



# Federal Court of Australia - Full Court

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## **Bennell v State of Western Australia [2004] FCAFC 338 (23 December 2004)**

Last Updated: 6 January 2005

### **FEDERAL COURT OF AUSTRALIA**

#### **Bennell v State of Western Australia [2004] FCAFC 338**

**NATIVE TITLE – case management – Regional Case Management Conference – whether trial date should be vacated – funding issues – availability of expert reports – ongoing mediation – directions given**

[Native Title Act 1993](#) (Cth)

**ANTHONY BENNELL, ALAN BLURTON, ALAN BOLTON AND OTHERS (SNC) v THE STATE OF WESTERN AUSTRALIA AND OTHERS**

**WAD6006 of 2003**

**KEN COLBUNG, GLEN COLBUNG AND OTHERS (SOUTH WEST BOOJARAH), M VAN LEEUWEN ON BEHALF OF THE HARRIS FAMILY , L BELLOTTI AND OTHERS ON BEHALF OF THE NYUNGAR PEOPLE (GNAALA KARLA BOOJA) v THE STATE OF WESTERN AUSTRALIA AND OTHERS**

**WAD 6279, 6085, Part of 6274 of 1998**

**ANTHONY BENNELL AND OTHERS (Single ↗Noongar↘ Claim Area 2) v THE STATE OF WESTERN AUSTRALIA**

**WAD 6012 OF 2003**

**MARTHA BORINELLI, ARNOLD FRANKS AND OTHERS ON BEHALF OF THE YUED FAMILIES v THE STATE OF WESTERN AUSTRALIA AND OTHERS**

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**PATRICIA MORICH AND OTHERS ON BEHALF OF THE WOM-BER PEOPLE v THE STATE OF WESTERN AUSTRALIA AND OTHERS**

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**ALAN BOLTON AND OTHERS ON BEHALF OF THE SOUTHERN NOONGAR  
FAMILIES, ALAN BOLTON AND OTHERS ON BEHALF OF THE WAGYL KAIP,  
PATRICIA MORICH AND OTHERS ON BEHALF OF THE WOM-BER PEOPLE v THE  
STATE OF WESTERN AUSTRALIA AND OTHERS**

**WAD 6134, 6286 and Part of 6130 of 1998**

**DONALD COLLARD and SYLVIA RACHAEL COLLARD ON BEHALF OF THE  
NOONGAR PEOPLE**

**WAD6091, 6102, 6142, 6171 and 6223 of 1998**

**WILCOX, FRENCH and FINN JJ**

**23 DECEMBER 2004**

**PERTH**

**IN THE FEDERAL COURT OF AUSTRALIA**

**WESTERN AUSTRALIA DISTRICT REGISTRY**



**WAD6006 of 2003**

**BETWEEN: ANTHONY BENNELL, ALAN BLURTON, ALAN BOLTON  
AND OTHERS (SNC)  
APPLICANTS**



**AND: THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS**

**JUDGE: WILCOX J**

**DATE OF ORDER: 23 DECEMBER 2004**

**WHERE MADE: PERTH**

**THE COURT ORDERS THAT:**

1. The trial of so much of the application as relates to the area covered by the Perth  
Metropolitan Application, formerly WAG142/98, be adjourned to a date to be fixed early in  
the second half of 2005.

2. The time limited for the filing of an historical report by Dr John Host be extended to 21  
January 2005.

3(a) The applicants and the State of Western Australia do endeavour to agree a revised  
timetable for pre-trial programming to be filed in Court prior to 31 January 2005 on notice  
to the other parties to the application.

(b) If no timetable can be agreed the applicants are to apply to Wilcox J on or before 7  
February 2005 for further directions and, in any event, are to apply for directions as to the  
fixing of trial dates in the second half of 2005.

4. There is liberty to apply.

5. The balance of the application is to continue in mediation in accordance with the protocol

presently agreed.

6. Liberty to apply to French J for directions as to formal referral to mediation following completion of notification and for any variation of mediation protocols for the balance of the application.

7. The SWALSC is directed to take all reasonable steps to pursue its application to the Commonwealth for funding to represent the applicants in connection with the trial of the **Perth** Metropolitan area claim and pre-trial steps in relation to it.

8. The SWALSC is directed to prepare and file prior to 1 June 2005 a statement of its priorities in respect of the trial of applications and/or the hearing of evidence in respect of particular parts of any application including this application.

9. The directions hearing in respect of so much of this application as does not relate to the area covered by the **Perth** Metropolitan application, formerly WAG142/98, be adjourned to 1 June 2005 at 9am.

