FEDERAL COURT OF AUSTRALIA

 McLennan on behalf of the Jangga People #3 v State of Queensland [2023] FCAFC 191

|  |  |
| --- | --- |
| Appeal from: | *Malone v State of Queensland (The Clermont-Belyando Area Native Title Claim) (No 5)* [2021] FCA 1639 |
|  |  |
| File number(s): | QUD 48 of 2022 |
|  |  |
| Judgment of: | **PERRY, SARAH C DERRINGTON and colvin JJ** |
|  |  |
| Date of judgment: | 12 December 2023 |
|  |  |
| Catchwords: | **NATIVE TITLE** – appeal from adverse determination of questions as to whether native title exists in relation to any land and waters of the claim area in partially overlapping claim – where no lay evidence led below in relation to issues arising under s 223(1)(a) of the *Native Title Act 1993* (Cth) – whether prior consent determination in relation to adjacent land and waters disposed of the inquiry required by s 223(1)(a) – whether appellant entitled to rely at trial on the findings or the material underpinning the necessary facts to support the prior determination**NATIVE TITLE** – consent determination – *in rem* character of determination – status of “findings” where facts and issues not “actually litigated and determined” |
|  |  |
| Legislation: | *Acts Interpretation Act 1901* (Cth) s 15AA*Federal Court of Australia Act 1976* (Cth) s 37M*Native Title Act 1993* (Cth) ss 13(1), 13(3), 13(5), 13(7), 61, 61A, 62(1)(b), 62(2)(a)-(b), 62(2)(g), 66, 67, 68, 84, 86(1)(c), 87, 87A, 94A, 223(1), 225*Federal Court Rules 2011* (Cth) r 30.01 |
|  |  |
| Cases cited: | *Ballnayne v Mackinnon* [1896] 2 QB 455*Barkandji Traditional Owners #8 (Part B) v Attorney-General of New South Wales* [2017] FCA 971*Brown v Northern Territory of Australia* [2015] FCA 1268*Brown v The State of South Australia* [2010] FCA 875;189 FCR 540*Coles-Smith v Smith* [1965] Qd R 494*Commonwealth v Yarmirr* [2001] HCA 56; 208 CLR 1*Dale v State of Western Australia* [2011] FCAFC 46; 191 FCR 521*Daniel v Western Australia* [2004] FCA 849; 138 FCR 254*Drury on behalf of the Nanda People v State of Western Australia* [2018] FCA 1849*Drury on behalf of the Nanda People v State of Western Australia* [2020] FCAFC 69*Farrer on behalf of the Ngarrawanji Native Title Claim Group v State of Western Australia* [2019] FCA 655*Fortescue Metals Group v Warrie* *on behalf of the Yindjibarndi People* [2019] FCAFC 177; 273 FCR 350*Freddie v Northern Territory* [2017] FCA 867*Fulton v Northern Territory of Australia* [2016] FCA 1236*Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537*Hoysted v Federal Commissioner of Taxation* (1925) 37 CLR 290*Hughes (on behalf of the Eastern Guruma People) v State of Western Australia* [2007] FCA 365*Kokatha People v State of South Australia* [2007] FCA 1057*Kuligowski v Metrobus* [2004] HCA 34; 220 CLR 363*Lake Torrens Overlap Proceedings (No 3)* [2016] FCA 899*Lander v State of South Australia* [2012] FCA 427*Lennon Snr on behalf of the Antakirinja Matu-Yankunytjatjara Native Title Claim Group v South Australia* [2011] FCA 474*Mabo v Queensland (No. 2)* [1992] HCA 23; 175 CLR 1*Malone v State of Queensland (The Clermont-Belyando Area Native Title Claim) (No 5)* [2021] FCA 1639*McLennan on behalf of the Jangga People v State of Queensland* [2012] FCA 1082*Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] HCA 58; 214 CLR 422*North Ganalanga Aboriginal Corporation for and on behalf of the Waanyi People v Queensland* [1996] HCA 2; 185 CLR 595*Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135; 145 FCR 442*Re Lawrence; Ex parte Burns* [1985] FCA 469; 9 FCR 9*Starkey on behalf of the Kokatha People v State of South Australia* [2018] FCAFC 36; 261 FCR 183*Vincentia MC Pharmacy Pty Ltd v Australian Community Pharmacy Authority* [2020] FCAFC 163; 280 FCR 397*State of Western Australia v Ward* [2002] HCA 28; 213 CLR 1*State of Western Australia v Ward* [2000] FCA 191; 99 FCR 316*Ward v State of Western Australia* [2006] FCA 1848*Western Bundjalung People v Attorney General of New South Wales* [2017] FCA 992*Widjabul Wia-Bal v Attorney General of New South Wales* [2020] FCAFC 34; 274 FCR 57*The Wik Peoples v The State of Queensland* (1994) FCA 113; 49 FCR 1 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | Queensland |
|  |  |
| National Practice Area: | Native Title |
|  |  |
| Number of paragraphs: | 130 |
|  |  |
| Date of hearing: | 15 – 19 May 2023  |
|  |  |
| Counsel for the Appellant in QUD 48 of 2022: | Mr J Waters SC with Mr G Carter |
|  |  |
| Solicitor for the Appellant in QUD 48 of 2022: | Dillon Bowers Solicitors  |
|  |  |
| Counsel for the Appellant in QUD 46 of 2022: | Mr AM Preston with Mr C Gregory |
|  |  |
| Solicitor for the Appellant in QUD 46 of 2022: | Queensland South Native Title Services Ltd |
|  |  |
| Counsel for the Respondents: | Mr S Lloyd SC with Ms C Taggart |
|  |  |
| Solicitor for the Respondents: | Crown Law  |

ORDERS

|  |  |
| --- | --- |
|  | QUD 46 of 2022 |
|   |
| BETWEEN: | PATRICK MALONE & ORS ON BEHALF OF THE CLERMONT-BELYANDO NATIVE TITLE CLAIM GROUPAppellant |
| AND: | STATE OF QUEENSLANDRespondent |
|  | QUD 48 of 2022 |
|   |
| BETWEEN: | COLIN MCLENNAN AND ORS ON BEHALF OF THE JANGGA PEOPLE #3Applicant |
| AND: | STATE OF QUEENSLAND AND ORSRespondent |

|  |  |
| --- | --- |
| order made by: | perry, SARAH C DERRINGTON and colvin jJ |
| DATE OF ORDER: | 12 december 2023 |

THE COURT ORDERS THAT:

1. The appeals from the judgment in QUD 25 of 2019, *Malone v State of Queensland (The Clermont-Belyando Area Native Title Claim) (No 5)* [2021] FCA 1639, be dismissed.

2. There be liberty to apply within 14 days for any order as to costs such liberty to be exercised by filing submissions of no more than 5 pages stating the terms of the order sought together with any necessary affidavit in support.

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

REASONS FOR JUDGMENT

PERRY J:

|  |  |
| --- | --- |
| 1 INTRODUCTION | [1] |
| 2 THE DECISION OF THE PRIMARY JUDGE | [8] |
| 3 RELEVANT PRINCIPLES OF STATUTORY CONSTRUCTION | [17] |
| 4 RELEVANT STATUTORY PROVISIONS | [19] |
| 4.1 Approved determinations of native title | [19] |
| 4.2 Principles regarding consent determinations under s 87 of the NTA | [27] |
| 5 DISPOSITION OF THE APPEAL | [33] |
| 6 CONCLUSION | [46] |

##### 1. INTRODUCTION

1 I am indebted to Sarah C Derrington and Colvin JJ for setting out the relevant history of the proceedings and agree with their Honours’ proposed orders dismissing the appeal for the reasons explained below.

2 This is an appeal from the decision of the primary judge in *Malone v State of Queensland (The Clermont-Belyando Area Native Title Claim) (No 5)* [2021] FCA 1639 (**PJ** or **Primary Judgment**). Pursuant to rule 30.01 of the *Federal Court Rules 2011* (Cth), the primary judge addressed the following questions separately from, and before, any other questions in the proceedings:

But for any question of extinguishment of native title:

a) Does native title exist in relation to any and what land and waters of the claim area?

b) In relation to that part of the claim area where the answer to (a) above is in the affirmative:

i. Who are the persons, or each group of persons, holding the common or group rights comprising native title?

ii. What is the nature and extent of the native title rights and interests?

3 The claim area is a large area of land (approximately 30,200 square kilometres) in Central Queensland and surrounds the town of Clermont, particularly to its south, west and north.

4 The primary judge answered the first separate question in (a) “*no*”, and the second in (b), “*not applicable*”.

5 In line with the approach adopted to the hearing and resolution of the appeal (as explained by Sarah Derrington and Colvin JJ), the dispositive issues on the appeal are as follows:

(1) did the primary judge err in holding that the consent determination (the **Jangga #1 determination**) in ***McLennan*** *on behalf of the Jangga People v State of Queensland* [2012] FCA 1082 did not dispose of the inquiry as to whether the criterion in s 223(1)(a) of the *Native Title Act 1993* (Cth) (**NTA**) was satisfied (**ground 1**); or, in the alternative,

(2) did the primary judge err in finding that the native title applicant (the **Jangga appellant**) could not rely upon the consent determination in *McLennan,* the findingsor the material unpinning the facts necessary to support the consent determination in order to satisfy the inquiry required by s 223(1)(a) of the NTA (**ground 2**)?

6 Section 223(1) is a central concept in the NTA and defines “*native title*” in the following terms:

The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

7 In my view, no error has been established in the primary judge’s decision and the appeal must be dismissed for the reasons set out below.

##### 2. THE DECISION OF THE PRIMARY JUDGE

8 With respect to the alleged relevance of the consent determination made in *McLennan*, the Jangga appellant contended before the primary judge that the J#1 determination made in *McLennan* disposed of the inquiry required by subs (a) of the definition of native title in s 223(1): at [235]. The appellant specifically contended that *McLennan* made a determination relevantly with respect to three matters, namely:

(a) the Jangga [p]eople (J#3 claim group) are a native title holding group;

(b) the group is comprised of the descendants of J#3 apicals [sic] ancestors;

(c) all persons in the group hold native title rights and interests to all of the J#1 determination area.

