



Federal Court of Australia

[\[Index\]](#) [\[Search\]](#) [\[Download\]](#) [\[Context↗\]](#) [\[Help\]](#)

Bolton on behalf of the Southern ↗Noongar↘ Families v State of Western Australia [2004] FCA 760 (15 June 2004)

Last Updated: 16 June 2004

FEDERAL COURT OF AUSTRALIA

Bolton on behalf of the Southern ↗Noongar↘ Families v State of Western Australia [\[2004\] FCA 760](#)

ABORIGINAL AND TORRES STRAIT ISLANDERS – native title – motions to replace applicants in native title determination applications – asserted withdrawal of authorisation by native title claim group – conferral of authority on new applicants – authorisation to apply for removal of applicants – adequacy of evidence – defined native title claim groups – meetings of persons asserting membership of native title claim groups – no direct evidence as to connection with native title claim groups – no evidence as to representativeness of meetings – necessary authorisation not established – applications dismissed – combination applications – dependent upon success of amendment of applications to change applicants – combination applications dismissed

[Native Title Act 1993](#) (Cth) [s 61](#), [s 251B](#), [s 64](#), [s 66B](#)

Anderson v Western Australia (2003) 204 ALR 522 applied
Queensland v Hutchison (2001) 108 FCR 575 cited
Strickland v Western Australia (1999) 89 FCR 117 cited
Wulgurukaba People (No 1) v Queensland [\[2002\] FCA 1555](#) cited
Daniel v Western Australia (2002) 194 ALR 278 applied
Western Australia v Strickland (2000) 99 FCR 33 cited
Moran v Minister of Land and Water Conservation (NSW) [\[1999\] FCA 1637](#)

ANTHONY BENNELL, ALLAN BOLTON AND OTHERS (SINGLE ↗NOONGAR↘ CLAIM No 1) v THE STATE OF WESTERN AUSTRALIA AND OTHERS
W6006 of 2003

ALLAN BOLTON, GLEN COLBUNG, DALLAS COYNE AND OTHERS ON BEHALF OF VARIOUS SOUTHERN ↗NOONGAR↘ FAMILIES v THE STATE OF WESTERN AUSTRALIA AND OTHERS

WAG 6134 of 1998

ALLAN BOLTON AND OTHERS ON BEHALF OF THE WAGYL KAIP v THE STATE OF WESTERN AUSTRALIA AND OTHERS

WAG 6286 of 1998

LORRAINE BELLOTTI, JOSEPH NORTHOVER, PETER MICHAEL AND OTHERS ON BEHALF OF THE NYUNGAR PEOPLE (GNAALA KARLA BOOJA) v THE STATE OF WESTERN AUSTRALIA AND OTHERS

WAG 6274 OF 1998

KEN COLBUNG, GLEN COLBUNG, DONALD CORBETT AND OTHERS (SOUTH WEST BOOJARAH) v THE STATE OF WESTERN AUSTRALIA AND OTHERS

WAG 6279 of 1998

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

WAG 6192 of 1998

CEDRIC ANDERSON, REG HAYDEN, HELEN JONES AND OTHERS ON BEHALF OF THE BALLARDONG PEOPLE v THE STATE OF WESTERN AUSTRALIA AND OTHERS

WG 6181 of 1998

DONALD COLLARD AND SYLVIA RACHEL COLLARD v THE STATE OF WESTERN AUSTRALIA AND OTHERS

WAG 6091, 6102, 6142, 6171 and 6223 of 1998

FRENCH J

15 JUNE 2004

↑PERTH↓

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY

WAG 6006 of 2003

**BETWEEN: ANTHONY BENNELL, ALLAN BOLTON AND OTHERS
(SINGLE ↑NOONGAR↓ CLAIM No 1)
APPLICANTS**

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

JUDGE: FRENCH J

DATE OF ORDER: 15 JUNE 2004

WHERE MADE: ↑PERTH↓

THE COURT ORDERS THAT:

The motion filed 28 November 2003 for amendment of the application by combination with others is dismissed.

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

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY

WAG 6134 of 1998

BETWEEN: ALLAN BOLTON, GLEN COLBUNG, DALLAS COYNE AND
OTHERS ON BEHALF OF VARIOUS SOUTHERN
↳NOONGAR↳ FAMILIES
APPLICANTS

AND: THE STATE OF WESTERN AUSTRALIA AND OTHERS
RESPONDENTS

JUDGE: FRENCH J

DATE OF ORDER: 15 JUNE 2004

WHERE MADE: ↳PERTH↳

THE COURT ORDERS THAT:

1. The motion filed 27 November 2003 for amendment by combination of the application is dismissed.
2. The motion filed 27 February 2004 for amendment of the application by replacement of the current applicants is dismissed save as to the removal of Cedric Roberts (deceased) who is hereby removed as an applicant.

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

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

WAG 6286 of 1998

BETWEEN: ALLAN BOLTON & OTHERS ON BEHALF OF THE WAGYL
KAIP
APPLICANTS

AND: THE STATE OF WESTERN AUSTRALIA AND OTHERS
RESPONDENTS

JUDGE: FRENCH J

DATE OF ORDER: 15 JUNE 2004

WHERE MADE: ↳PERTH↳

THE COURT ORDERS THAT:

1. The motion filed 28 November 2003 for amendment and combination of the application with other applications is dismissed.
2. The motion filed 27 February 2004 for amendment of the application by replacement of the current applicants is dismissed save as to the removal of Cedric Roberts and Marlene Ware (both deceased) who are hereby removed as applicants.