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

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

**WAD 6279, 6085 part  
of 6274 of 1998**

**BETWEEN:           KEN COLBUNG, GLEN COLBUNG, AND OTHERS  
(SOUTH WEST BOOJARAH)  
FIRST APPLICANTS**

**M VAN LEEUWEN ON BEHALF OF THE HARRIS FAMILY  
SECOND APPLICANTS**

**L BELLOTTI AND OTHERS ON BEHALF OF THE NYUNGAR  
PEOPLE (GNAALA KARLA BOOJA)  
THIRD APPLICANTS**

**AND:               THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS**

**JUDGE:             FRENCH J**

**DATE OF ORDER:   23 DECEMBER 2004**

**WHERE MADE:      Perth**

**THE COURT ORDERS THAT:**

1. The applicants and the State in conjunction with the National Native Title Tribunal are to prepare a program for the negotiation and mediation of the combined applications commencing 1 February 2005. The program is to set out:

- (i) specific issues to be negotiated;
- (ii) a detailed timetable including proposed meeting dates and venues set in a regional context;
- (iii) an outline of a negotiated protocol to be adopted by the State and the applicants;
- (iv) provision for the taking of connexion evidence;
- (v) identification of questions of law or fact which, if determined by the Court, could advance the resolution of a particular claim or conflict between claims.

2. A copy of the program is to be lodged with the Court by 28 February 2005.

3. A copy of the program is to be made available to any party on request to the applicants.

4. The parties are to comply with the timetable set out in the program provided that, if it appears likely to any party that it will be unable to take a programmed step within two months of the time limited for doing so by the program, it must apply to the Court to vary the program accordingly.

5. A directions hearing be listed on 1 June 2005 at 9am to provide direction under Order 1 rule 9 of the Federal Court Rules.

6. The applicants file any documents and/or submissions relating to the directions hearing at least 28 days prior to the date set in Order 5.

7. The respondents file any documents and/or submissions in relation to the directions hearing at least 14 days prior to the date set in Order 5.

8. The applicant file any documents and/or submissions in reply at least 11 days prior to the date set in Order 5.

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

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

**WAD6012 of 2003**

**BETWEEN:**                   **ANTHONY BENNELL and OTHERS**  
                                  **(Single Noongar Claim Area 2)**  
                                  **APPLICANTS**

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

**JUDGE:** FRENCH J  
**DATE OF ORDER:** 23 DECEMBER 2004  
**WHERE MADE:** ↕PERTH↕

**THE COURT ORDERS THAT:**

1. The applicants and the State in conjunction with the National Native Title Tribunal are to prepare a program for the negotiation and mediation of the combined applications commencing 1 February 2005. The program is to set out:

- (i) specific issues to be negotiated;
- (ii) a detailed timetable including proposed meeting dates and venues set in a regional context;
- (iii) an outline of a negotiated protocol to be adopted by the State and the applicants;
- (iv) provision for the taking of connexion evidence;
- (v) identification of questions of law or fact which, if determined by the Court, could advance the resolution of a particular claim or conflict between claims.

2. A copy of the program is to be lodged with the Court by 28 February 2005.

3. A copy of the program is to be made available to any party on request to the applicants.

4. The parties are to comply with the timetable set out in the program provided that, if it appears likely to any party that it will be unable to take a programmed step within two months of the time limited for doing so by the program, it must apply to the Court to vary the program accordingly.

5. The directions hearing is adjourned to 1 June 2005 at 9am at which time the question of formal referral to mediation will be dealt with.

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

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

**WAD6192 of 1998**

**BETWEEN:** MARTHA BORINELLI, ARNOLD FRANKS AND OTHERS ON  
BEHALF OF THE YUED FAMILIES  
APPLICANTS  
**AND:** THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS  
**JUDGE:** FRENCH J  
**DATE OF ORDER:** 23 DECEMBER 2004  
**WHERE MADE:** ↕PERTH↕

**THE COURT ORDERS THAT:**

1. The mediation facilitated by the National Native Title Tribunal continue.
2. The directions hearing be adjourned to 1 June 2005 at 9am.
3. The National Native Title Tribunal be requested to provide a mediation report on or before 23 May 2005.
4. There be liberty to apply.

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

**IN THE FEDERAL COURT OF AUSTRALIA  
WESTERN AUSTRALIA DISTRICT REGISTRY****WAD6274 of 1998**

**BETWEEN:**                    **LORRAINE BELLOTTI AND OTHERS ON BEHALF OF THE  
NYUNGAR PEOPLE  
(GNAALA KARLA BOOJA)  
APPLICANTS**

**AND:**                         **THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS**

**JUDGE:**                     **FRENCH J**

**DATE OF ORDER:**       **23 DECEMBER 2004**

**WHERE MADE:**           **PERTH**

**THE COURT ORDERS THAT:**

1. The mediation facilitated by the National Native Title Tribunal continue.
2. The directions hearing be adjourned to 1 June 2005 at 9am.
3. The National Native Title Tribunal be requested to provide a mediation report on or before 23 May 2005.
4. There be liberty to apply.