(**PJ** at [233] (also noting that the Jangga appellant used the expressions “*Jangga [p]eople*” and the “*J#3 claim group*” interchangeably).)

9 In the alternative, the Jangga appellant contended that a further 15 matters were “*necessary findings*” or were “*factual findings*” which underpinned the *McLennan* consent determination and would equally dispose of the inquiry required by s 223(1)(a) (PJ[234]). With respect to this contention, the primary judge explained that:

The distinction between these two kinds of findings [i.e. necessary or factual findings] was not explained. An example of the former is: “the claim group’s traditional law adapted to accommodate succession of any remaining Jangga families to all Jangga lands and water, and that this was not a ‘new’, or post-sovereignty, rule”. An example of the latter is: “that the pre-sovereignty society was comprised of a number of -barra groups united by intermarriage”. With respect to these 15 matters, it [the Jangga appellant] contended that any countering evidence adduced in these matters “must be afforded no weight”.

10 The primary judge rejected these submissions for the following reasons.

11 ***First***, while an approved native title determination under the NTA is a determination *in rem* which binds the world at large, his Honour held that it is binding only with respect to the area the subject of the determination (the **determination area**) (applying *The* ***Wik*** *Peoples v The State of Queensland* [1994] FCA 113; (1994) 49 FCR 1 at 8 (Drummond J); and ***Dale*** *v State of Western Australia* [2011] FCAFC 46; (2011) 191 FCR 521 at [92] (the Court). As the Full Court held in *State of Western Australia v Ward* [2000] FCA 191; (2000) 99 FCR 316 (***Ward FC***) at [186] (in a passage quoted by the primary judge at [246]):

The scheme of the NT was and is to have before the Court in a matter that requires curial determination, all parties who hold or wish to assert a claim or interest in respect of the defined area of land. This process is to bring about a decision which finally determines the existence and nature of native title rights in the determination area, and which also identifies other rights and interests held by others in respect of that area. As the determination is to be declaratory of the rights and interests of all parties holding rights or interests in the area, the determination operates as a judgment in rem binding the whole world…

12 ***Secondly***, the primary judge held that the binding effect of an approved native title determination operated only with respect to the status of the determination area and did not extend to the reasons for judgment or findings made in the reasons for judgment (citing *Dale* at [92]; ***Re Lawrence****; Ex parte Burns* [1985] FCA 469; (1985) 9 FCR 9 at 10 (Pincus J); and *Coles-Smith v Smith* [1965] Qd R 494 at 504 and 506 (Stable and Gibbs JJ, with whom Jeffriess J agreed)).

13 ***Thirdly***, the primary judge relied upon the text of s 225 as making clear that a native title determination relates to the particular area the subject of the determination only (PJ[252]).

14 Thus the primary judge concluded at [256]-[258] that:

Having regard to the authorities set out above and the text of s 225, I consider *McLennan* relevantly determined two matters in rem: the existence of native title in the particular area of land and waters to which the determination related; and the identity of the persons or group of persons who held the common or group rights comprising that native title in the confined sense described in the authorities above.

With respect to the former matter, that area was identified in Order 1 of *McLennan* as follows:

1. The determination area is the land and waters described in Schedule 1, and depicted in the map attached to Schedule 1 (the “Determination Area”).

With respect to the latter matter, the group of persons was described in Order 3 as follows:

3. The native title is held by the Jangga [p]eople described in Schedule 3 (the “native title holders”).

Schedule 3 described those persons as:

The native title holders are the Jangga people, being the descendants of one or more of the following people:

(a) Charlie Tiers;

(b) Dick Hegarty, also known as Dinduk;

(c) Pompey Earl;

(d) Mick Havilah (also known as Mick Cotherstone) or his brother Johnny Havilah;

(e) Albert Twist;

(f) Dick Cook and his wife / partner Lilly Cook;

(g) Charlie Pinkipie and his wife / partner Judy Pinkipie; or

(h) Billy (also known as King Billy) and his wife / partner Clara (also known as Queen Clara).

Consistently with the Full Court authorities mentioned above (at [253]-[255]), it will be noted that none of these orders, or Schedule 3, said anything about the Jangga people as a society, or about the content of their traditional laws and customs, or identified the individual descendants of the apical ancestors described in Schedule 3 who comprised the Jangga people.

15 The primary judge then turned to consider the Jangga appellant’s alternative contention that findings made by Rares J in *McLennan* or evidence before Rares J in that proceeding were dispositive of the criteria in s 223(1)(a) in the present claim. The primary judge found that Rares J made findings under the heading “*Jurisdictional Findings*”, including whether a real basis existed in the evidence that justified the parties agreeing to the consent determination and whether the jurisdictional requirements under s 87 of the NTA for making a consent determination were met. However, the primary judge held that *“[n]o findings were made in that section about the Jangga people’s society, nor about the nature and content of its traditional laws and customs. Even if such findings had been made, they would not, for the reasons discussed above, have been binding in rem*” (PJ[261]). Further, while Rares J in *McLennan* then reviewed the evidence before him, including the expert opinions expressed by Mr Daniel Leo (tendered by the Jangga #3 appellant in that proceeding) and Dr Sandra Pannell (tendered by the State), the primary judge held at [264] that:

Rares J merely recorded these opinions. He did not expressly accept or reject them, nor, more importantly, did he make any findings based on them. Even if his Honour had expressly accepted them and/or made findings about some aspects of them, whether that were as to the Jangga people’s pre-sovereignty society, or their traditional laws and customs, or some similar matter, there would be no justification for importing those opinions, or those findings, or the evidence upon which they were ostensibly based, into these proceedings.

16 For these reasons, the primary judge held at [265] that:

This means that these separate questions must be determined based on the issues raised in the pleadings, the evidence properly adduced at the trial and the relevant facts as established on the balance of probabilities. That, all the more so, where they relate to the “particular area” of land and waters which comprises the CB/J#3 claim area and where there is a contest between the CB and J#3 claim groups as to who holds the native title they each claim continues to exist in that area and an overriding contest by the State as to whether that native title exists at all. It necessarily follows that, apart from the two matters identified above that were determined *in rem*, the J#3 applicant cannot rely upon any of the 18 matters it claims were determined, or were the subject of findings, or were supported by the evidence adduced in *McLennan*.

##### 3. RELEVANT PRINCIPLES OF STATUTORY CONSTRUCTION

17 As I explain below, the dispositive questions posed on the appeal turn upon the proper construction of the NTA.

18 The relevant principles of statutory construction are well-established. These were summarised by Perry and Stewart JJ in ***Vincentia*** *MC Pharmacy Pty Ltd v Australian Community Pharmacy Authority* [2020] FCAFC 163; 280 FCR 397 at [46]-[48]:

In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (*Project Blue Sky*), McHugh, Gummow, Kirby and Hayne JJ explained that:

69. The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined ‘by reference to the language of the instrument viewed as a whole’. In *Commissioner for Railways (NSW) v Agalianos* [(1955) 92 CLR 390 at 397], Dixon CJ pointed out that ‘the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed’. Thus, the process of construction must always begin by examining the context of the provision that is being construed.

The importance of starting with the statutory context and text was recently emphasised by Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 in the following passage:

14. The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose [citing *Project Blue Sky* with approval]. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.”

Context “in its widest sense”, as referred to in this passage, includes “such things as the existing state of the law and the mischief which … one may discern the statute was intended to remedy”: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (cited with approach [sic] in SZTAL at [14]). ]). To have regard to context in this sense, as integral to the process of statutory construction irrespective of whether ambiguity or inconsistency exists in the literal text, accords with the mandate in s 15AA of the Acts Interpretation Act that the interpretation which best gives effect to the legislative purpose ***must*** be preferred to any other interpretation: *Mills v Meeking* (1990) 169 CLR 214 at 235 (Dawson J). As a result, as Dawson J also explained with respect to Victoria's equivalent to s 15AA, the approach required by interpretive provisions of this kind “*allows a court to consider the purposes of an Act in determining whether there is more than one possible construction*” (ibid); see also the discussion in Pearce D, *Statutory Interpretation in Australia* (9th ed, LexisNexis Butterworths, 2019) … at [2.17]-[2.20]; Herzfeld P and Prince T, *Interpretation* (2nd ed, LawBook, 2020) … at [7.20]-[7.30]. That said, it must also be borne steadily in mind that, as Hayne, Heydon, Crennan and Kiefel JJ cautioned in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, “[h]istorical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention”.

##### 4. RELEVANT STATUTORY PROVISIONS

###### 4.1 Approved determinations of native title

19 In line with the principles set out above, it is necessary to begin with the text of the relevant provisions of the NTA. As Gleeson CJ, Gummow and Hayne JJ held in *Members of the* ***Yorta Yorta*** *Aboriginal Community v State of Victoria* [2002] HCA 58; (2002) 214 CLR 422 at [32]:

It is necessary, as has now been said repeatedly, to begin with a consideration of a claim or determination of native title by examination and consideration of the provisions of the *Native Title Act*. … what the claimants sought was a determination that is a creature of that Act, not the common law.

20 Further, as to context, it is necessary to approach the construction of the NTA with an understanding of the unique problems that the Act was intended to address. Thus Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ explained in *North Ganalanga Aboriginal Corporation for and on behalf of the* ***Waanyi******People*** *v Queensland* [1996] HCA 2; (1996) 185 CLR 595 at 614-615 that, “*[u]nless the Act is read with an understanding of the novel legal and administrative problems involved in the statutory recognition of native title, its terms may be misconstrued.*” These problems included the need, following *Mabo v Queensland (No. 2)* [1992] HCA 23; (1992) 175 CLR 1, to address uncertainty as to the status of land and waters across Australia and the concern that this uncertainty may have a “chilling effect” on dealings in, and actions with respect, to land and waters. It is in the context of addressing that uncertainty that the Act evidences a legislative preference for resolving claims by negotiation, as is reflected in the Preamble to the NTA and the provisions for the making of determinations where agreement has been reached between all interested parties: *Waanyi* at 614.

