the benefits of this Agreement from the date of signing.

2.5 Separate ILUAs for Separate Areas

2.5.1 For the purposes of s199C of the NTA and despite anything else contained in this Agreement or any rule of law to the contrary:

2.5.1.1 subject to clause 2.5.2, this Agreement may be registered as a separate ILUA for each Claim Area or such other area within the ILUA Area determined by Comalco after consultation with CYLC and Attachment 1 will be amended accordingly; and

2.5.1.2 for each such separate ILUA a reference to "ILUA Area" will be taken to be a reference to that Claim Area or such other area within the ILUA Area determined by Comalco after consultation with CYLC.

2.5.2 Although this Agreement embodies what may become a number of separate ILUAs (see clause 2.5.1), Comalco may, for convenience,

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exercise its rights or perform its obligations as if all such ILUAs were the one agreement. The performance by Comalco of its obligations or the exercise of its rights as described under this Agreement will be deemed to be the performance of obligations or the exercise of rights for all of the ILUAs referred to in clause 2.5.1.

2.5.3 If at any time:

2.5.3.1 it appears to Comalco that it is likely that a native title determination will be made; or

2.5.3.2 a native title determination is made,

in relation to any part of the ILUA Area (referred to in clause 2.5 as the "**Relevant Part**") in favour of any Aboriginal person not a party to, or bound by, this Agreement (referred to in this clause 2.5 as the "**New Native Title Holder**") which will cause s199C(1)(b) of the NTA to apply:

2.5.3.3 then Comalco is entitled to notify the Native Title Registrar that the ILUA Area is reduced by the Relevant Part and does not include, and is taken not to relate to, the Relevant Part (and if the native title determination is made as contemplated in clause 2.5.3.2, the notification will be deemed to have been given); and

2.5.3.4 CYLC and the Communities will use their respective best endeavours to ensure that the New Native Title Holder:

2.5.3.4.1 adopts and enters into this Agreement as a Native Title Party; and

2.5.3.4.2 makes the appropriate applications to the Federal Court under s199C(1A) of the NTA seeking an order that the Federal Court not remove the details of this Agreement from the Register or, if removal is inevitable, only the minimum area possible.

2.5.4 During any period of time that this Agreement is not registered over a Relevant Part upon the Register under clause 2.5.3, then the provisions of this Agreement (other than clauses 1, 2, 3, 4, 16, 17, 18, 19, 20, 21, 22, 24, 27 and 31 through to 46 (inclusive) and the related Schedules and Attachments) will cease to apply to the Relevant Part during the relevant period.

2.5.5 If this Agreement is (or its details are) removed from the Register, and the New Native Title Holder declines to become a party to this Agreement, or it is reasonably clear, from the circumstances, that the holder does not wish to become a party to this Agreement, the Parties will use their best endeavours to ensure that this Agreement is again

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registered in respect of the ILUA Area except for the Relevant Part, and for the purposes of this Agreement:

2.5.5.1 "ILUA Area" is taken to exclude the Relevant Part;

2.5.5.2 (for the avoidance of doubt) clause 2 will, to the extent practicable, apply again.

...

2.11 Commitments related to clause 2

2.11.1 Except where it is allowed by this Agreement, no Party may at any time:

2.11.1.1 make a Claim in relation to the ILUA Area or the subject matter of this Agreement (whether a part of any application or other proceedings in a court, tribunal, arbitral body or other judicial or semi-judicial forum) that any matter or thing is contrary to a Model Determination or any other provision in clause 2; or

2.11.1.2 commence or prosecute any Native Title Application in connection with the ILUA Area other than a Conforming Application.

2.11.2 Unless otherwise agreed in writing by the Parties, the Communities must not, at any time, take any action to:

2.11.2.1 except as contemplated by clauses 5.4, 5.6, 11.1 and 11.2, seek the conversion of the underlying tenure of any land the subject of any Comalco Interest into Aboriginal Land;

2.11.2.2 except as contemplated by clauses 5.4, 5.6, 11.1 and 11.2 and the Weipa Township Agreement, seek any other grants of freehold or leasehold title within the ILUA Area which would impede, interfere with or prejudicially affect any of Comalco's rights or interests under the Comalco Interests or this Agreement; or

2.11.2.3 commence or prosecute any claim or other legal action relating to cultural heritage in connection with the land the subject of the Comalco Interests, except in accordance with clause 27.

2.11.3 If any Party (other than Comalco or Queensland) materially breaches the condition referred to in clause 2.11.1, Comalco may, at its discretion (and without limiting its other rights) oppose any Native Title Application in so far as it relates to that Party in any manner it sees fit (including by contending that native title to or part of, the ILUA Area has been extinguished).

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2.12 Warranties by the Communities

The Communities represent and warrant to Comalco that:

2.12.1 the native title groups (other than CYLC), on whose behalf the Native Title Parties have been authorised to sign this Agreement, in respect of all parts of the ILUA Area have been identified and are as identified in the :

...; and

2.12.2 the members of each of the Traditional Owner Groups to make Conforming Applications in respect of all parts of the ILUA Area have, in accordance with s251A of the NTA, properly authorised the making of this Agreement.

...

2.14 NTA Authorisation

2.14.1 The Parties acknowledge that, but for this Agreement, certain activities may nevertheless be permitted by provisions of the NTA (other than by subdivision C, division 3 of part 2 of the NTA).

2.14.2 If a Government proposes to do any of the things the subject of the sections referred to in s24AA(4)(e), (f) and (i) of the NTA, in relation to the ILUA Area and those things directly relate to the Comalco Interests or the performance of the Comalco Activities, then such things are consented to, valid and permitted under and covered by this Agreement.

3 SUPPORT FOR COMALCO INTERESTS AND COMALCO ACTIVITIES

3.1 General support

3.1.1 The Communities agree to, and support, Comalco's having and obtaining the Comalco Interests and the performance of the Comalco Activities.

3.1.2 The Communities will support the grant, from time to time, to Comalco of such Government approvals and authorisations in the future that are necessary for the performance of the Comalco Activities or as may be required for Comalco Activities. The Communities are not required to incur any expense in the performance of their obligations.

3.1.3 If after the Commencement Date, Comalco lawfully acquires any new rights or interests in relation to the ILUA Area (including after, where relevant, following any processes under the NTA), the Communities agree to support such rights as if they were part of the Comalco Interests under this Agreement.

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3.1.4 Comalco, or any of its Associates, may carry out any act or activity, directly or indirectly, permitted or supported by clauses 3.1.1 and 3.1.2 as of right and without any payment to any other Party under this Agreement.

3.2 Specific Support

3.2.1 The support contemplated in clause 3.1 includes, subject to this Agreement, requirements that the Communities will:

3.2.1.1 support the same or similar activities carried out in parts of the Comalco Interests not previously used (for example, mining in, or transportation or access over, new areas) and construction of plant, facilities and infrastructure for the performance of the Comalco Activities;

3.2.1.2 as an alternative to ML 6024, consent to the grant of any interests that may be necessary for Comalco for access to or to transport materials between the areas of land the subject of ML 7024 which are north and south of the Embley River and to enable the construction of any infrastructure required for that access or transportation; or

3.2.1.3 if required, consent to any extensions, renewals or replacements of ML 7024 or ML 6024,

even though such rights and interests may, notwithstanding the provisions of this Agreement, be Pre-Existing Right-Based Acts.

3.2.2 Nothing in this clause 3 is intended to preclude the application of any law concerned with the protection of Aboriginal cultural heritage or environmental protection.

3.3 Support for Gas or Energy Supply

3.3.1 Subject to the payment under clause 3.3.2, the Communities consent to the grant of any rights over the ILUA Area necessary to enable the supply of gas to the Weipa Operations and to lay any related gas pipelines or provide any storage installations and other facilities and these rights must:

3.3.1.1 be substantially similar to the rights granted over native title rights and interests for the provision of gas spur pipelines in Cape York but outside the ILUA Area (for example the gas spur lines from the proposed PNG/Queensland Gas pipeline);

3.3.1.2 have a substantially similar effect on native title rights and interests as those referred to in clause 3.3.1.1 and any compensation referred to in clause 3.3.2 will be substantially similar to that paid for the effect on native title rights and interests of the grant of the provision of gas spur pipelines in Cape York but outside the ILUA Area.

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3.3.2 The nature of the rights, their effect on native title rights and interests and any compensation will be agreed by Comalco and the Co-ordinating Committee following consultation with the relevant Traditional Owner Groups. The amount of compensation must be paid to the Trustee and applied in accordance with this Agreement.

3.3.3 If the Co-ordinating Committee and Comalco cannot agree on the amount referred to in clause 3.3.2 within a reasonable time, then either may give the other notice that there is a Dispute. Clause 27 will apply to the Dispute subject to the dispute being determined by the person whom the Co-ordinating Committee and Comalco agree has, under other agreements, determined, or been appointed to determine, the amount payable as compensation for the effect on native title rights and interests of the grant of similar rights within Cape York but outside the ILUA Area. Where they cannot agree on the appointment or there is no such person, then the appointment will be made by the President of the Institute of Arbitrators.

3.4 **Change in circumstances**

The commitments of the Parties under this Agreement (in particular, clauses 2 and 3) are intended to provide long-term benefits for the Parties, even if the law or circumstances change over time. Without any limitation:

3.4.1 the commitments continue even if, for some reason at some time in the future, any of the Parties obtain further rights or interests or new rights or interests are given to any of the Parties (for example, by future legislation), in relation to the ILUA Area; and

3.4.2 if the Parties obtain further or new rights or interests in relation to the ILUA Area that, if exercised, might hinder or impede the rights of any other Party, the Parties agree to exercise those rights in a way that is consistent with this Agreement.

...

10 **THIRD PARTY ACCESS TO AND ACTIVITIES ON THE MINING LEASES**

10.1 **Towns upon ML7024**

The Native Title Parties and the Communities acknowledge that the following activities may be conducted on any part of any ML7024 Town for purposes of or incidental to a town:

10.1.1 residential, commercial, industrial, municipal, airport, road, transportation, social, tourist, sporting, recreational, health, educational, charitable, community and other similar purposes; and

10.1.2 activities typically conducted by or for residents, and their invitees, of similar sized towns elsewhere in Queensland.

10.2 Infrastructure

10.2.1 The Communities agree to public use of the following infrastructure within the Mining Leases:

10.2.1.1 roads intended for public use, aerodromes, airports, bridges and other transport related infrastructure in existence as at the date of this Agreement, which (for the avoidance of doubt) includes the Weipa-Mapoon Road, the Weipa-Coen Road (where it joins the Peninsula Development Road at the boundary of ML7024), the Weipa-Aurukun Road and the Weipa Aerodrome; and

10.2.1.2 any infrastructure of the kind referred to in clause 10.2.1 established upon any of the Mining Leases in the future.

10.2.2 Comalco will consult with the Co-ordinating Committee and the Co-ordinating Committee or its authorised representative must consult with the relevant Traditional Owner Groups about any proposal by it to establish infrastructure of the kind referred to in clause 10.2.1.

10.3 Permit System

10.3.1 The Parties acknowledge the existence of the permit system for access by tourists and residents of ML7024 Towns for sporting, recreational, community or similar purposes to parts of the ILUA Area, compiled by Comalco with the assistance of the Aurukun Shire Council, Napranum Aboriginal Council, Marpuna Corporation (now Mapoon Aboriginal Council), Alspac and the Weipa Citizens Advisory Committee. The Co-ordinating Committee will review the Permit System as soon as practicable but in any event within 6 months of the Commencement Date.

10.3.2 Comalco will, to the extent it is reasonably able to do so, assist the Communities to implement the Permit System.

10.3.3 Comalco will not authorise the establishment or use of any camp site for sporting, recreational, community or similar purposes on the Mining Leases other than those camp sites governed by the Permit System, without the consent of the Co-ordinating Committee. The consent of the Co-ordinating Committee may only be given after it has consulted with the Traditional Owner Groups who are traditional owners of the land on which the camp site is to be established or used.

10.3.4 The Permit System may be amended by the Co-ordinating Committee from time to time, provided the amendment has been consented to by the relevant Traditional Owner Groups and each of the relevant Councils and, to the extent it applies to the ILUA Area, Comalco. Such consent by Comalco will not be unreasonably withheld having regard to the Comalco Interests and Comalco Activities.

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10.3.5 Comalco will not (other than for safety or in an emergency) authorise, under the Permit System, the discharge of firearms or the lighting of campfires.

10.3.6 The Permit System, its operation and any obligations of Comalco in relation to the Permit System, are subject to any rights of access or use or any right to carry out activities authorised by the operation of clauses 2.3.9, 10.1, 10.2 and 10.4 or the principles referred to in them.