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

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

**WAD6130 of 1998**

**BETWEEN:** PATRICIA MORICH AND OTHERS ON BEHALF OF THE  
WOM-BER PEOPLE  
APPLICANTS

**AND:** THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS

**JUDGE:** FRENCH J

**DATE OF ORDER:** 23 DECEMBER 2004

**WHERE MADE:** ↻PERTH↻

**THE COURT ORDERS THAT:**

1. The mediation facilitated by the National Native Title Tribunal continue.
2. The directions hearing be adjourned to 1 June 2005 at 9am.
3. The National Native Title Tribunal be requested to provide a mediation report on or before 23 May 2005.
4. There be liberty to apply.

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

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

**WAD6181 of 1998**

**BETWEEN:** CEDRIC ANDERSON, DONALD COLLARD, SYLVIA  
COLLARD AND OTHERS ON BEHALF OF THE  
BALLARDONG PEOPLE  
APPLICANTS

**AND:** THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS

**JUDGE:** FRENCH J

**DATE OF ORDER:** 23 DECEMBER 2004

**WHERE MADE:** ↻PERTH↻

**THE COURT ORDERS THAT:**

1. The mediation facilitated by the National Native Title Tribunal continue.

2. The directions hearing be adjourned to 1 June 2005 at 9am.
3. The National Native Title Tribunal be requested to provide a mediation report on or before 23 May 2005.
4. There be liberty to apply.

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

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

**WAD 6134, 6286 and  
part of 6130 of 1998**

**BETWEEN:**                    **ALAN BOLTON AND OTHERS ON BEHALF OF THE  
SOUTHERN ↕NOONGAR↔ FAMILIES  
FIRST APPLICANTS**

**ALAN BOLTON AND OTHERS ON BEHALF OF THE WAGYL  
KAIP  
SECOND APPLICANTS**

**PATRICIA MORICH AND OTHERS ON BEHALF OF THE  
WOM-BER PEOPLE  
THIRD APPLICANTS**

**AND:**                         **THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS**

**JUDGE:**                     **FRENCH J**

**DATE OF ORDER:**       **23 DECEMBER 2004**

**WHERE MADE:**            **↕PERTH↔**

**THE COURT ORDERS THAT:**

1. The mediation facilitated by the National Native Title Tribunal continue.
2. The directions hearing be adjourned to 1 June 2005 at 9am.
3. The National Native Title Tribunal be requested to provide a mediation report on or before 23 May 2005.
4. There be liberty to apply.

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

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

**WAD6091 of 1998**

**BETWEEN:** DONALD COLLARD and SYLVIA RACHAEL COLLARD ON  
BEHALF OF THE ↵NOONGAR↵ PEOPLE  
APPLICANTS

**AND:** THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS

**JUDGE:** FRENCH J

**DATE OF ORDER:** 23 DECEMBER 2004

**WHERE MADE:** ↵PERTH↵

**THE COURT ORDERS THAT:**

The directions hearing be adjourned to 1 June 2005 at 9am.

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

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

**WAD6102 of 1998**

**BETWEEN:** DONALD COLLARD and SYLVIA RACHAEL COLLARD ON  
BEHALF OF THE ↵NOONGAR↵ PEOPLE  
APPLICANTS

**AND:** THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS

**JUDGE:** FRENCH J

**DATE OF ORDER:** 23 DECEMBER 2004

**WHERE MADE:** ↵PERTH↵

**THE COURT ORDERS THAT:**

The directions hearing be adjourned to 1 June 2005 at 9am.

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

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

**WAD6142 of 1998**

**BETWEEN:** DONALD COLLARD and SYLVIA RACHAEL COLLARD ON  
BEHALF OF THE ↵NOONGAR↵ PEOPLE  
APPLICANTS

**AND:** THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS

**JUDGE:** FRENCH J

**DATE OF ORDER:** 23 DECEMBER 2004

**WHERE MADE:** ↵PERTH↵

**THE COURT ORDERS THAT:**

The directions hearing be adjourned to 1 June 2005 at 9am.

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

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

**WAD6171 of 1998**

**BETWEEN:** DONALD COLLARD and SYLVIA RACHAEL COLLARD ON  
BEHALF OF THE ↵NOONGAR↵ PEOPLE  
APPLICANTS

**AND:** THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS

**JUDGE:** FRENCH J

**DATE OF ORDER:** 23 DECEMBER 2004

**WHERE MADE:** ↵PERTH↵

**THE COURT ORDERS THAT:**

The directions hearing be adjourned to 1 June 2005 at 9am.

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

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

**WAD6223 OF 1998**

**BETWEEN:** DONALD COLLARD and SYLVIA RACHAEL COLLARD ON  
BEHALF OF THE NOONGAR PEOPLE  
APPLICANTS

**AND:** THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS

**JUDGE:** FRENCH J

**DATE OF ORDER:** 23 DECEMBER 2004

**WHERE MADE:** PERTH

**THE COURT ORDERS THAT:**

The directions hearing be adjourned to 1 June 2005 at 9am.