21 The definition of native title in s 223(1) (set out at the start of these reasons) is central to the task of determining whether native title exists under the NTA. As Gleeson CJ, Gummow and Hayne JJ held in *Yorta Yorta* at [33]-[35]:

In undertaking that task [of considering a claim for a native title determination], ***all*** elements of the definition of native title must be given effect. “Native title” means certain right and interests of indigenous peoples. Those rights and interests may be communal, group or individual rights and interests, ***but they must be “in relation to” land or waters***. The rights and interests must have three characteristics. The first is that they are possessed under the traditional laws acknowledged and the tradition customs observed by the peoples concerned. That is, they must find their source in traditional law and custom, noting the common law. …

Secondly, the rights and interests must have the character that, by the traditional laws acknowledged and the traditional customs observed by the relevant peoples, those peoples have “a connection with” the land or waters. …

Thirdly, the rights and interests in relation to land must be “recognised” by the common law of Australia …

(Emphasis added.)

22 Sections 13(1) and 61 of the NTA provide that certain persons may make a native title determination application to the Federal Court, being an application for a determination of native title in relation to an area for which there is no approved native title determination. By virtue of ss 62(1)(b) and (2)(a)-(b) and (g), that application must, among other things, contain information that enables the boundaries of the claim area to be identified and a map showing the boundaries of the claim area, as well as details of any other native title applications made in relation to all or part of the claim area of which the applicant is aware. Section 225 in turn, defines “*a determination of native title*” as:

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.

23 A determination of native title made by the Federal Court or by the High Court is an “*approved determination of native title*”: ss 13(3) and (7) of the NTA: see also the definition of “*approved native title determination*” in s 253 of the NTA. Important consequences flow under the NTA where an approved determination of native title is made. These consequences are intended to provide for certainty through the authoritative resolution in the exercise of judicial power of the existence and content of any native title in the specific geographical area covered by the determination and, if it exists, of who holds the native title. Thus, once an approved determination of native title has been made, no further native title application in relation to the area in question may be made under the Act by virtue of s 61A(1) providing that a native title application “*must not be made in relation to an area for which there is an approved determination of native title*”. Similarly, s 13(1)(a) provides that a native title determination application may be made only in relation to an area for which there is no approved determination of native title. Further, s 68 provides that:

If there is an approved determination of native title (the *first determination*) in relation to a particular area, the Federal Court ***must*** ***not***:

(a) conduct any proceeding relating to an application for another determination of native title; or

(b) make any other determination of native title;

in relation to that area or to an area wholly within that area, except in the case of:

(c) an application as mentioned in subsection 13(1) to revoke or vary the first determination; or

(d) a review or appeal of the first determination

 (Emphasis added.)

24 Related to this, while s 13(1) permits multiple overlapping native title determination applications to be made, s 67 of the NTA ensures that these are determined in the same proceeding. As RD Nicholson J observed in *Daniel v Western Australia* [2004] FCA 849; (2004) 138 FCR 254 at [9]:

The underlying rationale of ss 13, 67 and 68 of the NTA [and now also s 61A] is that the issue of whether native title exists in any particular area is to be determined once only in respect of a determination area (ie in the one proceedings; subject to any revision application or appeal).

25 In this regard, while the NTA provides that applications may be made for a determination of native title to be varied or revoked, the circumstances in which such applications may be made and, more particularly, the persons who may apply (the registered native title body corporate, the Commonwealth, State or Territory Minister or the Native Title Registrar) are limited: see s 13(5) and 61(1).

26 The proposition that, in light of these features of the statutory scheme, an approved native title determination under the NTA was intended to operate *in rem*, resolving the status of the land and waters with respect to the determination area as against all the world, is well established: see e.g. *Wik* at 8 (Drummond J); *Ward (FC)* at [186]; *Lennon Snr on behalf of the Antakirinja Matu-Yankunytjatjara Native Title Claim Group v South Australia* [2011] FCA 474 at [4] (Mansfield J). In addition to the provisions to which I have referred, that intention is also evident in the requirements that the Commonwealth and State or Territory Ministers must be parties to any native title determination application under s 61, the extensive notice requirements in s 66, and the width of the joinder provisions for persons as parties under s 84 to ensure that all persons with an interest that may be affected have an opportunity to be heard. Thus, as Finn J explained in *Kokatha People v State of South Australia* [2007] FCA 1057 at [33]:

It is clear from the text and structure of the Act that a s 225 determination, once made, should be a final resolution, “once and for all”, of the extent of native title in relation to a particular piece of land: see *Munn v State of Queensland*, at [8]; subject only to the possibility of it being varied or revoked on the limited grounds specified in s 13(5). Because such a determination is declaratory of the rights and interests of all parties holding rights or interests in the area, it is commonly and properly described as a judgment in rem binding the whole world: *The Wik Peoples v The State of Queensland* (1994) 49 FCR 1; *Western Australia v Ward* (FC), at 368-369; *Gumana v Northern Territory* (2005) 141 FCR 457 at [127]; on judgments in rem see also 2 *Smith’s Leading Cases* 776 (12th ed, 1915). Nonetheless, it should in my view be remembered that it is the terms of the Act itself (i) which now emphatically give the s 225 determination its finalising effect; see in particular ss 13(1) and (3), 61A(1) and 68; and (ii) which give persons likely to be affected by such a determination (including native title claimants) the opportunity to protect their interests by becoming a party to the proceedings: see s 84(3) and see also s 66; cf *The Wik Peoples* at 5-6.

###### 4.2 Principles regarding consent determinations under s 87 of the NTA

27 It is relevant also to consider the principles regarding the making of consent determinations under s 87 of the NTA. Specifically, in furtherance of the legislative preference for the negotiated resolution of native title claims, the NTA confers power on the Court to make a determination of native title that gives effect to the terms of an agreement between the parties (commonly described as a **consent determination**). That power may be exercised where the jurisdictional conditions in s 87(1) are met and it appears to the Court that it is appropriate to make an order consistent with the agreement between the parties (s 87(1) and (1A) respectively). While the discretion must be exercised judicially, the parties to an agreement are not required to produce evidence as if in a trial: *Ward v State of Western Australia* [2006] FCA 1848 at [8] (North J); *Hughes (on behalf of the Eastern Guruma People) v State of Western Australia* [2007] FCA 365 at [8] (Bennett J). Rather, as Rares J held at [6] in *McLennan*:

The Court has not had a trial to establish the applicant’s claim on its merits. Even so, the Court has an important power to make a determination that native title over land and waters exists under s 87 of the Act once all of the parties have signed a written agreement and provided certain other conditions are met. In these proceedings, the State of Queensland has consented to the making of the determination of native title. Before the Court can make the orders recognising native title, it must be satisfied that the consent determination has been reached after proper consideration by the parties, particularly the State, of all of the matters that the Act requires be established. This consensual process depends upon the executive government of each State and Territory in whose jurisdiction the claim is made taking an active role in the litigation. The government must scrutinise carefully any claim for native title in order to seek to protect the interests of the whole community that it represents: *Munn v State of Queensland* (2001) 115 FCR 109 at 115 [29] per Emmett J.

28 In this regard, as Rares J stated, the State has a public responsibility to ensure that any agreement made under s 87 of the NTA is in the interests of the community it represents, bearing in mind that a determination of native title is a determination *in rem*. As Mortimer J (as her Honour then was) explained in *Farrer on behalf of the* ***Ngarrawanji*** *Native Title Claim Group v State of Western Australia* [2019] FCA 655 at [42]:

Thus, the State’s responsibility is to satisfy itself there is a sufficient basis for concluding that the proposed determination is capable of meeting the requirements of s 225 of the Native Title Act. The way in which the State satisfies itself of that matter may vary considerably from case to case. No minimum requirements of proof can or should be set out. If the State embarks on such a course, and ultimately accepts it is appropriate to recognise the existence of native title in the determination area, then the Court is entitled to proceed on the basis the State has made a reasonable and rational assessment of the material to which it has been given access.

29 This responsibility is discharged by the State where it is satisfied that there is a credible or cogent basis for concluding that the requirements of s 223 of the NTA are satisfied. Thus Jagot J helpfully explained in *Western Bundjalung People v Attorney General of New South Wales* [2017] FCA 992 at [21]-[22] that:

In reconciling its multiple duties the orthodox position which has emerged and been settled for many years is that the State should not require an applicant to prove to it on the balance of probabilities that each of the requirements of s 223 is satisfied. For the State party to discharge its duties not only to the public at large but also to the claim group and to the Court, and to fulfil its fundamental obligations of fidelity to the objects of the NTA and the requirements of the Court Act, it looks for only a credible or cogent basis to conclude that the requirements of s 223 are satisfied whether or not that basis would constitute admissible evidence in contested litigation or would enable the Court to make findings about s 223 in favour of an applicant on the balance of probabilities. …

For a State respondent to apply a more onerous standard for the purpose of negotiations with a view to reaching an agreement under s 87 would involve an impermissible departure from the standards of fidelity to the provisions of the NTA, the Court Act and the obligations of such bodies to act as a model litigant. The disparity between the positions of an applicant and the State, and the resources available to them, is stark. … This disparity of power and resources, in the context of the provisions of the NTA and the obligations imposed on parties by the Court Act, mean that the State must be acutely sensitive to the requirements of good faith, reasonableness and the avoidance of conduct which may have an oppressive impact on an applicant.

30 Significantly for present purposes, the NTA does not differentiate between the effect of an approved native title determination which has been made by consent under s 87 or one made after a contested hearing and proved on the balance of probabilities. Specifically, in either case:

(1) what is determined is whether or not native title exists in relation to a particular area of land and waters, as defined in s 223(1);

(2) the determination must specify the matters identified in s 225; and

(3) the determination is an approved determination for the purposes of the NTA (ss 13(3) and (7) of the NTA respectively).

31 As such, it was rightly not in issue that the approved native title determination made by Rares J by consent in *McLennan* operated *in rem*,as wouldan approved native title determination made under the Act following a contested trial.

32 In this regard, Rares J in *McLennan* at [15]-[16]pointed to the contextual considerations explaining the legislative intention behind this unique statutory regime for the making of a binding declaration of right:

Ordinarily, the courts are reluctant to make binding declarations of rights merely because the parties seek this remedy by consent. The reason for this is that it is difficult for the Court to be satisfied that a declaration is appropriately and completely accurately expressed if there has been no contest in the litigation that exposes all the issues and ramifications that would impact on the Court’s appreciation of the precise point to be decided.