10.3.7 The Co-ordinating Committee and Comalco may agree on the roads within the Mining Leases that are not to be used by the public as contemplated under clause 10.2.1 but which are to be subject to the Permit System eg tracks or roads to Outstations or Significant Aboriginal Sites or areas that have been surrendered from the Mining Leases in accordance with clauses 5.1 or 5.2.

...

10.5 **Avoidance of doubt**

For the avoidance of doubt:

10.5.1 nothing in this clause 10 affects any Parties' rights elsewhere in this Agreement; and

10.5.2 the Parties acknowledge that Comalco cannot control any use a third party might make of any part of the Mining Leases if that third party's right to enter or be upon the land, use or occupy it or erect any buildings or structures or make any other improvements is lawfully authorised, independently of Comalco, for example:

10.5.2.1 by or under the *Mineral Resources Act 1989*, any other statute relating to mining or any other law; or

10.5.2.2 under any permission given by the Minister for access across ML7024 pursuant to clause 56(a) of the Comalco Agreement.

...

19 **BENEFITS PROVIDED BY COMALCO AND QUEENSLAND**

19.1 **No other Benefits**

19.1.1 The benefits provided by Comalco and Queensland under this Agreement are in full satisfaction of:

19.1.1.1 any and all payments or benefits that may be or may have been, payable or provided, and any other right, under any laws (including common law, equity or statute) about the enjoyment by Comalco (or any Associate) of the Comalco Interests, or the performance of the Comalco Activities; and

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19.1.1.2 any claims, under any laws (including common law, equity or statute), that may be made by any native title holders, or any person on their behalf, against Queensland, Comalco, or its predecessors in title, or any person acquiring property from Comalco, on the basis of any derogation of their rights or interests in relation to the land the subject of the Comalco Interests or the effect of the performance of the Comalco Activities.

19.1.2 Clause 19.1.1 includes amounts that might otherwise have been, or become, payable under the NTA, *Native Title (Queensland) Act 1993* (Qld), *Racial Discrimination Act 1975* (Cth), the *Aboriginal Land Act 1991* (Qld), the *Mineral Resources Act 1989* (Qld), the *Acquisition of Land Act 1967* (Qld), any other relevant legislation and any new legal principles established from time to time (including by the decisions of any court or tribunal).

19.1.3 The Communities and each member of the Communities and CYLC release Queensland, Comalco and its Related Bodies Corporate from any Claim in relation to the Comalco Interests or the performance of the Comalco Activities.

19.2 Protection of Benefits

If any person, other than the members of the Communities who are bound by this Agreement:

19.2.1 is able to establish that they have native title rights or interests in relation to any part of the ILUA Area and, as a result, is entitled to payment or provision of benefits or compensation from Queensland or Comalco (whichever is relevant) (directly or indirectly) under any law (including common law, equity or statute) including any payment for interference with such rights or interests; or

19.2.2 they are entitled to damages against Queensland or Comalco (whichever is relevant) on the basis of any derogation of the rights or interests of a native title holder,

Queensland or Comalco (whichever is relevant) may elect to suspend (in whole or in part) its obligation to make the payments or contributions under this Agreement until the amount that would have been paid but for the suspension is equivalent to any such payment, contribution, provision of benefits or damages and its costs in defending any action by the person asserting those rights or interests.

19.3 Benefits to Possible Native Title Holders

In addition to the benefits which Comalco has agreed to make available under other provisions of this Agreement, CYLC acknowledges the receipt of the sum of \$1.00 paid by Comalco and \$1.00 paid by Queensland on the Commencement Date which is to be held in trust by CYLC on behalf of all Possible Native Title Holders. ...

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ATTACHMENT 1

ILUA AREA (clause 1.1 of Agreement)

The map showing the ILUA Area follows the ILUA Area description below. To the extent of any inconsistency, the written description prevails over the area indicated on the map.

ILUA AREA DESCRIPTION

The ILUA Area is comprised of the following areas:

1. all land and waters within the ML 6024 Area and the ML 7024 Area but subject to the removal of particular areas from the ILUA Area from time to time as specifically provided in this Agreement;
2. the land and waters of Albatross Bay and the rivers and creeks running into it (below the high water mark) from the Territorial Sea Baseline of Albatross Bay eastward to the most easterly of:
 - (a) the coastline;
 - (b) the western boundary of ML 7024;
 - (c) the north-western boundary of ML 6024;
 - (d) in the Mission River, longitude 141° 59' 30.5",but excluding any areas within the Shire of Aurukun as shown on Plan SC 211;
3. the land and waters of Port Musgrave and the rivers and creeks running into it (below the high water mark) from the Territorial Sea Baseline of Port Musgrave easterly along the Ducie River to the boundary of ML 7024 and southerly along the Wenlock River to the boundary of ML 7024;
4. the land and waters within the Weipa Township boundary irrespective of whether the land and waters are also within ML 7024;
5. the following lots outside of the Weipa Township boundary which have been surrendered from ML 7024 but which are generally located within the area defined by the outer boundaries of the ML 7024 Area:
 - (a) Lot 342 on MP 36486;
 - (b) Lot 22 on MP 32268;
 - (c) Lot 15 on SP 116851 (WP 7);

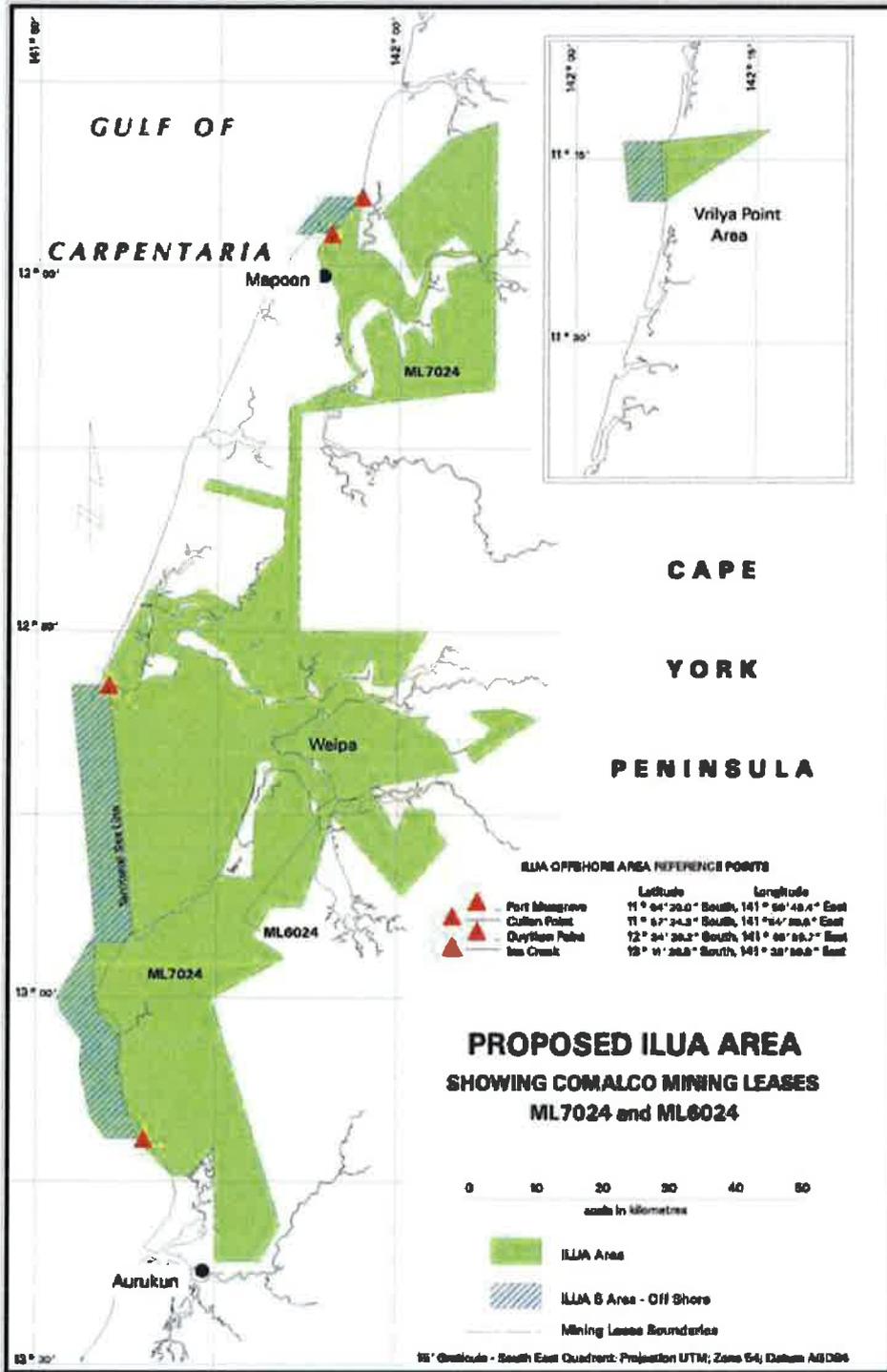
Signed by AustLII

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- (d) Lot 29 on SP 116854 (WP 18);
 - (e) Lot 17 on SP 116853 (WP 12);
 - (f) Lot 2 on MP 26144 (WP 6);
 - (g) Lot 25 on MP 26155 (WP 15);
 - (h) Lot 37 on MP 30227 (WP 23);
 - (i) Lot 39 on MP 30554 (WP 26); and
 - (j) Lot 30 on MP 30144 (WP 21); and
6. ILUA Area B which is the land and waters extending 3 nautical miles from the coastline or the Territorial Sea Baseline as applicable between:
- (a) latitudes 12° 54' 23.0" South and 11° 57' 24.2" South (between Port Musgrave and Cullen Point);
 - (b) latitudes 12° 34' 26.2" South and 13° 11' 28.3" South (between Duyfken Point and Ina Creek); and
 - (c) latitudes 11° 13' 35.3" South and 11° 18' 24.8" South (off the Vriya Point Area),

irrespective of whether the land and waters are also within ML 7024.

ILUA AREA MAP



Signed by AustLII

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Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using eSearch on the Court's website.

Signed by AustLII

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION**

QUD 6029 of 2001

BETWEEN: **ANTHONY KERINDUN, JANINE CHEVATHUN AND
ALISON WOOLLA AS THE APPLICANT ON THEIR OWN
BEHALF AND FOR AND ON BEHALF OF THE MEMBERS
OF THE WIK AND WIK WAY NATIVE TITLE CLAIM
GROUP
Applicant**

AND: **STATE OF QUEENSLAND, RIO TINTO ALUMINIUM
LIMITED (FORMERLY COMALCO ALUMINIUM
LIMITED), PORTS CORPORATION OF QUEENSLAND,
COOK SHIRE COUNCIL, ALBATROSS HIRE PTY LTD
T/AS WEIPA HOUSEBOATS, A NUMBER OF
COMMERCIAL FISHING AUTHORITY HOLDERS
Respondent**

JUDGE: **GREENWOOD J**
DATE: **29 JULY 2009**
PLACE: **AURUKUN, CAPE YORK PENINSULA**

REASONS FOR JUDGMENT

1 The Federal Court of Australia convenes here at Aurukun today on country to make and explain the reasons for making orders under s 87 of the *Native Title Act* 1993 (Cth) (“the Act”) that take effect as a determination of the traditional native title rights and interests of the Wik and Wik Way Peoples in the lands and waters of the Determination Area over which they assert a continuous exercise of traditional rights and interests by their people prior to and since sovereignty.

2 The land and waters of the Determination Area described in detail in the Schedule to the Orders made today, and also illustrated as Areas 1 and 2 on the Plan annexed to the Orders, are more broadly described as the land and waters on the western side of Cape York Peninsula landward of the high water mark at mean spring tide of the sea of the Gulf of Carpentaria, bounded to the north by the Embley River and to the south by the Edward River

and extending in the east to the upper reaches of the watercourses that drain into the Gulf of Carpentaria.

3 The application is brought by Anthony Kerindun, Janine Chevathun and Allison Woolla as applicants on their own behalf and for and on behalf of the members of the Wik and Wik Way Native Title Claim Group.

4 The parties that elected to be joined as respondents to the application are the State of Queensland; the Ports Corporation of Queensland; the Cook Shire Council; Albatross Hire Pty Ltd; 15 commercial fishing authority licence holders by their agent the Queensland Seafood Industry Association; and Rio Tinto Aluminium Limited (formerly Comalco Aluminium Limited). Although the Commonwealth entered an appearance, it elected to withdraw as a respondent on 2 September 2008.