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

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

**WAD6006 of 2003**

**BETWEEN:** ANTHONY BENNELL, ALAN BLURTON, ALAN BOLTON  
AND OTHERS (SNC)  
APPLICANTS

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

**WAD6279, 6085,  
Part of 6274 of 1998**

**BETWEEN: KEN COLBUNG, GLEN COLBUNG AND OTHERS  
(SOUTH WEST BOOJARAH)  
FIRST APPLICANTS**

**M VAN LEEUWEN ON BEHALF OF THE HARRIS FAMILY  
SECOND APPLICANTS**

**L BELLOTTI AND OTHERS ON BEHALF OF THE**

**NYUNGAR PEOPLE (GNAALA KARLA BOOJA)  
THIRD APPLICANTS**

**AND: THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS**

**WAD6012 of 2003**

**BETWEEN: ANTHONY BENNELL and OTHERS  
(Single Noongar Claim Area 2)  
APPLICANTS**

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

**WAD6192 of 1998**

**BETWEEN: MARTHA BORINELLI, ARNOLD FRANKS AND OTHERS  
ON BEHALF OF THE YUED FAMILIES  
APPLICANTS**

**AND: THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS**

**WAD6274 of 1998**

**BETWEEN: LORRAINE BELLOTTI AND OTHERS ON BEHALF OF  
THE NYUNGAR PEOPLE  
(GNAALA KARLA BOOJA)  
APPLICANTS**

**AND: THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS**

**WAD6130 of 1998**

**BETWEEN: PATRICIA MORICH AND OTHERS ON BEHALF OF THE  
WOM-BER PEOPLE  
APPLICANTS**

**AND: THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS**

**WAD6181 of 1998**

**BETWEEN: CEDRIC ANDERSON, DONALD COLLARD, SYLVIA COLLARD AND OTHERS  
ON BEHALF OF THE BALLARDONG PEOPLE  
APPLICANTS**

**AND: THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS**

**WAD6134, 626 and  
Part of 6130 of 1998**

**BETWEEN: ALAN BOLTON AND OTHERS ON BEHALF OF THE  
SOUTHERN ↵NOONGAR↻ FAMILIES  
FIRST APPLICANTS**

**ALAN BOLTON AND OTHERS ON BEHALF OF THE  
WAGYL KAIP  
SECOND APPLICANTS**

**PATRICIA MORICH AND OTHERS ON BEHALF OF THE  
WOM-BER PEOPLE  
THIRD APPLICANTS**

**AND: THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS**

**WAD6091, 6102, 6142,  
6171 and 6223 of 1998**

**BETWEEN: DONALD COLLARD and SYLVIA RACHAEL COLLARD  
ON BEHALF OF THE ↵NOONGAR↻ PEOPLE  
APPLICANTS**

**AND: THE STATE OF WESTERN AUSTRALIA AND OTHERS  
RESPONDENTS**

**JUDGE: WILCOX, FRENCH and FINN JJ  
DATE: 23 DECEMBER 2004  
PLACE: ↵PERTH↻**

**REASONS FOR DIRECTIONS ON SOUTH WEST REGIONAL  
CASE MANAGEMENT CONFERENCE**

**THE COURT:  
The Applications Under Review**

1 These reasons for direction follow a special combined directions hearing constituted as a Regional Case Management Conference (RCMC) for native title determination applications in the South West of Western Australia held in ↵Perth↻ in October. The RCMC considered native title matters in the dockets of Wilcox ACJ, French and Finn JJ.

2 There were 13 native title determination applications under consideration at the RCMC. They were as

follows:

1. In the docket of Wilcox ACJ:

. WAD142/98 – the part heard **Perth** Metro claim now combined with WAD6006/03, the single **Noongar** Claim No 1.

2. In the docket of Finn J:

. WAD 6279, 6085 and part 6274/98 – jointly referred to as South West Area 1.

3. In the provisional docket of French J:

. WAD 6192/98 – Yued  
 . WAD6274/1998 – Gnaala Karla Booja  
 . WAD6130/1998 – Wom-Ber  
 . WAD6181/1998 – Ballardong  
 . WAD6134, 6286 and part 6130/1998 – South West Area 2  
 . WAD6091/1998 – D & S Collard  
 . WAD6102/1998 – D & S Collard  
 . WAD6142/1998 – D & S Collard  
 . WAD6171/1998 – D & S Collard  
 . WAD6223/1998 – D & S Collard  
 . WAD6006/03 – Single **Noongar** Claim No 1  
 . WAD6012/03 – Single **Noongar** Claim No 2

3 Prior to the convening of the RCMC, written submissions about the future directions of the management of these claims had been received from the South West Aboriginal Land and Sea Council (SWALSC), representing applicants in the following matters:

(a) WAD6006/2003 – the Single **Noongar** Claim No 1  
 (b) WAD6012/2003 – the Single **Noongar** Claim No 2