However, the Act itself creates in s 87 the power to make consent determinations. Therefore, the discretionary limitations ordinarily placed on the Court’s exercise of its power to make a declaration are not necessarily apposite to the issue raised by s 87(1A), namely, whether “it appears to the Court to be appropriate” to make a consent determination. The power must be exercised having regard to the beneficial purpose of the Act and its moral foundation declared in the words of its preamble: *Northern Territory of Australia v Alyawarr* (2005) 145 FCR 442 at 461 [63] per Wilcox, French and Weinberg JJ.

##### 5. DISPOSITION OF THE APPEAL

33 In my view, once the aspects of the NTA explained above are understood, it is apparent that the primary judge did not err in holding that the Jangga #1 determination did not dispose of the criterion in s 223(1)(a) for the purposes of the Jangga #3 proceedings.

34 ***First***, the Jangga #1 determination is an approved determination that native title as defined in s 223(1) exists in relation to the specific area of land and waters to which it relates. So much is plain from the chapeau to the definition of native title in s 223(1), as well as the chapeau to the definition of a “*determination of native title*” in s 225. Importantly, the chapeau to the statutory definition of native title applies to, and therefore qualifies each of, subs (a), (b) and (c) of the definition which are ultimately aspects of a singular concept. Thus, as Gleeson CJ, Gummow and Hayne JJ held in *Yorta Yorta* at [33] (as earlier quoted), the rights and interests possessed under the traditional laws acknowledged and traditional customs observed to which s 223(1)(a) refers “*may be communal, group or individual rights and interests,* ***but they must be “in relation to” land or waters***” (emphasis added).

35 Thus, an approved native title determination, is a “*recognition of the content of a set of existing rights, over a* ***specific*** *area of land and waters*”: *Fortescue Metals Group v* ***Warrie*** *on behalf of the Yindjibarndi People* [2019] FCAFC 177; (2019) 273 FCR 350 at [80] (Jagot and Mortimer JJ). The rationale for, and importance of, establishing each element of native title with respect to the specific area of land and waters in question was explained by Jagot and Mortimer JJ in *Warrie* as follows:

[H]ow [a claim group’s] law and custom operates to give rise to rights and interests islikely to vary ***because it is different land and waters***: different people within the claim group may have a right to speak for it, the law which is present and to be observed on that land and waters might manifest itself differently (in terms of what can be or should be done, where and when). What needs to be protected, in terms of sites, will be specific to that land and waters. How and where within the claim area individuals or families or groups acquire rights to speak and protect particular areas under traditional law and custom will be specific to the land and waters involved. We do not see why it is necessarily beyond argument that the actual nature and content of the rights which might arise under traditional law and custom may not be different. Taking an example which is hypothetical, but not uncommon in Australian native title litigation, there may be areas of land and waters over which rights and interests are found to be shared with other groups, or where rights and interests may not be as readily seen exclusive because the area abuts the country of people with a different set of traditional laws and customs. In such an area, perhaps there might not be any right or interest which equates to an exclusive right, or the evidence might be more opaque, even though there is but one overarching source of traditional law and custom. However, in country centrally and firmly connected to one group, and recognised by other groups to be so, rights equating to exclusive rights may be clearly apparent. ***All will depend on the evidence*.** There are not necessarily any hard boundary lines, or prohibitions on how rights and interests might be articulated, and many nuances in terms of the nature and content of rights in land and waters are possible.

(Emphasis added.)

36 Two important aspects of native title flow from this analysis. The first is the recognition that the rights and interests (if any) possessed by a claim group can vary according to the area in question. A claim group might well exercise rights and interests for the purposes of native title in relation to one area of land or waters, but exercise different rights and interests (or indeed have no rights and interests) in another. It would be wrong to assume, for example, that merely because it has been determined that native title exists in one area, the same group possesses the same rights and interests in relation to a different area. The second is that “*all will depend on the evidence*”. In a contested native title application, as here, native title will be established only where each of the requirements in s 223(1) have been established on the evidence adduced at trial.

37 It follows that the inquiry demanded by s 223(1) cannot be divorced from a “*geographical element*”: *Dale* at [76] (the Court). Yet that is precisely the consequence of the appellant’s submissions with respect to s 223(1)(a) of the NTA Act.

38 ***Secondly***, as has been seen, by virtue of ss 13, 61A, 67 and 68 of the NTA, no further application for a native title determination may be made in relation to land and waters which are the subject of an “*approved native title determination*”. In line with those provisions, it has been held to be implicit in the Act that an approved native title determination has an *in rem* effect in that it determines the status of the land and waters *erga omnes*, that is, *vis-à-vis* the whole world. In other words, it is the approved native title determination ***as a whole*** which has this effect under the Act. There is no warrant in the statutory text for inferring that some aspect, stated or implied, of an approved native title determination may have an effect *erga omnes* divorced from the remainder of the approved native title determination or from the land to which the determination relates. Nor was any foothold in the text of the Act or any contextual consideration identified by the Jangga appellant which would support such a contention.

39 The Jangga appellant relied upon the Full Court’s decision ***Starkey*** *on behalf of the Kokatha People v State of South Australia* *v State of South Australia* (2018) 261 FCR 183; [2018] FCAFC 36 in support of its contention that the determination in Jangga #1 resolved the question posed by s 223(1)(a) in a binding manner for future claims by the Jangga appellant over different land and waters (at least if adjacent). However, I agree that the decision in *Starkey* lends no support to the Jangga #3 appellant’s contention for the reasons shortly stated by the primary judge at [268], namely:

The apposite finding in that matter was that the primary judge was correct to prevent the Barngarla and Adnyamathanha claimants from attempting to rely on evidence which was directly inconsistent with the fundamental matters determined in the Kokatha consent determination (see at [202]-[205]). Neither the State nor the CB applicant has sought to proceed in that manner in these claims with respect to the matters determined in *McLennan*, confined as they are to the area of that determination.

40 Even less is there any warrant in the NTA for holding that particular findings about an element of the definition of native title made in the reasons for a native title determination somehow have a binding effect *in rem*,or that particular evidence referred to in the course of those reasons could have a dispositive effect, in relation to an element of a native title determination application with respect to different land and waters. As the primary judge held (at [248]-[250]), the distinction between the operation of a declaration *in rem* as to the status of the person or thing, on the one hand, and the reasons or findings explaining the basis on which the declaration is made, on the other hand, is well established. In this regard, there is no difference between the status attributed to findings made in a judgment *in rem* and those made in a judgment *in personam*. Thus, for example, in *Ballnayne v Mackinnon* [1896] 2 QB 455 at 462, the English Court of Appeal, Queen’s Bench Division, held that:

That a judgment in rem by a Court of competent jurisdiction is conclusive against all the world as to the status of the res, that is, of the thing adjudicated upon, is clear …

The question is whether this judgment also concludes as to the grounds upon which the judgment must have proceeded. There is a passage in Blackburn J.'s judgment in *Castrique v. Imrie*, when delivering his own opinion and that of Bramwell B., Mellor and Brett JJ., and Cleasby B. in the House of Lords, which is pertinent to this point. The learned judge says: “A judgment in an English Court is not conclusive as to anything but the point decided, and therefore a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged.” As to a judgment being only conclusive as to the point decided, there is as to this in our opinion no distinction between a judgment in rem and a judgment in personam, excepting that in the one “the point” adjudicated upon (which in a judgment in rem is always as to the status of the res) is conclusive against all the world as to that status, whereas in the other “the point,” whatever it may be, which is adjudicated upon, it not being as to the status of the res, is only conclusive between parties or privies.

41 Equally, in *Re Lawrence* (in a passage cited by the primary judge), Pincus J held at 10 that:

A judgment in rem is one determining the status of a person or thing, or the disposition of a thing, as distinct from the particular interest in it of a party to the litigation: *Halsbury*, (4th ed), vol 16, par 1522. It is characteristic of a judgment in rem that it binds all the world: ibid par 1537.

… A judgment in rem is conclusive ***only*** as to the point adjudicated upon, ***which is the status of the res***: see *Coles-Smith v Smith* [1965] Qd R 494 at 506 per Stable and Gibbs JJ. It is not easy to find examples of judgments held to be binding in rem as to anything other than the immediate effect of the judgment itself, as opposed to the reasons or findings; some are mentioned in the footnotes to *Halsbury*, (4th ed), vol 16, par 1538. *Coles-Smith v Smith* (supra) is more typical; it was there held that a divorce decree is not conclusive as to the validity of the ground on which the decree was granted.

(Emphasis added.)

42 There is no reason to suppose that the NTA intended any departure from these fundamental principles. To the contrary, as I have explained, the Act prescribes the operation and effect of an approved native title determination only.

43 ***Thirdly***, subject to the rules of evidence, s 86 confers a discretion upon the Federal Court to receive evidence in other proceedings into evidence and to adopt, among other things, findings, transcripts of evidence, or decisions of the Federal Court or other courts or tribunals: *Fulton v Northern Territory of Australia* [2016] FCA 1236 at [46] (White J); and *Lake Torrens Overlap Proceedings (No 3)* [2016] FCA 899 at [96] (Mansfield J). It is through the exercise of that discretion that the NTA makes provision relevantly for findings or evidence in a different proceeding to be received in evidence on a native title determination application. Importantly, in accordance with the requirements of procedural fairness and the rules as to evidence, that discretion would fall to be exercised in circumstances where the parties to the native title application would have the opportunity to be heard on the exercise of the discretion, including the purposes for which the findings or evidence from the different proceeding might be used, and, if received, the weight to be afforded to the findings or evidence.

44 However, the Jangga appellant’s contention would mean, for example, that the parties to the present native title determination application (including the CB appellant) would be bound by findings purportedly made in *McLennan*,to the effect that the Jangga appellant had satisfied the element of native title specified in s 223(1)(a) of the NTA, even though they were not a party in *McLennan* because they did not claim any rights or interests in that land*.* That result would not only be procedurally unfair; among other things, it would also likely cause protective applications for joinder by neighbouring claimant groups where there was any risk of an overlapping claim and complicate attempts to resolve native title claims by agreement. As such, the construction does not best promote the purpose of the NTA of facilitating negotiated determinations of native title and must be rejected in line with the mandate in s 15AA of the *Acts Interpretation Act 1901* (Cth).