5 This application was commenced on 14 September 2001.

6 On 14 March 2001, the State of Queensland, Rio Tinto Aluminium Limited ("Rio Tinto"), Cape York Land Council, the Council of the Shire of Aurukun, Mapoon Aboriginal Council, Napranum Aboriginal Council, New Mapoon Aboriginal Council and a number of traditional owners entered into an agreement known as the Western Cape Communities Co-existence Agreement ("the Co-existence Agreement"). The Co-Existence Agreement is an area indigenous land use agreement ("ILUA") under subdivision C of Division 3 of Part 2 of the Act. The ILUA Area for the Co-Existence Agreement is defined to include all the land and waters the subject of ML6024 and ML7024 which are held by Rio Tinto; the land and waters of Albatross Bay and the rivers and creeks running into it; and certain other land and waters adjacent to ML7024.

7 On 27 August 2001, the Co-Existence Agreement was registered on the Register of Indigenous Land Use Agreements as an area agreement under the provisions of the Act.

8 The Co-Existence Agreement cast obligations upon the traditional owners to commence determination applications under the Act in respect of any or all parts of the ILUA area, according to the terms and conditions of the Co-Existence Agreement. Such an application is regarded as a conforming application for the purposes of that agreement. Prior

to the parties entering into the Co-Existence Agreement, a claim group on behalf of the Wik and Wik Way Peoples commenced a native title determination before the National Native Title Tribunal on 24 March 1994 and proceedings QG6001 of 1998 were commenced in this Court by which a determination of native title rights and interests was sought. Determination application QUD6001 of 1998 came to be described as the main application. Three determinations of the subsistence of native title rights and interests have been made by the Court in relation to the land and waters the subject of the claim in the main application. The first determination was made by Justice Drummond on 3 October 2000 in respect of what was described as Part A of the determination application. Part A of the application was confined to lands that had always been unallocated Crown lands or lands that had only ever been subject to forms of title granted for the benefit of Aboriginal peoples (*Wik Peoples v State of Queensland* [2000] FCA 1443). Part B of the application comprised the balance of the lands and waters of the claim area, which contained lands held under pastoral and mining titles. The parties to the main application negotiated, through mediation processes, a resolution of the Part B claim and on 13 October 2004, Justice Cooper made two determinations of the native title rights and interests of the Wik and Wik Way Peoples in respect of those lands and waters (*Wik Peoples v State of Queensland* [2004] FCA 1306).

- 9 On 12 June 2003 and 4 September 2003, the present application was amended with leave of the Court. Schedule E to the application was amended on 12 June 2003 to properly and effectively describe the native title rights and interests. Schedule G was amended on that date to properly identify the details of the activities currently being carried out in respect of the land and waters by the native title claim group. Schedule H was amended on that date to re-define the land and waters of the claim so as to sit consistently with the main application. The Wik and Wik Way Peoples native title determination application (QG6001/98) had been amended on 7 September 2001 to remove from the determination application any claim for a determination of native title in relation to any part of the land and waters the subject of *this* application. The application was further amended to record that the Wik Peoples compensation application (QG6213/98) was discontinued on 2 September 2003 pursuant to leave granted by the Court on 25 August 2003. On 18 September 2003, the application was registered on the Register of Native Title Claims. The National Native Title Tribunal notified the claim publicly in accordance with s 66 of the Act on 7 April 2004. The notification period under the Act expired on 6 July 2004.

10 The application as then formulated involved a sea component. On 29 April 2009, the Court gave leave to the claimants to amend the application by removing the sea component of the claim from the proposed Determination Area.

11 Accordingly, the Determination Area in this application is not the subject of any other claim or determination by the Court.

12 After mediation, the parties to their credit reached a final agreement in respect of this application, executed by them between 25 June 2009 and 6 July 2009 for the purposes of a Consent Determination by the Court under s 87(2) of the Act. The agreement was filed in the Court on 6 July 2009.

13 Section 87 of the Act provides, relevantly for present purposes, that if, after a particular date, the parties to a determination application reach agreement, in writing, on the terms of a proposed order the Court might make in the disposition of the proceeding, the Court may, if the proposed orders are within the power of the Court (i.e. within jurisdiction) and, if it appears to the Court to be appropriate to do so, make orders in, or consistent with, the terms of the agreement without conducting a hearing of the proceeding.

14 Section 13(1) of the Act provides that an application for a determination of native title may be made under Part 3 of the Act in relation to an area for which there is no approved determination of native title. The present application is made under s 61 of the Act within Part 3 and there is no approved determination in relation to the land and waters within the Determination Area. I am familiar with the material in this application having been involved in the case management of the proceedings and having conducted a number of directions hearings in the proceedings. I am satisfied that the orders sought are plainly within power.

15 Orders made under s 87 of the Act take effect not only inter-parties in the resolution of the claims made in the proceedings but represent an independent judicial determination, in the exercise of the judicial power of the Commonwealth, that may be asserted, as a matter of law, against anyone. Although the Act by s 223(1)(c) in part defines *native title* or *native title rights and interests* by reference to the rights and interests recognised by the common law of Australia, a determination of native title expresses the recognition and protection of those rights and interests in relation to land and waters defined and described in s 223 of the Act

which find their *origin* in traditional laws and customs, not the Act (*Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422 at [75] and [76] per Gleeson CJ, Gummow and Hayne JJ).

16 A number of considerations are to be taken into account in determining whether the proposed orders appear appropriate to the Court. First, the Act recognises and encourages the resolution of applications by mediation, negotiation and ultimately agreement without the need for a hearing and the assessment of evidence and fact-finding by the Court necessary in the course of a resolving a controversy. Second, the Court will be concerned to understand and place emphasis upon whether the agreement is freely made on an informed basis by all parties and whether the parties are represented by experienced independent lawyers. In the case of a State party representing the public interest, the Court will consider whether appropriate consideration has been given to the issues raised by the proposed consent determination. Third, so far as the State is concerned, the Court recognises that a State has access to its own archival material and generally has had a long period of engagement with Aboriginal communities and is therefore likely to be familiar with the historical arrangements within those communities. Fourth, although it is not necessary for the Court to consider the body of material that would be available to it in the course of a contested hearing, the Court ought to have regard to sufficient material which is capable of demonstrating that the agreement and the proposed orders are “rooted in reality” (*Native Title – A Constitutional Shift?*”, University of Melbourne Law School, JD Lecture Series, Chief Justice French, 24 March 2009).

17 In that sense, the Court ought to be satisfied that the proposed orders are *prima facie* appropriate in order to satisfy the test under s 87(2) of the Act.

18 In this case, the parties are represented by independent lawyers experienced in the conduct of native title proceedings and the analysis of issues arising in such proceedings for the purposes of the Act. Negotiations between representatives of the Wik and Wik Way claim group and the State concerning the nature and extent of native title in the claim areas the subject of the main application have been taking place since 1996. There has been a long history of engagement on the nature of the traditional and customary rights and interests of the Wik and Wik Way Peoples, their connection with their country and the practice over time

of those traditional laws and customs. The State of Queensland has been a participant in these negotiations arising out of the main application and in this application. Anthropological reports and affidavits supporting those reports, prepared in the course of the main application, were submitted to the State in 1997, 2000, 2001 and 2004. On 15 July 2005, the State advised the claimants that the connection material identified by the applicants was sufficient to enable the State to proceed with substantive negotiations in relation to the land component of this application.

19 In this application, the applicants have retained Professor Peter John Sutton to assist them in isolating material in relation to connection with and occupation by the Wik and Wik Way Peoples of the land and waters of the Determination Area, the early society at sovereignty, the normative laws and customs acknowledged and observed by the society at and since sovereignty and the genealogical record.

20 Professor Sutton is an Australian Research Council Professorial Fellow of the School of Social Sciences at the University of Adelaide and in the Division of Anthropology at the South Australian Museum. Professor Sutton is also an Honorary Research Fellow of the Institute of Archaeology at University College, London. Professor Sutton has worked with Aboriginal people since 1969, mainly in remote and rural areas of far North Queensland and the Northern Territory. Professor Sutton speaks languages from western and eastern parts of Cape York Peninsula and he is extensively published in the discipline of anthropology. Professor Sutton has been retained as a linguistic and anthropological consultant in relation to the native title claims of the Wik and Wik Way claim group since 1992. He has carried out studies of the Wik and Wik Way Peoples and worked with members of the claim group and their predecessors since 1976.

21 Professor Sutton had regard to his own research over this long period and the research of other recognised anthropologists in formulating a report dated October 2008 described as an "Anthropological Overview" for consideration by the Court for the purposes of s 87 of the Act. Specifically, Professor Sutton has given extensive consideration to the nature and content of the rights and interests possessed by the Wik and Wik Way Peoples under traditional laws acknowledged and traditional customs observed by them, the continued acknowledgement and observance of those traditional laws and customs and the continued

connection of the Wik and Wik Way Peoples to the land and waters of the main application and the land and waters the subject of the present application, through the practice of those laws and customs by the Wik and Wik Way Peoples. Professor Sutton has also had regard to significant anthropological research and investigation on the same topic conducted by Dr David Martin.

22 Professor Sutton concludes that this body of research demonstrates so far as this application is concerned, that:

- (a) the members of the Wik and Wik Way native title claim group are descended from the traditional society in occupation of the land and waters identified as the determination area at the time of sovereignty;
- (b) the society in occupation of the determination area at the time of sovereignty observed traditional laws and customs which have continued to be acknowledged and observed by the members of the Wik and Wik Way native title claim group and their predecessors;
- (c) through the continued acknowledgement and observation of the traditional laws and customs, the members of the Wik and Wik Way native title claim group and their predecessors have maintained a connection to the determination area;
- (d) the activities undertaken by the members of the Wik and Wik Way native title claim group on the determination area are referable to the rights and interests identified in the proposed consent determinations of native title, as regulated by their traditional laws and customs.

23 I have considered the detailed Anthropological Overview prepared by Professor Sutton and particularly the discussion of Wik Totemic clans characterised as a social category formed on a principle of, for the most part, patrilineal descent; the nature of riverine groups and regional ceremonial groups; the collective clan *model* for articulating in a complex way the inter-relationship between higher-level groupings amongst the Wik Peoples; and the specific discussion of the Wik-Way Peoples. I particularly note the discussion by Professor Sutton of the nature of the traditional rights practised by the Wik-Way Peoples and the "order and character" of those rights and customs.

24 It is not necessary to set out in these reasons the details of the investigation conducted by Professor Sutton and Dr Martin. However, it is clear that there is extensive evidence of inhabitation of the Determination Area by Aboriginal people for millennia. Linguistic

analysis indicates that the Wik language has evolved over at least 300 years and that these linguistic patterns developed in an area now inhabited by Wik speaking Peoples.

25 There is firsthand evidence of Aboriginal society in the area now inhabited by the Wik and Wik Way Peoples. The evidence is to be found in the logs and journals of Captain Willem Jansz in the Duyfken as early as 1606. Captain Jansz mapped and named Cape Keerweer. The crew of the Dyufken engaged with Aboriginal people at Edward River and near Archer River. Observations of the area were made by Matthew Flinders. The Jardine brothers engaged with Aboriginal people in the course of their journey through Cape York Peninsula in December 1894. Mission and government records from as early as 1897 record the presence of Aboriginal people in a collective or organised way in connection with the land and waters of the main application and this application. The anthropological record includes the work of Ursula McConnel, Donald Thomson, Lauriston Sharp, Frederick McCarthy, John Taylor, John von Sturmer and Athol Chase. Linguistic studies were conducted by Ursula McConnel, Donald Thomson, Kenneth Hale, John von Sturmer and others.

26 All of the anthropological reports have been provided to the State.

27 Section 94A of the Act requires that an order for a determination of native title must set out details of the matters mentioned in s 225 of the Act which must be read together with s 223 of the Act. These sections give meaning to the terms “determination of native title” and “native title” and “native title rights and interests”. In *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (supra) at [76], Gleeson CJ, Gummow and Hayne JJ treated the statutory elements contained in s 223 as central. The mandatory requirements for a determination of native title are these. The native title rights and interests must be communal, group or individual. They must be rights and interests in relation to land or waters. They must be possessed under the traditional laws acknowledged and the traditional customs observed by Aboriginal peoples; Aboriginal people by their law and customs must have a connection with the land or waters; and the native title rights and interests must be recognised by the common law of Australia.

28 I am satisfied that the anthropological material demonstrates that the Wik and Wik Way Peoples are descended from a society of Aboriginal people who were in occupation of

the land and waters of the Determination Area at sovereignty and who formed a society united by their acknowledgement and observance of a normative body of traditional laws, customs and beliefs. Through their continued acknowledgement and observance of these normative laws and customs, the Wik and Wik Way Peoples have, since sovereignty, maintained a connection with the Determination Area. I am satisfied that the content of those native title rights and interests which derive from the practice of traditional laws and customs have been identified and established through the anthropological material. The agreement provides for consent orders entirely consistent with the anthropological material.