(c) WAD6279/1998 – South West Boojarah, WAD6274/1998 – Gnaala Karla Booja and WAD6085/1998 – Harris, together referred to as South West Area 1  
 (d) WAD6286/1998 – Wagyl Kaip, WAD6134/1998 – Southern **Noongar** and WAD6130/1998 – Wom-Ber, together comprising South West Area 2  
 (e) WAD6181/1998 – Ballardong  
 (f) WAD6192/1998 – Yued

4 The State of Western Australia also made global written submissions for the RCMC in respect of all of the matters. A separate submission was received from a group involved in WAD6006/2003 under the heading 'The Combined Swan River and Swan Coastal Plains Native Title Claims'. This submission came from Messrs. Corunna, Bropho, Wilkes, Greg and Kelvin Garlett and William Warrell said to be made on behalf of the 'named and registered native title claimants of the Swan River and the Swan Coastal Plains'.

5 In addition a number of affidavits were filed. There was an affidavit by Dr John Host sworn 11 October 2004. Dr Host is a consultant historian who has been engaged by the SWALSC. He deposed as to the timeframe necessary to carry out the work which he had been engaged to do. There was an

affidavit sworn by John Hein, the Manager Corporate Services of the SWALSC. The Western Australian Fishing Industry Council (WAFIC) relied upon an affidavit sworn by its solicitor, Ms Kate Barrett, on 22 March 2004.

### **The Evidence**

6 Dr Host is a consultant historian engaged by the SWALSC to prepare an expert historical report and to act as expert historian for the Single **Noongar** Claims Areas 1 and 2. He was engaged by the SWALSC in May 2004 and is assisted by one other historian in relation to the historical research program. His role as expert historian for the SWALSC will involve the review of historical and current materials relevant to the history of the Single **Noongar** claim area and the preparation of an expert historical report based on a literature review of published and unpublished sources tracing the history of Aboriginal people in the claim area since sovereignty in 1829.

7 Dr Host described the timeframe for completion of the research and delivery of the report as 'extremely concentrated'. He had agreed to a work plan which allowed for the report to be finalised for filing by 29 November 2004. It relates to the claimant group for the Single **Noongar** Claim (Areas 1 and 2). On 22 July 2004, Wilcox J had ordered that the applicants were to file and serve any expert reports on which they intended to rely on or before 30 November 2004. Several draft chapters of the report had already been provided to the SWALSC when Dr Host swore the affidavit, but because of the time consuming nature of the primary research required, he anticipated that the report will now be fully completed by 21 January 2005. He argued that any lessening of the time for the analysis of primary research for the report would undermine the research methodology, would be historically undesirable and would be an inefficient and ineffective use of resources. He said that an extension of time for the filing of the report to take proper advantage of all primary and secondary research was the most effective way of meeting the applicants' requirements in producing an expert report for the Federal Court and the report to be utilised by the applicants in the mediation process which would address the State Government's connection report guidelines. Counsel was unable at the RCMC to advise the Court whether Dr Host's report would deal with matters relevant to the connection between particular groups or individuals who had made applications for native title determinations in the South West and the land or water the subject of those applications.

8 John Hein is the Manager, Corporate Services of the SWALSC, a position he assumed earlier this year. He has had more than six years experience in financial management of native title representative bodies. In his various positions he has been responsible for negotiating funding with government agencies.

9 Mr Hein set out the general basis upon which native title funding is provided to the SWALSC and other native title representative bodies by the Commonwealth Government. It is administered through the Department of Immigration and Multicultural and Indigenous Affairs. He said the current funding arrangement is not a grant. In previous years funding arrangements had allowed some latitude in the allocation of funds by representative bodies. It is now subject to a funding agreement which requires specific performance outputs and outcomes.

10 The funding provided to the SWALSC for the financial year to 30 June 2005 is subject to a funding agreement between the SWALSC and the Commonwealth. The funding is provided on the basis of an Operational Plan which each native title representative body is required to submit for approval from the Commonwealth each year. The SWALSC Operational Plan was submitted on 14 June 2004.

11 The SWALSC's Strategic Plan for 2004-2007 was submitted for approval by the Commonwealth

Minister pursuant to the provisions of the [Native Title Act 1993](#) (Cth), on 28 May 2004. It was formally approved by the Commonwealth Minister on 21 June 2004.

12 Mr Hein set out the priorities specified in the Strategic Plan as follows:

- 'a. all individual claims will become part of the Single **Noongar** Claim ("SNC");*
- b. the SNC and its associated Comprehensive Regional Agreement, will have the highest priority for resources;*
- c. consent determinations and agreements will be preferred to contested outcomes and litigation;*
- d. ILUA's and standard agreements are to be in place to ensure Future Acts processes are as efficient as possible for all parties;*
- e. governance of SWALSC is to be of a high standard, transparent and in accordance with **Noongar** traditional law;*
- f. key decisions will be made only after extensive consultation with the community.'*

13 Under items (b) and (c) provision is made for funding in relation to mediated and negotiated, rather than litigated outcomes. So funding is available for participation in the mediation process including the preparation of connection materials, the preparation of documents to be filed in the Federal Court and the costs of preparing for possible hearings including obtaining external legal advice.