45 ***Finally*** and in any event, Rares J in *McLennan* explained at the outset that there had been no trial to establish the claimant’s claim on its merits but rather that, before making the consent determination sought by the parties under s 87 of the NTA, the Court “*must be satisfied that the consent determination has been reached after proper consideration by the parties, particularly the State, of all the matters that the Act requires be established*” (*McLellan* at [6]). Thus as the primary judge held at [261] and [264], Rares J did not in fact make findings about the Jangga people’s society or the nature and content of their traditional laws and customs, but rather was satisfied that there was a basis in the evidence to justify the parties’ agreement to the proposed consent determination having regard to the evidence including the opinions of various anthropologists described by his Honour.

##### 6. CONCLUSION

46 For these reasons I agree that no error in terms of grounds 1 and 2 have been established and the appeal should therefore be dismissed.

|  |
| --- |
| I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Perry. |

Associate:

Dated: 12 December 2023

REASONS FOR JUDGMENT

SARAH C DERRINGTON AND COLVIN JJ

47 This appeal is from the judgment in *Malone v State of Queensland (The Clermont-Belyando Area Native Title Claim) (No 5)* [2021] FCA 1639 (**PJ**), which concerned two partially overlapping claims to native title in relation to a large area of land in Central Queensland. The claims were described by the parties as the **J#3 claim** and the **CB claim**. Separate questions were stated in respect of each of the two overlapping claims and, as required by s 67 of the *Native Title Act 1993* (Cth) (**NTA**), the two claims were heard together. The questions as stated concerned whether native title exists in relation to any and, if so, what, land and waters the subject of the respective claims. The questions were answered in the negative by the primary judge.

48 This appeal concerns the J#3 claim. It was brought by Mr Colin McLennan and others as authorised applicants on behalf of the Jangga People. Together they are the appellant in the appeal (the **Jangga Appellant**)

49 The appeal was heard together with an appeal concerning the CB claim. The appeal concerning the CB claim is addressed by separate reasons to be published at the same time as these reasons.

50 The present appeal raises a matter of considerable importance concerning the status of a consent determination made under s 87 of the NTA. Relevantly for present purposes, that section empowers the Federal Court of Australia, if it appears appropriate to the Court to do so, to make a determination of native title in the terms of an agreement reached between the parties without holding a hearing.

51 Central to the determination of the appeal is an earlier and separate consent determination of native title in respect of the Jangga People’s claim to an adjacent area of land to the north of the land the subject of the J#3 claim: ***McLennan*** *on behalf of the Jangga People v State of Queensland* [2012] FCA 1082 (Rares J). The appellant says that on the hearing of the separate questions in the J#3 claim, the primary judge was bound to conclude that the Jangga People have rights and interests possessed under the traditional laws acknowledged, and traditional customs observed, by those People because that was a matter determined in a binding way in *McLennan*, alternatively that there were findings made in *McLennan* which could be relied upon to establish that conclusion.

52 In particular, by Grounds 1 and 2, the Jangga Appellant contends that in determining the stated questions in the negative in respect of the J#3 claim:

1. The primary judge erred in finding that the determination in *McLennan* did not dispose of the inquiry required by s 223(1)(a) of the NTA in respect of the J#3 claim.
2. Alternatively to Ground 1, the primary judge erred in finding that the now appellant could not rely upon the consent determination in *McLennan* to establish the findings or the material that underpinned the facts necessary to support that determination in order to satisfy the inquiry required by s 223(1)(a) of the NTA in respect of the J#3 claim.

53 Those grounds challenge the primary judge’s main conclusions in relation to the J#3 claim (PJ[1221]) that:

(a) with the exception of the limited matters that were determined in rem, the J#3 applicant cannot rely upon any of the matters it claimed: were determined; or were the subject of findings; or were supported by the evidence; in McLennan (at [265] above);

(b) as well, the J#3 applicant cannot rely upon any of the findings it claims were made, or the evidence ostensibly relied on, in any other consent determinations upon which it sought to rely (see at [266] above);

(c) the J#3 applicant has failed to adduce lay Aboriginal evidence which is representative of the J#3 claim group, or the Jangga people, such as to establish that, as a group of people, it continued to acknowledge and observe traditional laws and customs from which rights and interests in the J#3 claim area were derived (see at [867] above);

(d) the J#3 claim group has failed to establish that any rights holding group within its society at effective sovereignty held rights and interests in any defined part of the J#3 claim area under the traditional laws and customs of that society (see at [1081]-[1086] above).

54 The Jangga Appellant needs to succeed on either of Grounds 1 or 2 to overturn the primary judge’s decision. That is because the Jangga Appellant did not lead any evidence before the primary judge to demonstrate that, as a group, the Jangga People have rights and interests that are possessed under laws and customs of a traditional nature. Rather, it sought to rely on the consent determination in *McLennan* (or what it claimed to be findings made in that case) to establish that aspect of the J#3 claim. For that reason, and in circumstances we explain below, the Court ordered that Grounds 1 and 2 of the Amended Notice of Appeal be heard and determined separately and before the other appeal grounds.

# OUTCOME

55 For the reasons that follow, the Jangga Appellant has not made out either Ground 1 or Ground 2, which is therefore dispositive of the whole appeal.

# THE PROCEEDINGS BEFORE THE PRIMARY JUDGE

56 The following summary of the proceedings below is drawn from the introduction to the primary judge’s reasons (PJ[1]-[6]).

57 In September 2019, an amended application was filed for the CB claim. It was the final iteration of a claim that had first been filed in 2004 on behalf of a claim group then called the Wangan and Jagalingou People.

58 On 21 July 2017, separate questions were stated in respect of the then Wangan and Jagalingou claim in the following terms:

Pursuant to rule 30.01 of the *Federal Court Rules 2011* (Cth), the following questions be decided separately from and before any other questions in the proceedings:

*“But for any question of extinguishment of native title:*

*a) Does native title exist in relation to any land and water of the claim area?*

*b) In relation to that part of the claim area where the answer to (a) above is in the affirmative:*

*i) Who are the persons, or each group of persons, holding the common or group rights comprising native title?*

*ii) What is the nature and extent of the native title rights and interests?”*

59 Shortly after the commencement of the trial of the separate questions in December 2019, a separate group of people claiming to be from the area the subject of the CB claim filed a native title determination application which entirely overlapped the CB claim area (**CB#2 claim**). As required by s 67 of the NTA, orders were made for that claim to be heard concurrently with the CB claim. The trial was then beset with various delays.

60 In late September 2020, before the trial had resumed, the J#3 claim was filed. As has been explained, it overlapped part of the CB claim area. The area of overlap was to the extent of the northern half of the CB claim area (**J#3 claim area**). At about the same time, the CB#2 claim was discontinued.

61 Again, as required by s 67 of the NTA, on 9 October 2020, orders were made for the original CB claim and the J#3 claim to be heard together. As part of those orders, the J#3 claim area was divided into Parts A and B. Part A comprised that part of the claim area overlapping a portion of the land the subject of the CB claim. Those orders also stated substantially identical separate questions with respect to the J#3 claim area as had been stated in respect of the CB claim. Part B of the J#3 claim area was not the subject of the proceedings before the primary judge.

62 As to the J#3 claim, the primary judge held that native title did not exist in relation to any land and waters of the J#3 claim area. On that basis, his Honour concluded that the question of who are the persons, or each group of persons, holding the common or group rights comprising native title, and the nature and extent of those native title rights and interests did not therefore arise (PJ[6]).

# PROCEDURAL HISTORY BEFORE THIS COURT

63 Before turning to the merits of the appeal, we explain briefly why, in the circumstances of this appeal, similarly to the approach taken in the CB Appeal, we considered it appropriate to resolve the appeal by reference only to certain limited grounds raised by the Jangga Appellant’s amended notice of appeal.

64 The amended notice of appeal raised 17 grounds of appeal. It did not, however, indicate whether the establishment of any one ground would suffice to allow the appeal, or whether the Jangga Appellant accepted that multiple, and if so which, grounds would need to be established in order for the appeal to succeed. Furthermore, it was apparent from the extent and complexity of the factual challenges raised by the amended notice of appeal that the appeal was highly unlikely to be able to be argued within the week set aside for the hearing of the appeal in accordance with the parties’ estimate. It was apparent that the matter would in fact require a considerably longer hearing and the Full Court would need to be reconvened at a later time.

65 Given these concerns, the matter was called on for case management hearing at which orders were made requiring the Jangga Appellant to:

1. identify any grounds of appeal which are not pressed; and
2. file a ‘decision-tree’, agreed to the extent possible, with annotations as to areas of disagreement, the purpose of which was to indicate which grounds would need to be established for the appellants to succeed on appeal.

66 Pursuant to those orders, the Jangga Appellant indicated that Grounds 3 and 12 were not pressed and produced its contentions in the form of a “Decision Tree” as to the consequence of success on each ground of its appeal. It appeared from the Decision Tree that success on either of Grounds 1 or 2 and each of Grounds 4, 14 and 15 was a prerequisite to the success of any of the remaining grounds. Further, it was contended that Grounds 5, 6, 8, and 9 were particulars of Ground 4, and that Grounds 7, 10, 11, 13, and 16 were particulars of Grounds 14 and 15. Thereafter, Senior Counsel for the Jangga Appellant accepted that success in the appeal was in fact predicated on the success of either of Grounds 1 or 2, and Ground 4.

67 For that reason, the Court made orders on the first day of the hearing of the appeal requiring Grounds 1, 2, and 4 of the amended notice of appeal and Grounds 5, 6, 8, 9 and 10, to the extent that they are particulars of Ground 4, be heard and determined separately and before the other appeal grounds. Ultimately, that order was amended on Day 3 of the appeal to remove Ground 4 (and the further grounds which were its particulars), it having been accepted by Senior Counsel for the Jangga Appellant that the appeal could not succeed unless either of Grounds 1 or 2 succeeded. In other words, the Jangga Appellant ultimately accepted that, to succeed on appeal, the Jangga Appellant needs to establish error in the following combination of grounds of appeal:

(1) Grounds 1 or 2; *and*

(2) Grounds 4, 14 and 15.