29 I am satisfied the proposed orders address each of the elements of s 225 of the Act. Thus, I am satisfied that the orders appear appropriate in accordance with s 87 of the Act.

30 Order 11 of the proposed orders provides that native title is not to be held in trust. By Order 12, Ngan Aak-Kunch Aboriginal Corporation RNTBC ("the Corporation") is to be the prescribed body corporate for the purposes of s 57(2) of the Act and is to perform the functions set out in s 57(3) after becoming a registered body corporate.

31 Section 59 of the Act provides that regulations may prescribe the kinds of body corporate that may be determined to be a prescribed body corporate for the purposes of s 57(2)(b) of the Act. Regulation 4(1) of the *Native Title (Prescribed Bodies Corporate) Regulations* 1999 (Cth) ("the Native Title Regulations") provides that an Aboriginal and Torres Strait Islander corporation is prescribed if it is registered for the purposes of being the subject of a s 57 determination. It will be taken to be registered if the following three requirements of Regulation 4(2) are satisfied:

- (a) all members of the corporation 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 corporation; and
- (c) at all times after the section 56 or 57 determination is made, all members of the corporation are persons who have native title rights and interests in relation to the land or waters to which the native title determination relates.

32 The Wik and Wik Way Peoples took steps to incorporate Ngan Aak Kunch Aboriginal Corporation under the *Aboriginal Councils & Associations Act* 1976 (Cth) ("the

ACA Act”) on 16 October 2002. Their intention was that it would be nominated as the prescribed body corporate for the purpose of s 57(2) of the Act for the first approved determination of native title in the main application and also for subsequent determinations of native title in which the Wik and Wik Way Peoples were determined to be the native title holders.

33 The Corporation’s Constitution was approved by the Office of the Registrar of Aboriginal Corporations on 16 October 2002.

34 A consent order was made in QG6001/1998 by Justice Cooper on 14 April 2003 that the Corporation was to be the prescribed body corporate for the purpose of s 57(2) of the Act and to perform the functions in s 57(3) of the Act after becoming a registered native title body corporate. Orders in the same terms were incorporated into the second and third approved determinations on 13 October 2004.

35 The Corporation became registered as a corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)* (the CATSI Act) on 1 July 2007, when that act and the *Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Act 2006 (Cth)* commenced and the ACA Act was repealed.

36 The name of the Corporation was changed on 19 February 2009 to Ngan Aak Kunch Aboriginal Corporation RNTBC, as required by s 88-10(2) of the CATSI Act.

37 On 16 April 2009 a meeting was held of the Wik and Wik Way Peoples in Aurukun. At that meeting the terms of the proposed consent determination were considered. The agreement was approved and authorised.

38 At that meeting the Corporation was nominated as the prescribed body corporate for the purpose of s 57(2) and to perform the functions in s 57(3) after becoming a registered native title body corporate. A further meeting on that date of the directors of the Corporation resolved to accept and consent to that nomination.

39 The name of the Corporation was further amended at a meeting on 17 June 2009 from Ngan Aak Kunch Aboriginal Corporation RNTBC to Ngan Aak-Kunch Aboriginal

Corporation RNTBC. A new rule-book was also adopted and the previous constitution repealed.

40 The new rule-book sets out the Corporation's relevant objects thus:

6. Objects

6.1 The objects for which the Corporation is established are to:

- (a) be the subject of determinations of native title under section 57 of the *Native Title Act*;
- (b) be a registered native title body corporate in relation to a determination area for the purposes of the *Native Title Act*;
- (c) perform the functions of a registered native title body corporate that does not hold native title rights and interests in trust for the common law holders under the *Native Title Act* and the Regulations...
- (d) protect the native title rights and interests of the native title holders

41 The only people eligible to hold membership of the Corporation are adult Aboriginal people who are native title holders. "Native title holders" is defined as "those members of the Wik and Wik Way Peoples who from time to time hold native title rights and interests in relation to a determination area".

42 I am satisfied that the Corporation is a prescribed body corporate for the purposes of s 57 of the Act and Regulation 4(1), and that Regulation 4(2) is satisfied.

Conclusion

43 For the reasons I have indicated, I make the orders and determination sought by the parties. These orders made today give recognition within the Australian legal system to the native title rights and interests of the Wik and Wik Way Peoples in relation to the Determination Area, born out of traditions honoured and customs practised by the ancestors of the claimants and observed and practised by their descendents continuously over time and recognised and protected under the *Native Title Act 1993 (Cth)*.

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This is a proud day for the Wik and Wik Way Peoples.

I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Greenwood.

Associate:

Dated: 29 July 2009

Counsel for the Applicant:	Represented by their solicitors
Solicitor for the Applicant:	Mr P Hunter and HWL Ebsworth Solicitors
Counsel for the State of Queensland:	Represented by Crown Law
Solicitor for the State of Queensland:	Ms E Fraser, Crown Law
Counsel for Rio Tinto Aluminium Limited:	Represented by its solicitors
Solicitor for Rio Tinto Aluminium Limited:	Ms L Bretherton, Blake Dawson Solicitors
Counsel for the Cook Shire Council:	Represented by its solicitors
Solicitor for the Cook Shire Council:	Mr A Kerr, Preston Lawyers
Counsel for the Fishing Licensees:	Represented by its solicitors
Solicitor for the Fishing Licensees:	Mr P Gore, Gore & Associates Solicitors
Counsel for the Ports Corporation of Queensland:	Represented by its solicitors
Solicitor for the Ports Corporation of Queensland:	Mr D McGann, McCullough Robertson Solicitors
Date of Hearing:	29 July 2009
Date of Judgment:	29 July 2009

FEDERAL COURT OF AUSTRALIA

Wik and Wik Way Native Title Claim Group v State of Queensland [2012] FCA 1096

- Citation:** Wik and Wik Way Native Title Claim Group v State of Queensland [2012] FCA 1096
- Parties:** ANTHONY KERINDUN, VICTOR LAWRENCE, HOGAN SHORTJOE AND SILAS WOLMBY ON THEIR OWN BEHALF AND FOR AND ON BEHALF OF THE WIK AND WIK WAY NATIVE TITLE CLAIM GROUP v STATE OF QUEENSLAND, COOK SHIRE COUNCIL, TELSTRA CORPORATION LIMITED, AUSTRALIAN WILDLIFE CONSERVANCY, THE TONY AND LISETTE LEWIS SETTLEMENT PTY LIMITED, JOHN ERNEST LYNCH, CAMERON STUART MACLEAN, MICHELLE MARGARET MACLEAN, CAMERON CLIVE QUARTERMAINE and DOREEN RUTH QUARTERMAINE
- File number:** QUD 6001 of 1998
- Judge:** GREENWOOD J
- Date of judgment:** 11 October 2012
- Catchwords:** NATIVE TITLE – consideration of a consent determination of the subsistence of native title rights and interests in the Wik and Wik Way Peoples in lands and waters of the western and inland areas of Cape York Peninsula – consideration of the history of the sequence of claims by the Wik and Wik Way Peoples commencing with the filing of the common law claim on 30 June 1993 in reliance upon the principles established in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 and the subsequent filing of a claim under the *Native Title Act 1993* (Cth) – consideration of the early questions considered by the High Court in relation to impairment and extinguishment of native title rights in the context of the grant of pastoral leases – consideration of the successive determinations of native title made by the Federal Court of Australia
- Legislation:** *Native Title Act 1993* (Cth), ss 13, 57, 61, 81, 87(2), 94A, 223 and 225
Commonwealth Aluminium Corporation Pty Limited Act 1957 (Qld)
Aurukun Associates Agreement Act 1975 (Qld)

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Cases cited: *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 – cited and quoted
Wik Peoples v Queensland (1996) 63 FCR 450; 134 ALR 637 – cited
Wik Peoples and Thayorre People v Queensland (1996) 187 CLR 1; 141 ALR 129 - cited
Wik Peoples v State of Queensland & Others [2000] FCA 1443 – cited
Wik Peoples v State of Queensland & Others [2004] FCA 1306 - cited
Wik and Wik Way Native Title Claim Group v State of Queensland [2009] FCA 789; (2009) 258 ALR 306 - cited
Western Australia v Ward (2002) 213 CLR 1 – cited and quoted
Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245 - cited
Members of the Yorta Yorta Aboriginal Community v State of Victoria (2002) 214 CLR 422 – cited

Date of hearing: 11 October 2012

Date of last submissions: 11 October 2012

Place: Aurukun

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 68

Solicitor for the Applicant: P Hunter, HWL Ebsworth Solicitors

Solicitor for the State of Queensland: G Cooper, Crown Law

Solicitor for Cook Shire Council: A Kerr, Preston Law

Solicitor for Telstra Corporation Limited: C Lawrence, Ashurst Australia

Solicitor for the Australian Wildlife Conservancy: M Boge, Thynne & Macartney

Solicitor for the Tony and Lisette Lewis Settlement Pty Limited: M Boge, Thynne & Macartney

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Solicitor for John Ernest Lynch,
Cameron Stuart Maclean, Michelle
Margaret Maclean, Cameron Clive
Quartermaine and Doreen Ruth
Quartermaine: M Boge, Thynne & Macartney

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**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION**

QUD 6001 of 1998

**BETWEEN: ANTHONY KERINDUN, VICTOR LAWRENCE, HOGAN
SHORTJOE AND SILAS WOLMBY ON THEIR OWN
BEHALF AND FOR AND ON BEHALF OF THE WIK AND
WIK WAY NATIVE TITLE CLAIM GROUP**

Applicant

**AND: STATE OF QUEENSLAND, COOK SHIRE COUNCIL,
TELSTRA CORPORATION LIMITED, AUSTRALIAN
WILDLIFE CONSERVANCY, THE TONY AND LISETTE
LEWIS SETTLEMENT PTY LIMITED, JOHN ERNEST
LYNCH, CAMERON STUART MACLEAN and MICHELLE
MARGARET MACLEAN, CAMERON CLIVE
QUARTERMAINE and DOREEN RUTH QUARTERMAINE**

Respondents

**JUDGE: GREENWOOD J
DATE OF ORDER: 11 OCTOBER 2012
WHERE MADE: AURUKUN**

THE COURT NOTES THAT:

- A. The Applicant has brought Native Title Determination Application QUD 6001/1998 ("the Application") which relates to an area which includes the land and waters the subject of the proposed determination.
- B. On 3 October 2000 a determination that native title exists was made by consent by the Federal Court of Australia over the land and waters of Part A of the area covered by the Application.
- C. On 13 October 2004, two determinations were made over part of Part B of the area covered by the Application. These determinations became effective on 24 March 2005.
- D. The parties to the Application have reached an agreement as to the terms of a determination of native title to be made in relation to the remaining land and waters of Part B of the area covered by the Application and have asked the Court to make a consent order for a determination of native title over that area.

- E. The traditional laws acknowledged and traditional customs observed by the Wik and Wik Way Peoples includes the authority as between Aboriginal people to:
- (a) resolve disputes about who is or who is not a Wik person or a Wik Way person;
 - (b) determine as between Wik and Wik Way Peoples what are the particular native title rights and interests that are held by particular Wik and Wik Way Peoples in relation to particular parts of the Determination Area;
 - (c) exclude particular Wik and Wik Way Peoples from the exercise of particular native title rights and interests in relation to particular parts of the Determination Area; and
 - (d) resolve disputes between Aboriginal people concerning native title rights and interests in relation to the Determination Area, with the assistance of native title holders of adjoining areas where such assistance is necessary.