14 Mr Hein referred to the General Terms and Conditions Relating to the Native Title Program Funding Agreements produced in 2004-05 which provide, inter alia:

*'Clause 5.4 ... you must not use the Funds:*

- (k) to seek or support the referral of, the setting down or the making of programming orders for, any Contested Litigation Matter for hearing or commence any appeal and then prepare for and conduct such a hearing or appeal without prior agreement from us, unless notice has been given of, and Funds have been allocated for, such Contested Litigation Matter or Appeal, in your Operational Plan.'*

15 According to Mr Hein's affidavit the SWALSC Operational Plan does not provide for funds for the hearing of the metropolitan portion of the SNC (Area 1) or the State of Western Australia's proposed hearing of the South West Area 1. It would therefore be necessary under the Commonwealth Funding Agreement for SWALSC to seek approval from the Commonwealth for contested litigation matters to proceed in the Federal Court and to seek special funding from the Commonwealth for the anticipated litigation for the SNC (Area 1) application and those claims within the South West Area 1 which SWALSC represents.

16 Mr Hein says that litigation is a separate matter under the Funding Agreement and requires special funding. In practice annual funding does not include litigation funds. The process for acquiring litigation funds involves making application for them as a separate budget. The application for litigation funding is subject to the Commonwealth's assessment criteria. Commonwealth practice is to appoint an independent assessor to advise and only then make a decision as to whether or not funding will be provided for litigation. The Commonwealth, it is said, intends to fund claims of national importance in the Commonwealth's estimation and allocates priorities in distribution of litigation funding on that

basis. Mr Hein says that, based on experience, the amount of special funding required for the proposed litigation will be between \$1 million and \$1.5 million for each hearing, representing a total of between \$2 million and \$3 million. These costs are over and above staff and general administrative costs which would have to be reallocated from the current approved expenditure. Any such reallocation would require approval by the Commonwealth.

17 There has been an almost complete change of staff in the Department of Immigration and Multicultural and Indigenous Affairs within the period of a few weeks prior to 11 October.

18 Mr Hein said that he wrote to the Commonwealth on 30 September 2004 seeking approval for contested litigation matters to proceed in the Federal Court and seeking special funding for the anticipated litigation for the SNC (Area 1) application and those claims within the South West Area for which SWALSC was the representative body. At the time of swearing his affidavit, he had received no written reply but had received verbal advice that it was not likely that the Commonwealth would fund the proposed litigation.

19 In his letter of 30 September 2004, Mr Hein informed the Commonwealth that the metropolitan portion of the SNC (Area 1) had been listed for hearing in April 2005 at a directions hearing conducted on 22 July 2004. He indicated in that letter that it was not possible for the SWALSC to provide the Commonwealth with a specific budget for either proceeding but that previous experience suggested the amounts required would be between \$1 million and \$1.5 million. This would be in addition to the need for SWALSC to employ two additional litigation solicitors and two paralegals.

20 In a letter dated October 2004 the Department of Immigration and Multicultural and Indigenous Affairs, responsible for the administration of Commonwealth funding of native title applications, responded to Mr Hein's letter. The response pointed out that the SWALSC had to address conditions of funding in its submission and particularly key issues in cl 8.2 of the Funding Conditions:

- . Advice as to the national or regional significance and strategic importance of the contested litigation matter as well as priority native title outcomes as a consequence:*
- . Details of attempts made on behalf of the native title claimants to resolve the claim other than by litigation:*
- . Details of any offers made by any other party to settle the claim:*
- . A need to outline the extent of any overlapping applications over the claims in question as well as strategies adopted to resolve any internal disputes.*
- . Confirmation that your strategic and operational plans identify the litigation in question.'*

When an application complying with these conditions was received the Commonwealth would consider the application for funding.

21 The evidence suggests that the application for special funding was made very late in the day having regard to the fact that the directions for the hearing of the **Perth** Metropolitan area claim, which now comprises part of the Single **Noongar** Claim No 1, were given in July 2004.

22 The affidavit filed on behalf of WAFIC was sworn by Ms Barrett, a solicitor employed by Hunt & Humphry, the solicitors acting for WAFIC. Ms Barrett referred to the area covered by, and time taken to hear, various native title determination applications in which her law firm was involved. She pointed out that in respect of the South West Area 1 Consolidated Claim and South West Area 2 Consolidated Claim

and the Yued and Gnaala Karla Booja claims there was a total of 200 respondents. In relation to the Single **Noongar** Claim she noted that there are 80 named applicants and that the claim covers an area of about 194,000 square kilometres including that part of the Single **Noongar** Claim which overlaps with the proceedings in the **Perth** Metropolitan Claim.