68 The Court made orders to hear argument pertaining to Grounds 1 or 2 only for two main reasons. First, the Court considered this to be an approach which would most likely result in the dispute being resolved as quickly, inexpensively and efficiently as possible: s 37M of the *Federal Court of Australia Act 1976* (Cth). In that respect, the Court considered there to be limited utility in requiring the parties to analyse closely a large body of factual findings, in the event that the appeal could be dealt with having regard to a more self-contained set of issues. Further, the Court considered that before embarking upon such an exercise, it would be necessary for the Jangga Appellant to seek leave to further amend the notice of appeal so as to properly plead the proposed challenges to the factual findings of the primary judge. Secondly, in the event that the Jangga Appellant was unsuccessful on these limited grounds, that would result in judgment being delivered in this matter in a shorter timeframe than would otherwise be possible if all of the issues raised in the respective amended notices of appeal fell for determination.

69 It is convenient to deal with both grounds together.

# THE CONSENT DETERMINATION BY RARES J IN *MCLENNAN*

70 The consent determination that led to the orders in *McLennan* was the first claim by the Jangga People (**J#1 claim**). There was no dispute that (a) the claim group for the J#3 claim is described identically to the claim group for the J#1 claim; (b) the land the subject of the J#3 claim is adjacent to the land the subject of the consent determination in *McLennan*; and (c) the claimed rights and interests for the J#3 claim area are identical to those that were determined to exist in *McLennan*.

# THE USE THAT THE JANGGA APPELLANT SEEKS TO MAKE OF *MCLENNAN*

71 Before the primary judge, the Jangga Appellant contended that the decision in *McLennan* determined that the Jangga People are a native title holding group that is comprised of the same descendants as those claimed to hold the native title rights the subject of the J#3 claim (PJ[233]). It was also claimed that were a number of necessary findings or factual findings that underpinned the determination in *McLennan* and that countering evidence received in the hearing of the separate questions must be afforded no weight (PJ[234]). These matters were said to dispose of the inquiry required by s 223(1)(a) of the NTA (PJ[235]).

72 The gravamen of the Jangga Appellant’s case in the appeal is that the orders in *McLennan*, made by consent under s 87 of the NTA giving effect to the terms of an agreement reached by the parties, determined for all time, and against the whole world, the matters required to be established by the appellant pursuant to s 223(1)(a) of the NTA. Ground 2 seeks to rely upon particular findings that were said to have been made by Rares J on the basis that the orders in *McLennan* depend upon those findings.

73 The Jangga Appellant accepts that, for the purposes of the J#3 claim, it had to establish its “connection” with the specific land and waters the subject of the J#3 claim as required by s 223(1)(b). Self‑evidently that was a matter not the subject of the orders made in *McLennan*. However, to the extent that the demonstration of such connection for the purposes of the J#3 claim depended upon establishing that rights and interests were possessed by Jangga People under traditional laws and customs, that was a matter that was said to have been determined by *McLennan* in a way that was not geographically confined.

74 The Jangga Appellant contends that the course taken by the primary judge in considering the extent to which use could be made of *McLennan* is not supported by authority.

75 The terms of s 223 and its significance for present purposes are addressed below.

# THE REASONING OF THE PRIMARY JUDGE CONCERNING *MCLENNAN*

76 It was the primary judge’s view (PJ[256]-[258]) that *McLennan* relevantly determined two matters *in rem*:

(1) the existence of native title in the particular area of land and waters the subject of the J#1 claim; and

(2) the identity of the persons or group of persons who held the common or group rights comprising that native title in the confined sense described in the authorities he had identified – being the “the Jangga People described in Schedule 3”.

77 The primary judge also identified a third matter that was determined *in rem* by the consent determination in *McLennan*, namely the nature and extent of the native title rights and interests that exist in the particular area concerned (PJ[252]). It was not suggested that his Honour’s finding in that regard could impact in any way on the resolution of the issues raised by the J#3 claim, which concerned a different area of land.

78 His Honour found that *McLennan* otherwise made no findings as to the matters which the appellant contends by Ground 2 should have been found by the primary judge to have been established by the decision in *McLennan*.

# THE QUESTION FOR DETERMINATION

79 Therefore, the question raised by the appeal concerns the extent to which, if at all, the consent determination in *McLennan* operated to resolve in a binding way any of the matters in issue before the primary judge upon the hearing of the stated questions in the J#3 claim. Resolution of this question requires an understanding of the relevant statutory provisions.

## Legislative provisions

80 Section 81 of the NTA entrusts to the Court a jurisdiction to hear and determine applications that relate to native title. An application may be made for a determination of native title in relation to an area for which there is no approved determination of native title (s 13(1)(a)). The parties to such an application are the applicant and, amongst others, those who claim to hold native title “in relation to land or waters *in the area covered by the application*” and those whose interest “in relation to land or waters, *may be affected by a determination in the proceedings*” (ss 84(2) and (3)) (emphasis added). The Court also has power to join any person whose interests “may be affected by a determination in the proceedings” (s 84(5)).

81 These provisions have significance because the contentions advanced for the Jangga Appellant seek to give significance to a determination of native title for land and waters that are *not* the subject of the application.

82 Section 87 provides that the Court may make an order that is consistent with an agreement reached by the parties in relation to the proceedings (or a part of the proceedings) and “if it appears to the Court to be appropriate to do so” it may make the order without holding a hearing. The order may involve a determination of native title. The Court must be satisfied that the order would be within the power of the Court.

83 Section 94A provides that an order in which the Court makes a determination of native title “must set out details of the matters mentioned in section 255”.

84 Section 225 of the NTA provides:

**Determination of native title**

A ***determination of native title*** is a determination whether or not native title exists in relation to a particular area (***the determination area***) of land or waters and, if it does exist, a determination of:

(a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and

(b) the nature and extent of the native title rights and interests in relation to the determination area; and

(c) the nature and extent of any other interests in relation to the determination area; and

(d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and

(e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease--whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

(Emphasis in original.)

85 It may be observed that s 225 refers to two determinations. First, a determination as to whether native title exists in relation to a particular area of land and waters. Second, a determination of the matters listed in (a) to (e). See ***Drury*** *on behalf of the Nanda People v State of Western Australia* [2020] FCAFC 69 at [25]-[28] (Mortimer and Colvin JJ). However, by reason of the terminology concerning the first determination, both concern “a particular area” of land or waters.

86 Section 223(1) of the NTA is definitional. It is not a substantive operative provision. It provides:

*Common law rights and interests*

(1) The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

(Emphasis in original.)

87 Therefore, the determinations to be made under s 225 are in respect of native title as defined in s 223(1). Significantly for present purposes, it is a determination of native title (as defined) in relation to a particular area of land or waters. The term “native title” means communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders “in relation to land or waters” where three aspects pertain, being those in (a) to (c). The opening words of s 223(1) contextualise each of the matters that follow. Consequently, each of the three aspects concern rights and interests in relation to land or waters. When applied to s 225, the definition of native title rights and interests refers to those rights and interests in the land or waters the subject of the determinations to be made by the Court. A determination as to the existence of those rights and interests is made in relation to particular land or waters (or “country”): see *State of Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1 at [18]-[19]. It is a conception which requires each of the three aspects of native title to be manifest in respect of particular country. It does not invite a finding “in the air” that is separated from identified land or waters.

88 Further, a determination of native title cannot be disaggregated into its component parts. It is not a determination as to each of the three aspects described in (a) to (c) of the definition in s 223(1). Native title is a singular conception of a particular kind of rights and interests which are to be the subject of determinations made under s 225.

89 There is a considerable body of law as to what must be established to support a consent determination as to the existence of native title.

90 If satisfied that it is appropriate to do so, the Court may make the determination without receiving evidence or undertaking its own inquiry as to whether there is a foundation for the matters that have been agreed. Rather, it will consider evidence for the limited purpose of ensuring that the State, as the representative of the public interest and the relevant community of people, is making a rational decision and is acting in good faith: *Ward v State of Western Australia* [2006] FCA 1848 at [8] (North J); ***Lander*** *v State of South Australia* [2012] FCA 427 at [11] (Mansfield J); *Brown v Northern Territory of Australia* [2015] FCA 1268 at [23] (Mansfield J) and *Freddie v Northern Territory* [2017] FCA 867 at [12]‑[24] (Mortimer J).

91 It is well established that the support of a State will provide a basis upon which a consent determination will be made and the State is “not required to obtain proof from an applicant which would demonstrate to a civil standard of proof, on the balance of probabilities, that the native title rights claimed by the applicant exist”: *Widjabul Wia-Bal v Attorney General of New South Wales* [2020] FCAFC 34; 274 FCR 577 at [51] (Reeves, Jagot and Mortimer JJ). Therefore, a consent determination does not involve any adjudication as to whether there is a proper evidentiary foundation to establish each of the matters in (a) to (c) of the definition of native title or native title rights and interests as stated in s 223(1): see *Lander* at [11]‑[13] (Mansfield J) and *Drury on behalf of the Nanda People v State of Western Australia* [2018] FCA 1849at [52]‑[56] (Mortimer J).

92 When the Court makes a determination of native title by consent, it makes a determination of a special kind that reflects the exceptional nature of the legislation. It is not concerned with adjudicating common law rights. It is concerned with adjudicating whether there are traditional rights and interests that are recognised by the common law. The NTA responds to the need for a “special procedure…to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character”: see the Preamble to the NTA. In consequence, the legislation prefers agreement as the means of resolving controversies as to whether such native title rights exist: see *Brown v The State of South Australia* [2010] FCA 875; 189 FCR 540 at [38] (Mansfield J); *Barkandji Traditional Owners #8 (Part B) v Attorney-General of New South Wales* [2017] FCA 971 at [3] (Griffiths J); and *Western Bundjalung People v Attorney General of New South Wales* [2017] FCA 992 at [12]‑[13] (Jagot J).