BEING SATISFIED THAT a determination in the terms sought by the parties is within the power of the Court, and it appearing appropriate for the Court to do so,

BY CONSENT THE COURT ORDERS THAT:

1. Native title exists in relation to the Determination Area.
2. The native title in the Determination Area is held by the Wik and Wik Way Peoples ("Native Title Holders") in accordance with traditional laws acknowledged and traditional customs observed by them as common law holders.
3. Subject to paragraphs 5, 6, and 7, the nature and extent of the native title rights and interests within the Determination Area, other than in relation to Water, are non-exclusive rights to:
 - (a) access, move about in and on and be present on, and Camp on, the Determination Area;
 - (b) take and use the Natural Resources of the Determination Area for non-commercial:
 - (i) cultural purposes;
 - (ii) personal purposes;
 - (iii) domestic purposes; or
 - (iv) communal purposes;

- (c) maintain and protect from harm by lawful means sites and places of significance in the Determination Area;
 - (d) maintain Springs and Wells in the Determination Area for the sole purpose of ensuring the free flow of Water;
 - (e) conduct ceremonies and engage in cultural activities on the Determination Area;
 - (f) hunt and gather in, on and from the Determination Area for non-commercial:
 - (i) cultural purposes;
 - (ii) personal purposes;
 - (iii) domestic purposes; or
 - (iv) communal purposes; and
 - (g) teach the physical and spiritual attributes of sites and places of significance and areas of importance in the Determination Area,
and the right to inherit and succeed to the native title rights and interests.
4. Subject to paragraphs 5, 6 and 7 the nature and extent of the native title rights and interests in relation to Water within the Determination Area are non-exclusive rights to:
- (a) hunt and fish in or on, and gather from, the Water for non-commercial:
 - (i) cultural purposes;
 - (ii) personal purposes;
 - (iii) domestic purposes; or
 - (iv) communal purposes; and
 - (b) take and use the Water for non-commercial:
 - (i) cultural purposes;
 - (ii) personal purposes;
 - (iii) domestic purposes; or
 - (iv) communal purposes.
5. There are no native title rights or interests in or in relation to Minerals and Petroleum.
6. The native title rights and interests are subject to and exercisable in accordance with:
- (a) the Laws of the State and the Commonwealth; and
 - (b) the traditional laws acknowledged and traditional customs observed by the Native Title Holders.
7. The native title rights and interests referred to in paragraphs 3 and 4 do not:

- (a) confer possession, occupation, use or enjoyment to the exclusion of all others; and
 - (b) extend to a right to control access to or a right to control the use of the Determination Area.
8. The nature and extent of the other rights and interests in relation to the Determination Area (or respective parts thereof) are set out in Schedule 3.
9. The relationship between the native title rights and interests described in paragraphs 3 and 4 and the other rights and interests described in Schedule 3 (the “other rights and interests”) is that:
 - (a) the other rights and interests continue to have effect, and the rights conferred by or held under the other rights and interests may be exercised notwithstanding the existence of the native title rights and interests; and
 - (b) for the avoidance of doubt, the other rights and interests and any activity that is required or permitted by or under, and done in accordance with, the other rights and interests, or any activity that is associated with or incidental to such an activity, prevail over the native title rights and interests and any exercise of the native title rights and interests.
10. The words and expressions used in this order have the same meanings as they have in Part 15 of the *Native Title Act 1993* (Cth) except for the following defined words and expressions:

“Animal” and “Plant” have the meanings given to them in the *Nature Conservation Act 1992* (Qld);

“Camp” means to camp on the Determination Area but does not include permanent residence or the construction of permanent structures or fixtures;

“Determination Area” means the land and waters described in Schedule 1 and shown on the plan in Schedule 2 and, to the extent of any inconsistency between them, Schedule 1 prevails;

“Forest Products” has the meaning given to it in the *Forestry Act 1959* (Qld);

“Laws of the State and the Commonwealth” means the common law and the laws of the State and the Commonwealth of Australia, and includes legislation, regulations, statutory instruments, local planning instruments and local laws;

“Minerals” has the meaning given to it in the *Mineral Resources Act 1989* (Qld);

“Natural Resources” means:

- (a) any Plant, Animal and Forest Products found on, or in, the Determination Area from time to time; and
- (b) flints, clays, soil, sand, gravel and rock on or below the surface of the Determination Area,

that have traditionally been taken and used by the Native Title Holders, but does not include Minerals or Petroleum;

“Petroleum” has the meaning given to it in the *Petroleum Act 1923* (Qld) and the *Petroleum and Gas (Production and Safety) Act 2004* (Qld);

“Springs and Wells” means the land to which Water rises naturally from below the ground and the land over which the Water then flows; and

“Water” means water as defined by the *Water Act 2000* (Qld).

AND THE COURT FURTHER ORDERS THAT:

- 11. Upon paragraphs 1-9 taking effect:
 - (a) the native title is not to be held in trust; and
 - (b) Ngan Aak-Kunch Aboriginal Corporation RNTBC, incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), is to:
 - (i) be the prescribed body corporate for the purpose of section 57(2) of the *Native Title Act 1993* (Cth); and
 - (ii) perform the functions mentioned in section 57(3) of the *Native Title Act 1993* (Cth) after becoming a registered native title body corporate.
- 12. Paragraphs 1-9 will take effect on the agreements referred to in item 6 of Schedule 3 being registered on the register of indigenous land use agreements.
- 13. In the event that the agreements referred to in item 6 of schedule 3 are not registered on the Register of Indigenous Land Use Agreements within six (6) months of the date of this order or such later time as the Court may order, the matter is to be listed for further directions.
- 14. Each party to the proceeding to bear their own costs.
- 15. The parties have liberty to apply for the following purposes:
 - (a) to establish the precise location and boundaries of land on which the improvements referred to in Schedule 4 have been constructed and any

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adjacent land or waters the exclusive use of which is necessary for the enjoyment of the improvements; and

- (b) to establish whether any of the improvements referred to at Schedule 4 have been constructed unlawfully.

SCHEDULE 1 – Determination Area (see Order 10)

The Determination Area is the land and waters within the area described as Lots 4, 5, 6, & 7 on AP17644 covering:

- (a) Lot 1 on YK4 (“the Watson River Lease”), excluding areas identified on YK4 as “Road 60 Wide”;
- (b) Lot 653 on SP178000 (“the Kendall River Lease”) including an area identified as “Road 60 Wide” and delineated by stations “A – B” on SP178000;
- (c) that part of the Holroyd River where it adjoins the southern boundary of Lot 653 on SP178000;
- (d) part of Lot 2 on SP140870 (previously part of Lot 2 on YK11) (“the Piccaniny Plains Lease”), excluding area identified as “Road 60 Wide” within that part;
- (e) that part of the Archer River where it adjoins the southern boundary of that part of Lot 2 on SP140870 which falls within the Determination Area;
- (f) part of Lot 3 on SP140870 (previously part of Lot 2 on YK11) (“the Merluna Lease”), excluding areas identified as “Road 60 Wide” within that part;
- (g) part of Lot 1 on SP177772, (“the Leconsfield Lease”), excluding areas identified as “Road 60 Wide” within that part, but not excluding areas identified as “Road 60 Wide” and delineated by:
 - (i) stations “A - B” on SP177772;
 - (ii) stations “A - B” on SP148760; and
 - (iii) from station “C” on SP148760 extending in an easterly direction to its intersection with the eastern boundary of the Determination Area;
- (h) that part of the Holroyd River where it adjoins a south western boundary of that part of Lot 1 on SP177772 which falls within the Determination Area,

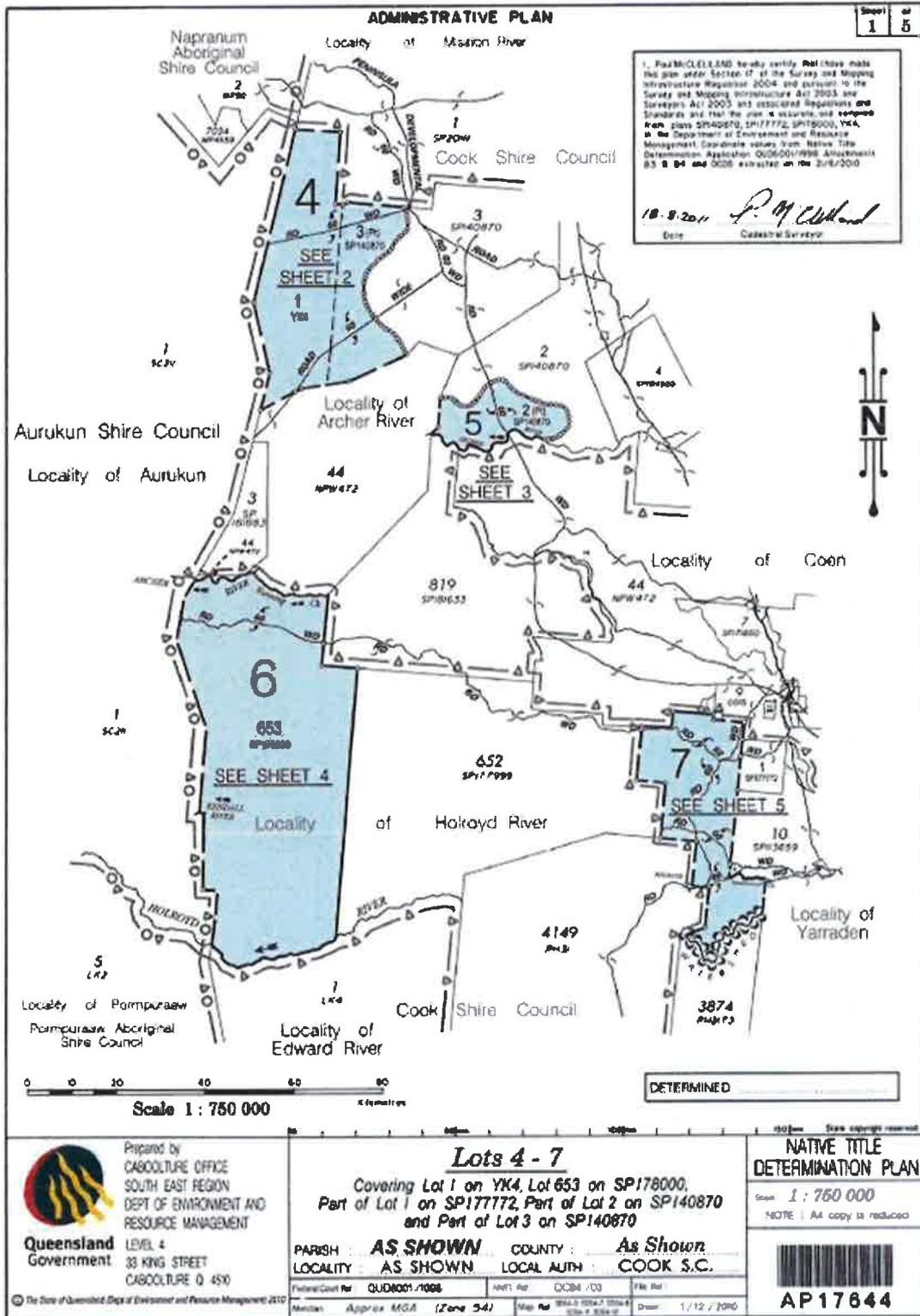
but excluding the areas identified in Schedule 4.

The land and waters within the road areas that are excluded from the Determination Area are excluded in accordance with section 61A of the *Native Title Act 1993* (Cth) (and section 23B(7) of the *Native Title Act 1993* (Cth) and sections 20 and 21 of the *Native Title (Queensland) Act 1993* (Qld)) because they are areas where previous exclusive possession acts have occurred, accordingly native title has been extinguished in relation to the whole of the area and no claimant application to the area can be made.