### The Submissions

23 The SWALSC contended that the SNC (Area 1) should remain in mediation while progress is being made. The prospect of a mediated outcome in the short term should be weighed against the public interest in relation to commencing expensive and drawn out litigation. It submitted that timeframes agreed for the mediation should be incorporated into the litigation timetable to ensure continuity. The orders of Wilcox J made on 22 July 2004 should be varied to extend the time for the filing of Dr Host's report to 21 January 2005. SWALSC submitted that the trial date of April 2005 allocated for the **Perth** Metropolitan portion of the SNC (Area 1) should be vacated. It contended that it would be premature to list any portion of the SNC (Area 1) as the claim generally has not yet been notified and an amendment to the application is required to allow it to pass the registration test. Moreover, the Commonwealth, through the Department of Immigration and Multicultural and Indigenous Affairs, has indicated orally that it will not be providing additional funding to SWALSC this financial year to enable it to undertake hearings.

24 The SWALSC said it was unable to agree to the fixing of any hearing dates, or to prepare and present a case for hearing in relation to the **Perth** Metropolitan area of the SNC (Area 1) or any other areas under claim in the South West. If the **Perth** Metropolitan portion were to proceed to hearing in April 2005 the applicants would be unrepresented as the SWALSC does not have funding or permission from its funding body to represent the applicants in contested litigation. It said that progress in the South West should continue in accordance with the next step on a broadly accepted standard litigation timetable, namely the respondent file expert reports in response to the applicants' expert reports and a response to the applicants' outline of case. The SWALSC submitted that, after the filing of the respondents' expert reports, the Registrar should convene a conference of experts to limit issues in dispute. Remaining matters in the South West should continue in mediation subject to any renewed applications to remove individuals no longer authorised and to combine the claims.

25 Counsel for the SWALSC was unable to identify at the hearing any ranking of areas the subject of applications for native title determinations in the South West that would provide a priority list for hearing. The SWALSC's preference was to select an area for priority hearing in which it had the best chance of proving native title.

26 In addition to the submissions made by counsel for the SWALSC on behalf of various applicants, there were some individual applicants who addressed the Court. Mrs Patricia Morich, who spoke for the Wom-Ber applicants, pointed out that the applications in that area had no funding at all. Mr Robin Yarran, who is one of the Ballardong applicants, said he would work with the other Ballardong applicants if they could prove their connection to the area in question. He complained about delays and said the application was 'getting nowhere'.

27 Mr Smith, a Wagyl Kaip applicant, expressed generalised criticism of the SWALSC questioning what it had done with the money provided to it to that point. As was pointed out to Mr Smith by the Court, his complaints were not matters into which the Court could inquire. Mr Smith did indicate that he was prepared to continue with mediation processes. Mr Miller, a South-West Boojarah applicant, expressed support for Mr Smith's remarks.

28 Mr Corrie Bodney, who appeared on his own behalf, said he wanted the **Perth** Metropolitan claim to proceed as scheduled in April. Mr Albert Corunna, speaking on behalf of applicants in the **Perth** Metropolitan claim, preferred mediation to continue. He wanted the **Perth** Metropolitan hearing to proceed as part of the larger Single **Noongar** claim.

29 The State of Western Australia submitted that the history of native title claims in the South West has been characterised by a lack of substantive progress brought about by numerous applications for adjournments and amendments and non-compliance with programming orders. The focus of the RCMC should now be on how to progress claims in the South West to trial. There should be a series of separate hearings and determinations as a single trial over the whole of the South West would be unmanageable. This would not prevent the applicants from contending that there is a single system of **Noongar** law and custom throughout the whole of the South West.

30 The State contended that the issue of the existence and content of a single system of **Noongar** law and custom should be addressed at the first trial. Thereafter those findings could be relied upon in subsequent cases so that the subsequent cases could focus on connection to the particular areas concerned. The State contended that the first of the separate hearings should be the trial of the **Perth** claim. That, which is in substance part heard, should proceed in April 2005. The listing of other trials in the South West should await the hearing and determination of connection issues in the **Perth** claim. The hearings in the South West should be conducted on the basis of a preliminary question as to 'connection' under O 29 r 2. Moreover, in relation to the **Perth** claim, that preliminary question should be stated to make it clear that Wilcox J can deliver judgment and make orders at the conclusion of the April 2005 hearing in relation to connection in that part of WAD6006/2003.

31 In oral submissions at the RCMC counsel for the State said that the **Perth** Metropolitan area hearing could proceed without prejudice to the continuation of mediation in respect of other areas under the Single **Noongar** claim. It was also pointed out that the filing of the Single **Noongar** claim was the culmination of a process which had been foreshadowed as early as 2002 by the SWALSC involving rationalisation of claims in the South West region.

32 Counsel for the State also pointed out that the SWALSC's Strategic Plan and Funding Operation lodged in May 2004 sought no funding for litigation.

33 In respect of the South West Area 1 claim, the State accepted that difficulties attending its progress to trial meant that it should proceed as a priority only after the **Perth** Metropolitan area hearing.