## Jangga Appellant’s case on appeal

93 The Jangga Appellant submits that the consent determination of native title in *McLennan* included a determination that s 223(1)(a) was satisfied such that it could not be an issue in the J#3 claim and, further, that there is no judicial authority for the proposition that a determination in relation to s 223(1)(a) is (or even could be) confined geographically (that is, to the land or waters the subject of the determination). However, as has been noted, the Jangga Appellant accepts that, even on its approach, the matters in s 223(1)(b) (namely whether there was connection with the land the subject of the J#3 claim) were required to be determined in order to answer the stated questions.

94 Four matters bear upon whether the Jangga Appellant’s case should be accepted. First, the proper construction of the relevant provisions of the NTA. Second, the reasons of Rares J in *McLennan*. Third,the conception of a determination of native title as operating *in rem*. Fourth, the authorities relied upon by the appellant to support its case.

### First, proper construction of the provisions of the NTA

95 For reasons that follow, the Jangga Appellant’s contention cannot be accepted as a matter of proper construction of the NTA.

96 First, the determination made in *McLennan* was a consent determination of the particular kind provided for by the NTA and operated as such. It was not founded upon any judicial determination of the matters in s 223(1). Rather, it rested upon the agreement of the parties and the support of the State according to the unique jurisdiction afforded under the NTA (as explained above). The reasons given by Rares J in *McLennan* supported conclusions that the orders were within power and that it appeared to the Court that it was appropriate to make them without a hearing. They did not (and could not) go further given the nature of the jurisdiction being exercised. In particular, the consent determination was not based upon any findings by the Court as to the three aspects of the definition of native title.

97 Second, in any event, as the determination made by the Court in *McLennan* (as with all determinations of native title) was concerned whether native title exists in relation to a particular area of land or waters, any findings made as part of that adjudication are geographically confined. In making such determinations, the Court is not called upon to consider whether the rights and interests that are to be determined to exist might also be possessed by the same people under the same laws and customs in places that are outside that particular area. As has been explained, the whole of the determination is geographically confined. Therefore, no part of any findings reach beyond the area that is the subject of the application in respect of which the determination is made.

98 Third, if there had been a contested hearing in *McLennan,* the Court would have been required to adjudicate whether the three elements in s 223(1) (including that stated in s 223(1)(a)) were satisfied. However, as to those matters, the chapeau to s 223(1) grounds the whole inquiry in geography. Native title rights and interests are to be determined by reference to the communal, group or individual rights and interests *in relation to land* or waters: *where* the rights and interests are possessed under the traditional laws acknowledged and the traditional customs observed (s 223(1)(a)); and *where* by those laws and customs, the people have a connection with *the* land or waters (s 223(1)(b)); and *where* the rights and interests are recognised by the common law of Australia (s 223(1)(c)). The use of the conjunctive between each subsection supports such a reading of the section as a whole. That is to say, s 223 requires a single inquiry in relation to the land or waters that are the subject of the determination.

99 Fourth, contrary to the appellant’s submission, judicial authority is clear that s 223(1)(a) is geographically bounded. In *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] HCA 58; 214 CLR 422 at [33], Gleeson CJ, Gummow and Hayne JJ explained:

“Native title” means certain rights and interests of indigenous peoples. Those rights and interests may be communal, group or individual rights and interests, but **they must be “in relation to” land or waters**.

(Emphasis added.)

100 The Court’s fact-finding task on a contested application for determination whether or not native title exists is specific to the land and waters the subject of the application. So much was made clear by the High Court in *Commonwealth v Yarmirr* [2001] HCA 56; 208 CLR 1 at [15] (Gleeson CJ, Gaudron, Gummow and Hayne JJ):

The relevant starting point is the question of fact posed by the Act: what are the rights and interests **in relation to land or waters** which are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples?

(Emphasis added.)

101 To similar effect, in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135; 145 FCR 442 at [88] and [93], the Full Court, after reviewing the relevant authorities, including those mentioned above, described what is involved in the concept of “connection” in s 223:

From the preceding it can be seen that “connection” is **descriptive of the relationship to the land and waters** which is, in effect, declared or asserted by the acknowledgment of laws and observance of customs which concern the land and waters in various ways. To observe laws and acknowledge customs which tell the stories of the land and define the rules for its protection and use in ways spiritual and material is to keep the relevant connection to the land. There is inescapably an element of continuity involved which derives from the necessary character of the relevant laws and customs as “traditional”. The acknowledgment and observance, and thereby the connection, is not transient but continuing.

…

The word “connection” should not be taken as qualifying or limiting the range of rights and interests arising under traditional law and custom which are native title rights and interests for the purposes of the NT Act. The existence of connection, in the sense explained, is a condition of their existence for the purposes of the NT Act. It does not limit their content. **Their content is limited by the requirement that they be rights and interests “in relation to land or waters”.** The words “in relation to” are words of wide import. The content of native title rights and interests may also be limited by the requirement, imposed by s 223(1)(c) that they “are recognised by the common law of native title”.

(Emphasis added.)

102 Fifth, as has been explained, a determination of native title as to a particular area of land or waters does not require a separate finding in terms of s 223(1)(a) that is somehow disconnected from the country the subject of the determination. Rather, it requires a finding that there are rights and interests *in relation to land or waters* that have the characteristics described.

103 Finally, the Jangga Appellant’s construction would have significant consequences for the conduct of applications for the determination of native title. If, as the Jangga Appellant submits, a determination of the existence of native title for one area resolves finally for the claim group that they have rights and interests possessed under traditional laws acknowledged and customs observed that is unconfined as to its geographical extent, with the consequence that such matters could not be disputed in the context of an application by that claim group to native title to an adjacent area then the determination may affect the interests of any other group that claims native title to that adjacent area (or any person who disputes the existence of any native title as to that area).

104 If that is so, there may be a need for all those persons whose interests may be affected to be joined as parties to the original determination. There would be considerable complexities in identifying all such people. Indeed, it may be practically impossible to identify them. If they are not joined, then issues may arise as to whether all required parties were joined in the original determination with the possibility of a challenge to the determination on that basis. If there is no requirement to join, but non-parties are nevertheless bound by the determination concerning the rights and interests possessed by the claim group, then that may have significant consequences for native title claims to adjoining land or waters not the subject of the original determination.

105 The present case is an example. The appellant says that the matters in s 223(1)(a) were established in respect of the Jangga People in a way that is not geographically confined. They say that the determination in *McLennan* to that effect is binding for all purposes. They say that the primary judge was bound to proceed on that basis in determining the J#3 claim. If that is right, then the CB claim must also be determined on that basis (to the extent of the overlap). In consequence, the claim group advancing the CB claim would be bound by that aspect of the determination made in *McLennan* being a consent determination of an application to which they were not a party.

106 There would be no limits upon the land or waters in respect of which the Jangga People could maintain that such a binding determination had been made.

107 These matters count strongly against the Jangga Appellant’s contention.

108 Separately, we note that the NTA has express provisions that enable the Court to receive the evidence and findings in other proceedings when determining applications under the NTA (s 86). Therefore, there is an express mechanism by which the Court may be invited to deploy the findings made in relation to the determination of one application in the resolution of another application. The availability of this express power ameliorates against the implicit contention of the appellant that there would be some undue or unreasonable burden in requiring the matters in s 223(1)(a) to be proved in successive applications as to adjoining land. We observe that no application of that kind was made to the primary judge in the present case. In any event, there would be the potential for parties to agree such matters if they were indeed not contentious in any successive application. In short, it is not the case that the construction for which the appellant contends is necessary for the effective operation of the NTA when it comes to the successive determination of claims to native title by the same group of people to adjoining areas of land in reliance upon the existence of the same society of people who are said to possess rights and interests under traditional laws acknowledged and customs observed by those people.

### Second, the reasoning of Rares J in McLennan

109 In *McLennan*, Rares J at [28] explained the Court’s task in the following terms:

A determination of native title affects the status of the land and waters **to which it relates** because it creates rights and interests in them that, subject to the Act and the terms of the determination itself, the holders can exercise forever after against any other person, including the Commonwealth and the State … Because a consent determination, just as a fully contested hearing, creates this status, the Court must be careful to ensure that the State, as representative of the community generally, has itself played an active role in carefully evaluating the material and evidence on which its consent is based.

(Emphasis added.)

110 Nowhere in *McLennan* did Rares J suggest that he was making any factual findings. Indeed, as we have explained, there were no findings to be made. As Rares J said, at [6], “[t]he Court has not had a trial to establish the applicant’s claim on its merits”. Further, at [30]-[31], Rares J couched his reasoning in terms that reflected the consent jurisdiction conferred by the NTA and in terms that were confined to the land the subject of the J#1 claim:

On the basis of Mr Leo’s and the State’s evidence, I am satisfied that a real basis existed that justified the parties entering into the agreement for the consent determination and that there is a sufficient foundation for it to be made, including in respect of the matters mentioned in s 225.

In addition, the Court must be satisfied that an order in, or consistent with, the terms of the parties’ signed agreement would be within its power to make if the proceedings had been contested (s 87(1)(c)). As I have noted, the parties have signed their agreement that the Court be asked to make a consent determination in the terms that I will shortly pronounce (s 87(1)(b) and (2)). I am satisfied that an order in, or consistent with, those terms is within the power of the Court for the purposes of s 87(1)(c) and (2) because:

(a) each of the original application, and the current amended application is valid and each was made in accordance with the Act (ss 61, 64, 81);

(b) the amended application relates to an area in relation to which there is no approved determination of native title (ss 13(1)(a), 61A(1));

(c) the proposed orders comply with the requirements of ss 94A and 225 because they set out, **in relation to the land and waters specified**, the group of persons holding the common or group rights comprising the native title, the nature and extent of each of the native title and other rights and interests, the relationship between those native title and other rights and interests, and specify the extent to which the Juru people’s native title rights and interests to possession, occupation, use and enjoyment **of particular lands and waters** will or will not be to the exclusion of others.

(Emphasis added.)

111 Therefore, nothing in the reasons supports the view that *McLennan* determined or made findings about the matters in s 223(1)(a) that would apply beyond the area the subject of the Jangga #1 claim.

112 The determination in *McLennan* was a determination that native title exists in the area the subject of the J#1 claim. It was also a determination of the matters listed in (a) to (e) of s 225 as to the native title rights in that area. It was not expressed to be a determination about anything outside that geographical area.