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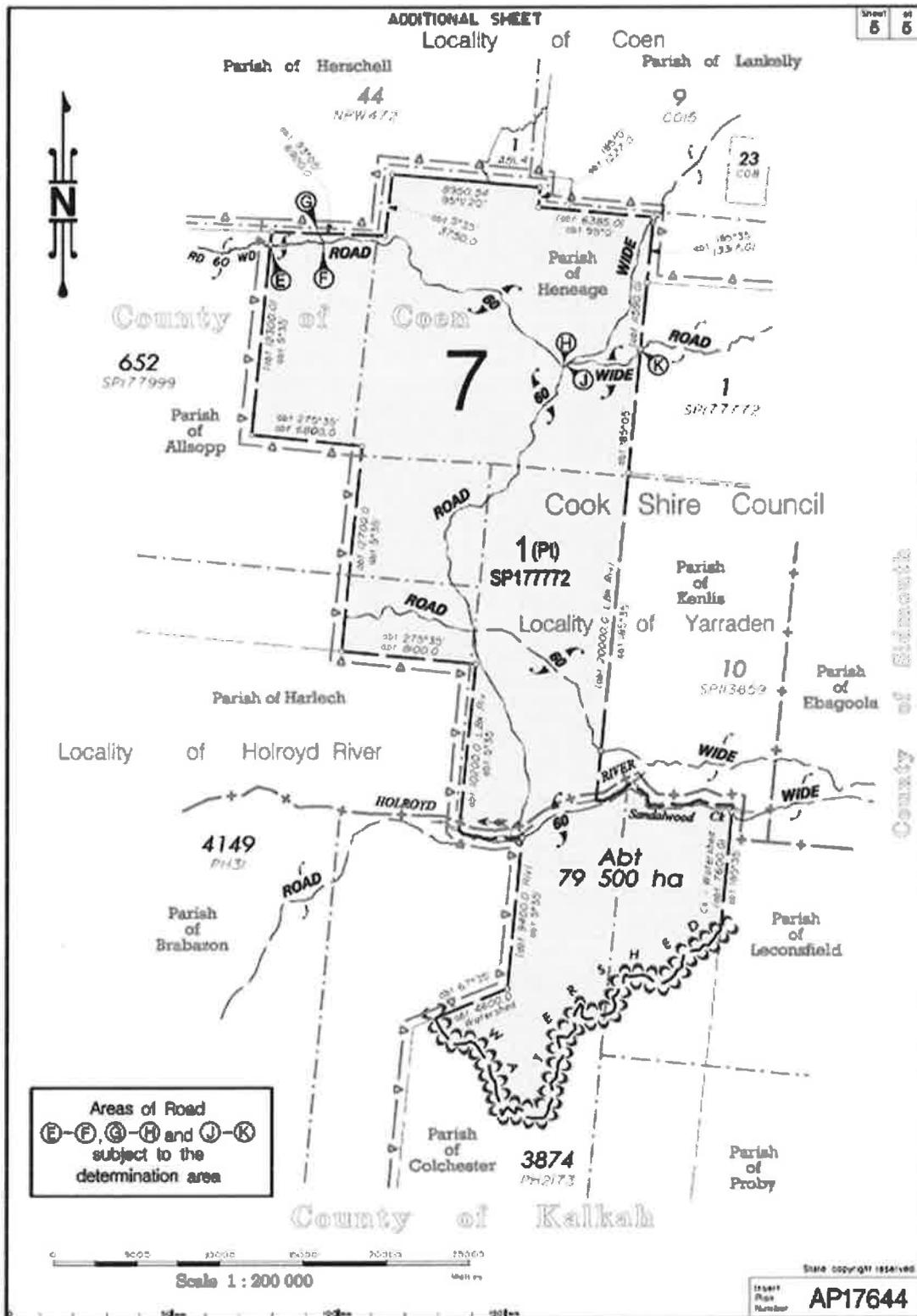
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SCHEDULE 2 – Determination Plan (see Order 10)



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SCHEDULE 3 – Other interests in the determination area (see Orders 8 and 9)

1. The rights and interests of
 - (a) the lessee and others under a term lease being title reference No. 17669036 comprising Lot 1 on YK4;
 - (b) the lessee and others under a term lease being title reference No. 40037990 comprising Lot 2 on SP140870;
 - (c) the lessee and others under a term lease, being title reference No. 40037991 comprising Lot 3 on SP140870;
 - (d) the lessee and others under a term lease being title reference No. 17668105 comprising Lot 653 on SP178000; and
 - (e) the lessee and others under a term lease being title reference No. 40033877 comprising Lot 1 on SP177772.
2. The rights, interests, powers and responsibilities of the Cook Shire Council as a local government established under the *Local Government Act 2009* (Qld) and as an entity exercising statutory powers in respect of the land and waters in its local government area.
3. The rights and interests granted by the State pursuant to statute or otherwise in the exercise of its executive power including, but not limited to, the rights and interests of persons holding licences, permits, authorities, allocations, leases, claims, agreements or other instruments granted or issued pursuant to:
 - (a) the *Mineral Resources Act 1989* (Qld) and any subordinate legislation, declarations or management plans made under that Act;
 - (b) the *Geothermal Exploration Act 2004* (Qld) and any subordinate legislation, declarations or management plans made under that Act;
 - (c) the *Forestry Act 1959* (Qld) and any subordinate legislation, declarations or management plans made under that Act;
 - (d) the *Water Act 2000* (Qld) and any subordinate legislation, declarations or management plans made under that Act; and
 - (e) the *Integrated Planning Act 1997* (Qld) or *Sustainable Planning Act 2009* (Qld) and any subordinate legislation, declarations or management plans made under those Acts,as may be current at the date of this determination.

4. The rights and interests of the State pursuant to any licence, permit or authority granted or issued pursuant to the *Radio Communicators Act 1992* (Cth) as may be current at the date of the determination.
5. Any other rights and interests held by the State, or by reason of the force and operation of the Laws of the State and the Commonwealth, as may be current at the date of this determination including, but not limited to, the rights and interests of the State under section 35 of the *Transport Infrastructure Act 1994* (Qld) in relation to an area within Lot 1 on YK4.
6. The rights and interests of the parties under the following agreements:
 - (a) the indigenous land use agreement ("ILUA") between Anthony Kerindun, Victor Lawrence, Hogan Shortjoe and Silas Wolmby and Cook Shire Council entitled the Wik & Wik Way – Cook Shire Council – Local Government ILUA (#3) executed on 22 August 2012;
 - (b) the ILUA between Anthony Kerindun, Victor Lawrence, Hogan Shortjoe and Silas Wolmby and Cameron Clive Quartermaine and Doreen Ruth Quartermaine entitled the Wik & Wik Way - Watson River Pastoral Lease ILUA executed on 7 September 2012;
 - (c) the ILUA between Anthony Kerindun, Victor Lawrence, Hogan Shortjoe and Silas Wolmby and Cameron Stuart Maclean and Michelle Margaret Maclean entitled the Wik & Wik Way - Merluna Pastoral Lease ILUA executed on 12 September 2012;
 - (d) the ILUA between Anthony Kerindun, Victor Lawrence, Hogan Shortjoe and Silas Wolmby and John Ernest Lynch entitled the Wik & Wik Way - Kendall River Pastoral Lease ILUA executed on 30 August 2012; and
 - (e) the ILUA between Anthony Kerindun, Victor Lawrence, Hogan Shortjoe and Silas Wolmby and The Tony and Lisette Lewis Settlement Pty Limited and Australian Wildlife Conservancy entitled the Wik & Wik Way - Piccaninny Plains Pastoral Lease ILUA executed on 29 August 2012.
7. The rights and interests of Telstra Corporation Limited:
 - (a) as the owner or operator of telecommunications facilities within the Determination Area;
 - (b) created pursuant to the *Post and Telegraph Act 1901* (Cth), the *Telecommunications Act 1975* (Cth), the *Australian Telecommunications*

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Corporation Act 1989 (Cth), the *Telecommunications Act 1991* (Cth) and the *Telecommunications Act 1997* (Cth) including rights:

- (i) to inspect land;
 - (ii) to install and operate new telecommunication facilities;
 - (iii) to alter, remove, replace, maintain, repair and ensure the proper functioning of its existing and any new telecommunications facilities; and
 - (iv) for its employees, agents or contractors to access the Determination Area for the purposes of exercising the rights in (i), (ii) and (iii) above in respect of the telecommunications facilities in and in the vicinity of the Determination Area;
- (c) under any licences relating to its telecommunications facilities in the Determination Area.

SCHEDULE 4 – Other areas excluded from the Determination Area (see Order 15)

The following areas are wholly excluded from the Determination Area on the grounds that native title has been extinguished and cannot be claimed:

1. In relation to the Watson River Lease, Kendall River Lease and Leconsfield Lease, those parts of those areas on which any permanent improvement consisting of:
 - (a) a house, shed or other outbuilding;
 - (b) an airstrip;
 - (c) a constructed dam or other constructed stock watering point, bores, turkey nest, squatters' tank or other water storage facility;
 - (d) stockyards; or
 - (e) trapyards,have been constructed prior to the date of this determination, and any adjacent land or waters the exclusive use of which is necessary for the enjoyment of the improvements, in accordance with the rights of the lessees under the Watson River Lease, Kendall River Lease and Leconsfield Lease.
2. In relation to the Merluna Lease and Piccaninny Plains Lease, those parts of those areas on which any permanent improvement consisting of:
 - (a) a shed or other outbuilding;
 - (b) a constructed dam or other constructed stock watering point, bores, turkey nest, squatters' tank or other water storage facility;
 - (c) stockyards; or
 - (d) trapyards,have been constructed prior to the date of this determination, and any adjacent land or waters the exclusive use of which is necessary for the enjoyment of the improvements, in accordance with the rights of the lessees under the Merluna Lease and Piccaninny Plains Lease.

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

Signed by AustLII

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION**

QUD 6001 of 1998

**BETWEEN: ANTHONY KERINDUN, VICTOR LAWRENCE, HOGAN
SHORTJOE AND SILAS WOLMBY ON THEIR OWN
BEHALF AND FOR AND ON BEHALF OF THE WIK AND
WIK WAY NATIVE TITLE CLAIM GROUP**

Applicant

**AND: STATE OF QUEENSLAND, COOK SHIRE COUNCIL,
TELSTRA CORPORATION LIMITED, AUSTRALIAN
WILDLIFE CONSERVANCY, THE TONY AND LISETTE
LEWIS SETTLEMENT PTY LIMITED, JOHN ERNEST
LYNCH, CAMERON STUART MACLEAN and MICHELLE
MARGARET MACLEAN, CAMERON CLIVE
QUARTERMAINE and DOREEN RUTH QUARTERMAINE**

Respondents

**JUDGE: GREENWOOD J
DATE: 11 OCTOBER 2012
PLACE: AURUKUN**

REASONS FOR JUDGMENT

1 In these proceedings, the applicants seek for themselves and on behalf of the Wik and Wik Way Peoples, a determination (with the agreement of all respondents to the application and subject to the Court being satisfied of the relevant matters), that by reason of the traditional laws acknowledged by the Wik and Wik Way Peoples, and the traditional customs observed by them, native title rights and interests as described in Orders 3 and 4 subsist in them as recognised by the common law of Australia in relation to the land and waters described in Schedule 1 to the Orders and shown on the plan in Schedule 2.

2 The 4,500 square kilometres of land and waters covered by this determination over which the Wik and Wik Way Peoples have maintained their traditional and customary connection comprises several separate areas of land and waters all subject to the grant of pastoral leases. Although each area is defined in Schedule 1 in precise terms, the areas are generally understood as the "Watson River Lease", the "Kendall River Lease", the "Piccaninny Plains Lease", the "Merluna Lease" and the "Leconsfield Lease" (also known as

the "Crystalvale Lease"). The waters covered by this determination are those parts of the Holroyd and Archer Rivers which adjoin parts of the boundary of particular leases and other waters associated with the leases.

3 I will describe the nature of the native title rights and interests that subsist in the Wik and Wik Way Peoples over the land and waters covered by this determination later in these reasons.

4 This determination, made under s 87(2) of the *Native Title Act 1993* (Cth), is a final determination of the subsistence of native title rights and interests in the Wik and Wik Way Peoples concerning the remaining Part B areas of land and waters over which they claim native title rights. The original *Native Title Act* claim was filed on 24 March 1994. Since then there have been three determinations of native title rights in the Wik and Wik Way Peoples over areas of land and waters within the original claim (Parts A and B1 and B2) and a further determination (the "4th determination") of native title over land excised in September 2001 from the original claim and made the subject of a separate application.

5 This is the fifth and final determination of the remaining Part B claim.

6 In view of the historical significance of the claims of the Wik and Wik Way Peoples, by both the coastal and inland Wik and Wik Way Peoples, and the context within which this final determination sits, it is important to set out some of the background concerning the original claim, the determinations already made, and the present claim. As to the procedural steps in the progression of the claim from 1993 (before the filing of the application under the *Native Title Act*), I have had regard to the contribution by Mr Philip Hunter, the solicitor for the Wik Peoples since 1993, to the Butterworths 1997 publication edited by Mr Hiley QC entitled "The Wik Case, Issues and Implications".

7 On 30 June 1993 before the commencement of the *Native Title Act 1993* (Cth), the Wik Peoples supported by the Cape York Land Council commenced proceedings in the Federal Court of Australia seeking, among other things, a declaration that they held, in accordance with the principles established in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, *Aboriginal title* and *possessory title* over approximately 28,000 square kilometres of traditional land and waters in an area south of Weipa and lying between the Embley and

Edward Rivers on the western side of Cape York Peninsula extending inland to areas almost as far as Coen in the eastern Cape. The Wik Peoples sought a declaration, among a range of other extensive relief, that their Aboriginal title and possessory title had not been *impaired* or *extinguished* by the grant of particular pastoral leases and that their rights continued to *co-exist* with the interests of the lessees.

8 Before mentioning further aspects of that claim and its progression, it is important to note the following matters concerning the nature of the interests in the claim area and aspects of the connection of the Wik and Wik Way Peoples to the land and waters of the broader claim area under the original application and then as that claim area became amended and determinations were progressively made.