### **Approach to Directions**

34 There is much force in the submission by the State of Western Australia that there has been undue delay in progressing any part of the South West claims to trial and that the Court should not contemplate any further delay in the trial of the **Perth** Metropolitan part of the land and waters covered by the Single **Noongar** claim. The difficulties in providing funding asserted by the SWALSC seem, at least to some extent, to be of its own making. Its application for funding this year related to the funding of mediation and although the trial of the **Perth** Metropolitan area claim was the subject of directions made on 21 July 2004, no application for funding was initiated with the Commonwealth until 30 September. Even then, it elicited a response which required it to address specific conditions for the grant of funds for litigation. Presumably, the SWALSC has, since the RCMC, progressed that application. If it has not, then it should do so immediately.

35 Counsel for the State made clear that the State's submission that the **Perth** Metropolitan area

hearing continue did not involve a rigid commitment to the April 2005 dates the subject of directions by Wilcox J which are currently in force. A hearing in May or June would meet the State's concerns.

36 There are practical imperatives which weigh in favour of a trial in the earlier part of the second half of next year. In particular, the time that will necessarily be taken in responding to Dr Host's report which will now not be available until 21 January 2005. In so saying it may be acknowledged, as the State pointed out, that the report of the anthropologist Dr Palmer is likely to prove of greater importance to the case than the historical material.

37 It is important to make the general point that the programming of native title matters in the Court's docket cannot be determined by the decisions of funding agencies or the views of representative bodies, the State or any other parties about appropriate priorities. These are all matters to be taken into account in setting realistic timeframes. But if it should happen that want of funding means that some applicants will be unrepresented at trial that is not a bar to proceeding with a trial although it will raise obvious difficulties in the management of the trial process.

38 Overall we have formed the view that it is in the interests of justice that the hearing of the **Perth** Metropolitan area claim should proceed early in the second half of next year at a date to be fixed. The SWALSC should, if it has not already done so, apply for litigation funding as soon as practicable.

39 The applications jointly referred to in South West Area 1 should continue in mediation for the time being albeit South West Area 1 will, in all probability, be a priority for hearing after the completion of the **Perth** Metropolitan area hearing.

40 The balance of the claims in the South West region which are still in the provisional docket are to continue in mediation. In the meantime the SWALSC should provide a proposed priority list of claims in the South West region which are to be progressed to trial in the event that mediation is unsuccessful.

41 Minutes of orders to give effect to these general directions are attached to these reasons. Further orders specific to particular applications may be sought from the members of the Court responsible for those matters.

I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 23 December 2004

Counsel for the Applicants in      Mr MF Rynne  
WAD6192, 6274, 6181, 6279,  
5274, 6134, 6286, 6091, 6102,  
5142, 6171 and 6223 of 1998:

Solicitor for the Applicants: South West Aboriginal Land and Sea Council

Counsel for the applicants in WAD6006 and 6012 of 2003: Mr VB Hughston SC via video with Mr MF Rynne

Ms P Morich appeared on in respect of Wom-Ber (WAD6130 of 1998)

Mr R Yarran appeared on his own behalf in WAD6181 of 1998

Mr M Smith appeared on his own behalf in WAD6286 of 1998

Mr K Miller appeared on his own behalf in WAD6279 of 1998

Mr A Corunna, Mr G Garlett, Mr C Garlett, Mr R Bropho and Mr W Warrell appeared on their own behalf in respect of **Perth** Metropolitan, WAD6006 of 2003

Counsel for the State of Western Australia: Mr SJ Wright

Solicitor for the State of Western Australia: Crown Solicitor's Office

Counsel for the Commonwealth of Australia: Ms R Webb via telephone

Solicitor for the Commonwealth of Australia: Australian Government Solicitor

Counsel for the Western Australian Fishing Industry Council: Mr MT McKenna

Solicitor for the Western Australian Fishing Industry Council: Hunt and Humphry

Counsel for Various Mining Interests: Ms RE McLennan

Solicitor for Various Mining Interests: Blake Dawson Waldron

Counsel for Adelaide Brighton Cement, Cockburn Cement and various Local Government Interests: Mr M Gregory

Solicitor for Adelaide Brighton Cement, Cockburn Cement and Various Local Government Interests: Minter Ellison

Counsel for Various Mining Interests and Edith Cowan University: Ms D Tosi

Solicitor for Various Mining Interests and Edith Cowan University: Freehills

Counsel for Various Local Government Interests: Mr PL Wittkuhn

Solicitor for Various Local Government Interests: McLeod & Co

Counsel for Telstra Corporation Ltd: Mr C Bodney appeared on his own behalf (WAD6006 of 2003)  
Mr M Richards via video

Solicitor for Telstra Corporation Ltd: Blake Dawson Waldron

Ms L Lloyd appeared on behalf of the National Native Title Tribunal

Date of Hearing: 15 October 2004

Date of Judgment: 23 December 2004