### Third, the conception of a determination of native title as operating in rem

113 As has been explained, the primary judge dealt with the claim concerning the significance of the decision in *McLennan* as a means of establishing matters for the purposes of the separate questions stated in the J#3 claim by first dealing with the extent to which *McLennan* determined matters *in rem*. His Honour addressed the authorities in which a determination of native title had been described as operating as a judgment *in rem* against the whole world (PJ[245]). This approach was understandable given the nature of the contentions advanced before the primary judge. In effect, it was claimed that the determination in *McLennan* somehow resolved against the world (that is, in a way that bound those who had not been parties to the J#1 claim determined in *McLennan*) the matters that were described in s 223(1)(a).

114 The Jangga Appellant now contends that the primary judge placed an “unwarranted emphasis” on the *in rem* status of a native title determination, which led him into error in concluding that the only matters determined in an approved determination of native title are the *thing* to which a determination relates (the determination area), and the *persons* to whom such a determination applies, and the nature and extent of the native title rights and interests *in the particular area* (PJ[252]).

115 However, his Honour’s conclusion as to the matters that are the subject of Grounds 1 and 2 in the present appeal did not rest upon the *in rem* conclusions. Rather, they rested on what followed in the reasons of the primary judge. In that regard, the primary judge went on to consider expressly whether Rares J had made any findings at all. His Honour found that Rares J did no more than record the matters of opinion of anthropologists that were before him for the purposes of concluding that there was a proper basis to make a consent determination. In that regard, after reciting from the reasons of Rares J, the primary judge found at PJ[264]:

…Rares J merely recorded these opinions. He did not expressly accept or reject them, nor, more importantly did he make any findings based on them. Even if his Honour had expressly accepted them and/or made findings about some aspects of them…there would be no justification for importing those opinions, or those findings, or the evidence on which they were ostensibly based, into these proceedings. The exceptions, of course, are the two rulings *in rem*, which have been delineated above. But even those rulings are confined to the defined determination area and the description of the group of persons who held the native title for the limited purpose described [earlier in the reasons].

116 Therefore, the reasoning of the primary judge as to the matters which the Jangga Appellant says by Grounds 1 and 2 should have been found to have been determined by *McLennan* does not rest upon his Honour’s views concerning the extent of the *in rem* character of the determination. Rather, the reasoning rests upon his Honour’s view of the nature of the reasons as dealing with an application invoking the jurisdiction to make a determination by consent without any hearing. As to that aspect of the reasoning by the primary judge, as we have explained, his Honour was entirely correct to describe the reasons of Rares J as not involving the making of any findings. His Honour was correct because of the nature of the jurisdiction that was exercised in *McLennan*, being the particular statutory jurisdiction conferred by the NTA to make a consent determination.

### Fourth, the authorities relied upon by the Jangga Appellant

117 It is important to be precise about the nature of the case advanced by the Jangga Appellant to support Grounds 1 and 2. There was no claim based upon issue estoppel, nor could there be given what we have said about the nature of a consent determination. The decision in *McLennan* was not based upon findings of essential matters of fact that were actually litigated and determined. In *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, Higgins J (in dissent but upheld on appeal by the Privy Council (1925) 37 CLR 290) referred to the phrase “actually litigated and determined” as necessary for an estoppel to operate. See also *Kuligowski v Metrobus* [2004] HCA 34; 220 CLR 363 at [53]. As the Full Court said in *Dale v State of Western Australia* [2011] FCAFC 46; 191 FCR 521 at [74] (Moore, North and Mansfield JJ), if there was no ultimate finding, there could be no issue estoppel.

118 There was also no claim that there was some form of abuse of process in requiring that all the matters in s 233 be established. In different circumstances an issue may arise as to whether a party could be permitted to advance a case that sought to impugn in some way the foundation of a determination of native title for another area (perhaps even if that determination was made by consent). That may be especially so if that party had participated (or been given the opportunity to participate) in the proceedings in which that other determination was made. Issues of that kind do not arise in the present case.

119 Rather, the objection to the course followed by the primary judge is that it opened up the prospect that the J#3 claim may be refused on the basis of a conclusion that s 223(1)(a) was not met for reasons that would be inconsistent with the determination of native title in *McLennan*. This possibility was not opened up by the way anything was put by the parties advancing the CB claim. Rather, it was a consequence of the fact that before the primary judge, the J#3 claim was advanced on the basis that the relevant laws acknowledged and customs observed for the area that overlapped with the CB claim were as between members of the same society who had been found to have a connection to the land the subject of the J#1 claim.

120 What was not explained by the Jangga Appellant (beyond its reliance on the alleged effect of the determination in *McLennan*)was why, as a matter of principle, that possible inconsistency meant that those advancing the J#3 claim did not have to prove all aspects of the definition of native title as to the J#3 claim area (and thereby foreclose those advancing the CB claim from being able to dispute that aspect of the foundation for the J#3 claim insofar as it overlapped the CB claim area). For reasons that have already been given, the nature of the consent determination meant that there had been no finding made as to that aspect in *McLennan*. Further, even if such a finding had been made on the basis of a contested hearing of the J#1 claim, it would have been a finding that was geographically confined to the land the subject of the J#1 claim as adjudicated in *McLennan*.

121 The Jangga Appellant relied on the decision in ***Starkey*** *on behalf of the Kokatha People v State of South Australia* [2018] FCAFC 36; 261 FCR 183 to support its contention that the primary judge was bound to accept that its rights and interests are possessed under the traditional laws, and the traditional customs observed. In particular, the appellant relied on the observation of Reeves J in *Starkey* (at [198]), with whom White J agreed (at [401]), “that the fundamental matters of which a determination of native title dispose, once and for all, are determined according to the provisions of the NTA, particularly ss 223(1) and 225”. The State did not cavil with that proposition. Its position was that the determination was confined to the area the subject the determination.

122 The Jangga Appellant focussed upon the majority’s reasoning in *Starkey* at [201] that:

It necessarily follows that one of the most important fundamental matters disposed of, once and for all, by a determination of native title made under the NTA is that the native title rights and interests described in that determination area are of that traditional nature and having those pre-sovereignty origins.

123 The Jangga Appellant submitted that it was not possible to reconcile the primary judge’s failure to refer to the findings required by s 223(1) with either the majority judgment in *Starkey*, as expressed above, or the minority reasoning of Jagot J at [293], where her Honour said:

Sections 223(1)(a) and (c) could not be in dispute because the groups in question were the same as those which had been found by the determinations to have rights and interests possessed under the traditional laws acknowledged, and the traditional customs observed, by them, which were recognised by the common law of Australia.

124 The observation quoted immediately above was made in direct response to a passage in the reasons of the primary judge in *Starkey*, extracted by Jagot J at [292], where the primary judge had explained:

The issue in the proceeding is whether all of, or any part of, the rights and interests possessed by any of the three groups, extend to and include all of, or any part of, Lake Torrens, including Andamooka Island, at sovereignty and have since been maintained and exercised by the successors to the relevant group or groups to the present time, albeit appropriately adapted, so as to satisfy s 223(1)(b) requiring the present connection to Lake Torrens (or a part or parts of it) under those traditional laws and customs. There is no issue concerning s 223 (1)(c).

125 *Starkey* does not assist the Jangga Appellant for three reasons. First, it was a decision concerned with whether the primary judge was correct to exclude evidence that areas the subject of an existing determination in favour of one group had, at sovereignty, been the subject of rights of a different group, thereby undermining the determination. That is to say, in *Starkey* one party sought to impugn a basis for the existence of native title rights *in an area that had been the subject of a determination of native title*. There was no attempt in the present case to challenge the determination in *McLennan* in any way similar to that in *Starkey*.

126 Secondly, the finding of the majority in *Starkey* (at [201]) quoted above must be read consistently with the proper construction of s 223(1) as discussed above, a matter which was not the subject of consideration in *Starkey*. On a proper construction of s 223(1), no error on the part of the primary judge is established.

127 Thirdly, the Jangga Appellant’s characterisation of Jagot J’s reasons as endorsing the proposition that a previous determination of native title in respect of a particular group settles the s 223(1)(a) question in respect of that group for any and all subsequent claims by that group, cannot be reconciled with her Honour’s reasons when read as a whole. As her Honour emphasised (*Starkey* at [274]), in accordance with s 225 of the NTA, each determination determines the persons holding the common or group rights comprising the native title *in the determination area* and the nature and extent of those rights *in relation to the determination area*. Consequently, in the context of the issue to be decided in *Starkey*, because there had already been determinations of native title which recognised the rights and interests possessed under the traditional laws acknowledged, and the traditional customs observed by the Kokatha People, the Adnyamathanha People and the Barngarla People respectively in relation to each of their determination areas, there was no scope for the common law of Australia to recognise any other native title rights and interests in those areas (*Starkey* at [277]). No such issue arises in the present case.

128 Further, there are many reasons why the foundation for a determination that a group holds native title in one area (area A) may not extend to another area (area B), even where one party contends that the law and customs acknowledged and observed in area A are also the law and customs that gives rise to native title for area B. Therefore, all such matter necessarily fall to be proved on the evidence in any subsequent application: *Fortescue Metals Group v Warrie* *on behalf of the Yindjibarndi People* [2019] FCAFC 177; 273 FCR 350 at [81] (Jagot and Mortimer JJ).

# CONCLUSION

129 The Jangga Appellant did not lead any evidence before the primary judge on the very question of fact the Court was required to consider under s 223(1)(a) of the NTA; namely, what were the rights and interests *in relation to the land or waters of the J#3 claim area* that were possessed under the traditional laws acknowledged and the traditional customs observed by the claim group for the J#3 claim. For reasons that have been given, the fact that the question in relation to the J#1 claim area had been determined in favour of the Jangga people in *McLennan* cannot answer that question in relation to the J#3 claim area.

130 Therefore, the Jangga Appellant cannot succeed on either of Grounds 1 or 2. As was conceded in oral argument, failure on those grounds is dispositive of the entire appeal. The appeal must be dismissed. We will reserve liberty to apply for any order as to costs.

|  |
| --- |
| I certify that the preceding eighty-four (84) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Sarah C Derrington and Colvin. |

Associate:

Dated: 12 December 2023