9 The area of land and waters the subject of the 30 June 1993 claim reflected a range of tenures and interests. They included land the subject of leases to Aboriginal people, Deeds of Grant in Trust for Aboriginal people, National Park land, vacant Crown land, land subject to pastoral leases and land the subject of special bauxite mining leases issued under an agreement between Commonwealth Aluminium Corporation Pty Limited (later Comalco Aluminium Limited, "Comalco") and the State of Queensland in 1957 (the "Comalco Agreement") and ratified under the *Commonwealth Aluminium Corporation Pty Limited Act 1957* (Qld) (the "1957 Act"), and also land subject to bauxite mining leases in favour of Pechiney Holdings Pty Ltd ("Pechiney").

10 The area between the Embley and Edward Rivers takes in the Watson, Archer, Kendall and Holroyd rivers among other rivers and waterways. Dr Sutton has undertaken extensive anthropological work in the area the subject of the claims of the Wik and Wik Way Peoples over a long period of time. Dr Sutton is a distinguished anthropologist, an Honorary Member of the Division of Anthropology of the South Australian Museum, formerly Head of that Division from 1984 to 1990, formerly a Nuffield Fellow in the Department of Anthropology at the University of Cambridge, Affiliate Professor of the School of Earth & Environmental Sciences at the University of Adelaide, an anthropologist who has worked with Aboriginal people since 1969 and an expert who is extensively familiar with languages from the western and eastern parts of Cape York Peninsula.

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11 I have had the benefit of reading Dr Sutton's extensive report of October 2008 and his further detailed report of July 2012 annexed to his affidavit of 26 July 2012.

12 In these reports, Dr Sutton examines the nature and extent of the anthropological, historical, linguistic and genealogical record of connection and traditional and customary practices of the Wik and Wik Way Peoples throughout areas of western Cape York both along the coastal sections of the western Cape and the inland areas of land and waters.

13 These reports contain an extensive examination of Wik Totemic clans characterised as a social category formed on a principle, for the most part, of patrilineal descent; the nature of riverine groups and regional ceremonial groups; the collective clan model for articulating in a complex way the inter-relationship between higher-level groupings amongst Wik Peoples; and a detailed examination of the traditional practises of the Wik Way Peoples. Dr Sutton's reports contain an extensive discussion of the nature and content of the traditional rights acknowledged, and traditional customs observed, by the Wik Way Peoples and the "order and character" of those rights and customs.

14 Dr Sutton has also had regard to significant anthropological research and investigation work conducted on the same topics by Dr David Martin. Dr David Martin resided in the region from 1976 to 1983 and undertook an anthropological mapping exercise from 1985 to 1988. Apart from the work of these anthropologists, the record includes the account in 1897 of Archibald Meston's visit to the lower and upper Embley River and his noting of Aboriginal place names and the identification of particular parts of the land with particular groups of Aboriginal peoples; Nicholas Hey's excursion in 1901 into the Archer River area from the Weipa Mission and his engagement with over 100 Aboriginal people; the long-term fieldwork of Ursula McConnel (based at Aurukun) in 1927, 1928 and 1934 including coastal and extensive overland fieldwork; long-term fieldwork of Donald Thomson (based at Aurukun) in 1928 and 1932-1933 around Aurukun and along the Archer River; the fieldwork of Lauriston Sharp around the Edward and Mitchell Rivers in the 1930s; the work of John Taylor at Edward River in 1968; the work of John von Sturmer with the Southern Wik Peoples in 1969 and the joint work with Athol Chase in 1976 and 1977 in undertaking mapping of territoriality and totemism in the region; and, the work of an archaeologist Roger Cribb and also the work of Diane Smith.

15 Important linguistic studies conducted among Wik and Wik Way Peoples were undertaken by Ursula McConnel and Donald Thomson in the 1920s and 1930s. Professor Kenneth Hale of the Massachusetts Institute of Technology conducted a major comparative survey of languages of the Wik and Wik Way Groups in 1960. Professor Hale prepared a two part paper addressing the linguistic evidence demonstrating the length of time these languages have been used and spoken in the claim areas as framed by the principal determination application filed under the *Native Title Act* in 1994. John von Sturmer undertook a study of Wik and Wik Way dialects and Dr Sutton also conducted a survey of Wik languages.

16 These other matters should be noted.

17 *First*, within the broader Wik region is the community of Aurukun. Aurukun was founded in 1904 by Moravian Missionaries. Wik and Wik Way Peoples from the lower Archer River came into contact with the Mission almost immediately. Over time, the Mission engaged with Wik and Wik Way Peoples over the entire field of the extensive Mission Reserve including a substantial group of inland or bush-dwelling Peoples from land in the upper Kendall and Holroyd River areas and also the upper Holroyd and Edward River areas. The Moravian Missionaries at Aurukun (particular Richter and Holmes) maintained the “historically deepest” (relevant for the present Determination Area) birth records extending back to 1891.

18 *Second*, Missionaries William and Geraldine MacKenzie at Aurukun from the 1920s to the 1960s kept a meticulous set of records of Wik and Wik Way Peoples including a large set of data-cards containing details of each person’s name, date and place of birth and death, and references to major site names or area names revealing the local “clan estate” or “homeland area” for each individual. In some of the genealogies for people from the Wik Way area, the data-cards include the names of parents and people born in the period 1900 to 1910 with birthdates of grandparents around 1875 to 1885.

19 *Third*, in 1938 at the southern end of the Reserve or broad original claim area, Joseph Chapman established the Church of England’s Edward River Mission now called Pormpuraaw. The Mission records therefore began later and those records are not as relevant as the Aurukun records so far as the present determination application is concerned.

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20 *Fourth*, apart from the Mission records, archaeological evidence (including shell mounds and carbon dating of shell beds) shows occupation from areas around the eastern or upper Hey River (south of Weipa between the Embley and Watson Rivers) and flood plains across the broader claim area by Aboriginal people for thousands of years.

21 *Fifth*, in 1606 the crew of the *Duyfken* under Willem Jansz sailed down the west coast of Cape York Peninsula for 350 kilometres turning back from Cape Keer-weer (mapped and named by Jansz). Jansz observed and engaged with coastal Aboriginal people at Pennefather River. Carstenz sailed beyond Cape Keer-weer in 1623 (the ships *Pera* and *Arnhem*) on 14 April 1623 and noted great volumes of smoke in the Holroyd-Edward River area. Carstenz's men engaged with coastal Aboriginal people in the Edward River area, and extensively so, on 7 May 1623, in a coastal area between the Love River (below the Archer River south of Aurukun) and Cape Keer-weer, and at the Archer River area the next day. Matthew Flinders observed smoke from the same areas and observed that the area was "well-peopled". In 1864 and 1865 the Jardine brothers traversed Cape York Peninsula from south to north and recorded contact with Aboriginal people of the Wik region between the Holroyd and Kendall River areas.

22 All of this material supports and confirms the views reflected in the reports of Dr Sutton to this effect which I accept.

23 *First*, the members of the Wik and Wik Way Peoples are descended from a traditional society in occupation at the time of sovereignty (and well before) of the land and waters the subject of this determination application and thus the Determination Area.

24 *Second*, the society in occupation of the Determination Area at sovereignty observed traditional laws and customs which have continued to be recognised and acknowledged and observed by members of the Wik and Wik Way Peoples and their predecessors.

25 *Third*, by reason of their continued acknowledgement, recognition and observance of these traditional laws and customs, the members of the Wik and Wik Way Peoples and their predecessors have maintained a connection to the land and waters of the Determination Area.

26 *Fourth*, the activities undertaken by members of the Wik and Wik Way Native Title Claim Group on the Determination Area are referable to the native title rights and interests identified in the determination as regulated by their traditional laws and customs.

27 These anthropological, historical, linguistic and genealogical considerations among other questions of fact and law resulted in the Court making determinations of native title rights in the Wik and Wik Way Peoples over the Part A and Parts B1 and B2 areas on 3 October 2000 and 13 October 2004, and a further determination on 29 July 2009. Those determinations represent areas of land and waters of approximately 20,400 square kilometres of traditional land and waters in the Aurukun Shire, the northern part of the Pormpuraaw Deed of Grant in Trust, part of the Napranum Deed of Grant in Trust to the south of the Embley River, a number of term pastoral leases, unallocated Crown land and the land over which bauxite mining leases have been granted south of the Embley River.

28 These factors of a *recognised traditional society* at sovereignty in *occupation* of land and waters between the Embley and Edward Rivers, observing identified *traditional laws and customs* as the source of particular native title rights and interests subsisting in the Wik and Wik Way Peoples by reason of their continuing connection to the land and waters, led to the filing of the first claim by the Wik Peoples based on the principles identified in *Mabo (No. 2)* on 30 June 1993 as already mentioned.

29 On 9 February 1994, the Wik Peoples sought an order that the proceedings commenced on 30 June 1993 be adjourned generally having regard to particular undertakings given by them not to press that application, so as to enable them to make an application for a determination of native title rights and interests under the Commonwealth Parliament's legislative response to the principles for determining native title identified by the High Court in *Mabo (No. 2)*. The 30 June 1993 proceedings were adjourned by Drummond J generally and on 24 March 1994 an application for a determination of native title together with a claim to compensation was filed with the National Native Title Tribunal (the "Tribunal") under the provisions of the *Native Title Act 1993* (Cth).

30 On 26 May 1994, Drummond J ordered that certain preliminary questions arising out of the application be set down for determination at a hearing later in that year. Those questions, among other things, concerned the extent of any limitations on the constitutional

power of the State to extinguish native title rights and the scope of the grant by the State of special bauxite mining leases to Comalco and Pechiney under the Comalco Agreement as ratified by the 1957 Act and under the *Aurukun Associates Agreement Act 1975* (Qld).

31 However, on 14 July 1994 the Wik Peoples applied for leave to amend their claim and also sought and obtained leave to join 10 lessees under particular pastoral leases as respondents to the proceeding. On 2 September 1994, Drummond J ordered that the limitation of power questions be reframed. The Court also set down for separate determination questions concerning the relationship between the rights of the traditional native title holders over parts of the land and waters of the claim area and the “interest” of a lessee under a pastoral lease of that land. The particular lease in question was the “Holroyd Pastoral Holding Lease”.

32 The questions to be determined were these:

(2) If at any material time aboriginal title or possessory title existed in respect of the land demised under the pastoral lease in respect of the [Holroyd River Holding (“Pastoral Lease”)]:

- (a) Is the Pastoral Lease subject to a reservation in favour of the Wik Peoples and their predecessors in title of any rights or interests which might comprise such aboriginal title or possessory title which existed before the New South Wales Constitution Act 1855 (“Imp.”) took effect in the Colony of New South Wales?
- (b) Does the pastoral lease confer rights to exclusive possession on the grantee?

If the answer to (a) is “No” and the answer to (b) is “Yes”:

- (c) Does the creation of the Pastoral Lease that has these two characteristics confer on the grantee rights wholly inconsistent with the concurrent and continuing exercise of any rights or interests which might comprise such aboriginal title or possessory title of the Wik Peoples and their predecessors in title which existed before the New South Wales Constitution Act 1855 (“Imp.”) took effect in the Colony of New South Wales?
- (d) Did the grant of the Pastoral Lease necessarily extinguish all incidents of aboriginal title or possessory title of the Wik Peoples in respect of the land demised under the Pastoral Lease?

33 On 16 September 1994, Drummond J ordered that the Thayorre People be joined as respondents to the claim. The Court also set down for determination questions in the same terms set out above in relation to two Mitchelton Pastoral Holding Leases.

34 The hearing of the preliminary questions took place in October and December 1994 and although a mediation of the overall native title determination application under s 61(1) of the *Native Title Act* took place during the course of an adjournment of the hearing, the matter did not resolve.

35 On 29 January 1996, Drummond J determined each of the preliminary questions adversely to the Wik Peoples and Thayorre People (*Wik Peoples v Queensland* (1996) 63 FCR 450; 134 ALR 637). Leave to appeal to the Full Court was granted by the Federal Court on 22 March 1996. The appeal was removed into the High Court on 15 April 1996 pursuant to Orders made by Brennan CJ, McHugh and Gaudron JJ under s 40 of the *Judiciary Act* 1903 (Cth).

36 The appeals on each question were heard by the Full Court of the High Court on 11, 12 and 13 June 1996. Prior to the commencement of the hearing the issues were narrowed so that the pastoral lease questions were the principal matters for determination by the High Court. Apart from the parties with a direct interest in the appeal such the State of Queensland, the Commonwealth and other respondents to the principal application, interveners in the appeals included all of the State Attorneys-General (with the exception of New South Wales), the Attorney-General for the Northern Territory and Aboriginal groups and Land Councils in Western Australia and the Northern Territory. The Aboriginal and Torres Strait Islander Commission, which was the lessee of the Coen River Pastoral Holding within the claim area supported the submissions of the Wik Peoples.

37 In the result, the Wik Peoples established in *Wik Peoples and Thayorre People v Queensland* (1996) 187 CLR 1; 141 ALR 129, the proposition by majority in the separate judgments of Toohey, Gaudron, Gummow and Kirby JJ that the granting of each pastoral lease in issue under the Queensland legislation (whether or not the lease had expired or had been terminated) did not *necessarily* extinguish *all* native title rights and interests that might subsist in the Wik Peoples over the claimed land and waters. Of course, at that time the

content of the native title rights and interest of the Wik Peoples had not been determined in respect of any part of the land and waters the subject of the claim.

38 The Wik Peoples also established the proposition subsequently affirmed in *Western Australia v Ward* (2002) 213 CLR 1 in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ at [78], [82], [215] and [234] that the question of whether each native title right or interest comprising the bundle of native title rights of the traditional owners is impaired or extinguished by the grant of a pastoral lease (or a mining lease) under a particular enactment, is to be determined by an “inconsistency of rights” test otherwise known as an “inconsistency of incidents” test. That test involves an objective comparison of the rights granted under the relevant Act and instruments to the lessee or grantee with *each* of the native title rights held by the Aboriginal people. One or more or all of the native title rights might be capable of co-existence with rights granted under a pastoral lease, a mining lease or some other right granted to a third party in the exercise of executive or legislative power.

39 The Wik People thus established that the mere grant of the lease or other interest does not necessarily extinguish all native title rights. Moreover before the objective inconsistency analysis is undertaken, the Act under which the third party grant is made or “created” must be properly construed and in the absence of “clear and unambiguous words” or in the absence of “plain words”, the Act is not to be construed as intended to apply in a way which will “extinguish or diminish rights under common law native title” (*Wik*, Brennan CJ at 85, *Wik*, Gaudron J at 209; *Mabo (No. 2)*, Brennan J at 64 (Mason CJ and McHugh J agreeing); *Mabo (No. 2)*, Deane and Gaudron JJ at 111 and Toohey J at 196). Each particular third party grant must, of course, be compared with each of the relevant native title rights or interests in issue, on a case by case basis.

40 The application of the Wik and Wik Way Peoples was remitted to the Federal Court for determination.

41 The application was amended on 31 August 2000.

42 On 3 October 2000, Drummond J determined (with the agreement of all eight respondents after various negotiation processes) that part of the claim area (called Part A) comprising lands (and inland waters) that had always been unallocated Crown land or lands

that had only ever been subject to forms of title granted for the benefit of Aboriginal people (subject to particular fishing permits granted under Queensland legislation), were subject to the communal group and individual native title rights and interests of the Wik and Wik Way Peoples as common law holders, as recited in Orders 3(a) to (i) made that day: *Wik Peoples v State of Queensland & Others* [2000] FCA 1443.

43 The remaining Part B area of the Wik and Wik Way Peoples claims comprised lands and waters held under seven pastoral leases and four mining leases.

44 Further negotiations took place concerning these titles and interests with all the interested respondents. The issues arising under the Part B claims were mediated involving the applicants and 17 respondent parties which resulted in two consent determinations made by Cooper J on 13 October 2004: *Wik Peoples v State of Queensland & Others* [2004] FCA 1306.

45 The first determination recognised the *exclusive* native title rights of the Wik and Wik Way Peoples (subject to the identified “other interests”) of possession, occupation, use and enjoyment of the lands and waters in particular parts of the claim area. Six extensive areas of land and waters are identified on the maps. The second determination recognised the *non-exclusive* rights of the Wik and Wik Way Peoples in other parts of the claim area also identified on the maps.

46 The area of land and waters covered by the two determinations made by the Court on 13 October 2004 represent approximately 12,530 square kilometres of the claim area. The determinations took effect on 24 March 2005. The 2004 determinations recognised the subsistence of native title rights in the Wik and Wik Way Peoples over the land and waters of the Holroyd leases and the Mitchelton leases which were the subject of the questions considered by the High Court in *Wik* in 1996.

47 Other areas of land and waters within the claim area remained subject to further claims.

48 These claims, the earlier determinations and the present determination, were and are made in what is called the main application before the Federal Court (QUD 6001 of 1998)

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after transfer of the original claim filed on 23 March 1994 from the Tribunal to the Federal Court of Australia for constitutional reasons reflected in the principles established in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. However, the main application was amended on 7 September 2001 to remove any claim for a determination of native title rights in land and waters the subject of an Area Indigenous Land Use Agreement (“ILUA”) called the “Western Cape Communities Co-Existence Agreement” made between the State, Rio Tinto Aluminium Limited (“Rio Tinto”), the Cape York Land Council, the Council of the Shire of Aurukun, three Aboriginal Councils and a number of traditional owners. The land and waters of the Co-Existence Agreement was the subject of a separate determination application filed on 14 September 2001.

49 On 29 July 2009, the Court determined that native title rights subsist in the Wik and Wik Way Peoples in the land and waters the subject of that claim: *Wik and Wik Way Native Title Claim Group v State of Queensland* [2009] FCA 789; (2009) 258 ALR 306. The native title rights and interests are the non-exclusive rights set out at Orders 3 and 4 in the qualifying context of all of the Orders made as part of that determination. The area of land and waters the subject of the 29 July 2009 determination comprises, put simply, the special bauxite leases held by Rio Tinto to the south of the Embley River.

50 The remaining Part B claim the subject of *this* determination concerns inland land and waters of the claim area generally described by reference to the titles of the pastoral leases and the waters associated with those leases earlier mentioned. The respondent parties to the application are the State of Queensland, the Cook Shire Council, Telstra Corporation Limited, Australian Wildlife Conservancy, John Ernest Lynch, Cameron Stuart MacLean, Michelle Margaret MacLean, Cameron Clive Quartermaine, Doreen Ruth Quartermaine and Tony and Lisette Lewis Settlement Pty Limited. A number of parties including the Commonwealth of Australia, some Aboriginal Shire Councils and parties reflecting mining, fishing and other pastoral interests have withdrawn as respondents from this remaining determination application.

51 I am satisfied having regard to the reports of Dr Sutton that native title subsists in the Wik and Wik Way Peoples in the land and waters of the Determination Area in accordance with the traditional laws acknowledged, and traditional customs observed, by them as the common law holders.

52 In *Western Australia v Ward* at [14], Gleeson CJ, Gaudron, Gummow and Hayne JJ recognise the “fundamental truth” that the relationship Aboriginal Peoples have with their land is essentially “spiritual” or “religious” and one of the difficulties in isolating and determining each of the rights and interests comprising the native title rights of a People is, as the High Court observes in *Ward* at [14], “[translating] the spiritual or religious into the legal”. The source of that translation lies in the traditional laws and customs acknowledged and observed by the People, not the *Native Title Act* itself (*Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422 at [75] and [76] per Gleeson, Gummow and Hayne JJ).

53 In *Ward*, the majority said this at [20]:

Paragraphs (a) and (b) of s 223(1) indicate that it is from the *traditional* laws and customs that native title rights and interests derive, not the common law. The common law is not the source of the relevant rights and interests; the role accorded to the common law by the statutory definition is stated in par (c) of s 223(1). This is the “recognition” of rights and interests ...

[original emphasis]

54 The rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the Wik and Wik Way Peoples over the land and waters of the Determination Area with which they have maintained their connection, are these. As to the lands, the non-exclusive right to:

- (a) access, move about in and on and be present on, and Camp on, the Determination Area;
- (b) take and use the Natural Resources of the Determination Area for non-commercial:
 - (i) cultural purposes;
 - (ii) personal purposes;
 - (iii) domestic purposes; or
 - (iv) communal purposes;
- (c) maintain and protect from harm by lawful means sites and places of significance in the Determination Area;
- (d) maintain Springs and Wells in the Determination Area for the sole purpose of ensuring the free flow of Water;
- (e) conduct ceremonies and engage in cultural activities on the Determination Area;
- (f) hunt and gather in, on and from the Determination Area for non-commercial;

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- (i) cultural purposes;
- (ii) personal purposes;
- (iii) domestic purposes; or
- (iv) communal purposes; and

(g) teach the physical and spiritual attributes of sites and places of significance and areas of importance in the Determination Area,

and the right to inherit and succeed to the native title rights and interests.

55 As to the waters, the non-exclusive right to:

(a) hunt and fish in or on, and gather from, the Water for non-commercial:

- (i) cultural purposes;
- (ii) personal purposes;
- (iii) domestic purposes; or
- (iv) communal purposes; and

(b) take and use the Water for non-commercial:

- (i) cultural purposes;
- (ii) personal purposes;
- (iii) domestic purposes; or
- (iv) communal purposes.

56 The native title rights and interests are subject to the matters set out at Orders 5, 6 and 7 and the rights of "others" set out at Orders 8 and 9 and Schedules 3 and 4 and, in particular, the rights and interests of lessees of the nominated pastoral leases.

57 I am satisfied that each of the matters identified at s 87(1)(a), (b) and (c) of the *Native Title Act* are satisfied.

58 I am satisfied that the proposed Orders forming the basis of the agreement between the parties ought to be made, in the exercise of the power conferred under s 87(2) of the *Native Title Act*, in the exercise of the Court's jurisdiction under s 81 in final resolution of the remaining parts of the application made under ss 13(1) and 61 of the *Native Title Act*.

59 I am satisfied that the Orders address each of the matters relevantly arising under s 225 of the *Native Title Act* for the purposes of s 94A of that Act.

60 Order 11 provides that the native title rights are not to be held in trust.

61 By Order 11(b), *Ngan Aak-Kunch Aboriginal Corporation RNTBC* (the “Body Corporate”) is to be the *prescribed* body corporate for the purposes of s 57(2) of the Act and is to perform the functions set out under s 57(3) after becoming a Registered Native Title Body Corporate. A representative of the Wik and Wik Way common law holders, Hogan Short Joe, nominated the Body Corporate for the purposes of s 57(2)(a)(i) on 9 August 2012. The written consent of the Body Corporate was obtained on 10 August 2012 for the purposes of s 57(2)(a)(ii). The Court determines for the purposes of s 57(2)(a)(iii) that the Body Corporate is to perform the s 57(3) functions.

62 The Body Corporate was formed according to its objects to be the subject of determinations under s 57 and to be a Registered Native Title Body Corporate in relation to determinations under the *Native Title Act*. I am satisfied that the Body Corporate is a prescribed body corporate for the purposes of s 57 of the Act.

63 It follows from all of these factors, by reason of the traditional laws and customs of the Wik and Wik Way Peoples recognised, practised and observed in connection with the land and waters of the Determination Area by the ancestors of the claimant Peoples and recognised, observed and practised by the descendents of those Peoples continuously over time, that the native title rights and interests as set out in the content of all the Orders and discussed in these reasons, subsist in the Wik and Wik Way Peoples in the land and waters of the Determination Area.

64 It also follows that the common law of Australia recognises those rights and interests sourced in the traditional laws and customs of the Wik and Wik Way Peoples.

65 Having regard to all of these matters, I make and publish today the Orders determining the existence and subsistence of the native title rights and interests in the Wik and Wik Way Peoples in the land and waters of the Determination Area.

66 In conclusion, it should be recognised that this is a proud day for the Wik and Wik Way Peoples and brings to a conclusion the determination of the remaining parts of the claim area recognising the native title rights and interests of the Wik and Wik Way Peoples in, particularly, the inland land and waters of the Determination Area. The Wik and Wik Way Peoples commenced these claims in a formal sense on 30 June 1993 in asserting common law

native title rights under the principles established by the High Court in *Mabo (No. 2)*. Their claims were then made the subject of claims under the *Native Title Act 1993 (Cth)* according to the principles reflected in that Act and particularly s 223 of that Act and progressed to conclusion in the way I have described.

67 I also want to acknowledge that this determination has been brought about by the concerted efforts of the parties to reach an agreement that recognises the native title rights of the Wik and Wik Way Peoples but also recognises the rights of others as set out in the Orders. I particularly want to acknowledge the long term commitment and energy of Mr Philip Hunter, the solicitor for the Wik and Wik Way Peoples, in progressing this matter to a concluded agreement and his efforts over many years since 1993 in acting for and on behalf of the Wik and Wik Way Peoples. I also want to acknowledge the role Mr Mark Boge has played on behalf of pastoral lessees in representing their collective interests and in contributing to the resulting agreement. I cannot over-emphasise the importance of ensuring that those parties with a common interest such as a group of pastoral lessees are, if possible, represented in negotiations of this kind by professional advisers experienced in native title issues and I encourage the Commonwealth, in the interests of securing mediated collective outcomes to extend the funding for the representation of such parties.

68 Accordingly, I today publish the Determination Orders and the reasons in support of those Orders.

I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Greenwood.

Associate:

Dated: 11 October 2012