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

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

WAG 6279 of 1998

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

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

JUDGE: **FRENCH J**

DATE OF ORDER: **15 JUNE 2004**

WHERE MADE: **↑PERTH↓**

THE COURT ORDERS THAT:

1. The motion filed 28 November 2003 for amendment and combination of the application with others is dismissed.
2. The motion filed 27 February 2004 for amendment of the application by replacement of the current applicants is dismissed, save as to the removal of Donald Corbett and George Webb (both deceased) who are hereby removed as applicants.

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

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

WAG 6274 of 1998

BETWEEN: **LORRAINE BELLOTTI, JOSEPH NORTHOVER, PETER
MICHAEL 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: **15 JUNE 2004**

WHERE MADE: **↑PERTH↓**

THE COURT ORDERS THAT:

1. The motion filed 28 November 2003 for amendment of the application by combination with others is dismissed.
2. The motion filed 27 February 2004 for amendment of the application by replacement of the current applicants is dismissed.

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

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

WAG 6192 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: 15 JUNE 2004

WHERE MADE: PERTH

THE COURT ORDERS THAT:

1. The motion filed 28 November 2003 for amendment of the application by combination with others is dismissed.
2. The motion filed 27 February 2004 for amendment of the application by replacement of the current applicants is dismissed, save as to the removal of Michael Egan (deceased) who is hereby removed as an applicant.

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**

WG 6181 of 1998

**BETWEEN: CEDRIC ANDERSON, DONALD COLLARD, SYLVIA
RACHEL 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: 15 JUNE 2004
WHERE MADE: ↻PERTH↻

THE COURT ORDERS THAT:

1. The motion filed 31 March 2004 for amendment of the application by replacement of the current applicants is dismissed, save as to the removal of William Riley and Alex Yarran (both deceased) who are hereby removed as applicants.
2. The amended motion filed 5 May 2004 is dismissed in relation to the application under [s 66B](#) to replace the applicants and in relation to the proposed amendment to the application to change its boundaries.
3. Liberty to apply for further directions.

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

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY

**WAG 6091, 6102, 6142,
6171 and 6223 of 1998**

BETWEEN: DONALD COLLARD AND SYLVIA RACHEL COLLARD
APPLICANTS
AND: THE STATE OF WESTERN AUSTRALIA AND OTHERS
RESPONDENTS
JUDGE: FRENCH J
DATE OF ORDER: 15 JUNE 2004
WHERE MADE: ↻PERTH↻

THE COURT ORDERS THAT:

In each of the above matters the motion filed 28 November 2003 for amendment of the application by combination with others is dismissed.

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**

W6006 of 2003

**BETWEEN: ANTHONY BENNELL, ALLAN BLURTON, ALLAN BOLTON
AND OTHERS (SINGLE NOONGAR CLAIM)
APPLICANTS**

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

WAG 6134 of 1998

**BETWEEN: ALLAN BOLTON & ORS ON BEHALF OF THE SOUTHERN
NOONGAR FAMILIES
FIRST APPLICANTS**

**ALLAN BOLTON & ORS ON BEHALF OF THE WAGYL KAIP
SECOND APPLICANTS**

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

WAG 6286 of 1998

**BETWEEN: ALLAN BOLTON AND OTHERS ON BEHALF
OF THE WAGYL KAIP
APPLICANTS**

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

WAG 6279 of 1998

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

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

WAG 6274 of 1998

**BETWEEN: LORRAINE BELLOTTI, JOSEPH NORTHOVER, PETER
MICHAEL AND OTHERS ON BEHALF OF THE NYUNGAR
PEOPLE (GNAALA KARLA BOOJA)
APPLICANTS**

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

WAG 6192 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

WAG 6181 of 1998

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

AND: THE STATE OF WESTERN AUSTRALIA AND
OTHERS
RESPONDENTS

**WAG 6091, 6102, 6142,
6171 AND 6223 of 1998**

BETWEEN: DONALD COLLARD AND SYLVIA RACHEL COLLARD
APPLICANTS

AND: THE STATE OF WESTERN AUSTRALIA AND OTHERS
RESPONDENTS

JUDGE: FRENCH J
DATE: 15 JUNE 2004
PLACE: ↻PERTH↻

REASONS FOR JUDGMENT

Introduction

1 There is a number of applications for native title determinations before the Court covering areas of land and waters in the South West of Western Australia. The native title representative body for the South West Region, the South West Aboriginal Land and Sea Council ('SWALSC') has been endeavouring for some time to resolve overlaps between the various applications and to rationalise them into a smaller number of applications.

2 Motions have been filed in the Court under [s 66B](#) of the [Native Title Act 1993](#) (Cth) ('the Act') to alter the named applicants in various of the applications and, under [s 64](#), to combine all of the applications into one application covering the bulk of the South West area. They raise, in each case, questions about whether the proposed changes have been authorised by the native title claim group defined in the application.

3 The applications in respect of which the motions under [s 66B](#) are brought are as follows:

1. Southern ~~Noongar~~ – WAG 6134, 6286 and part 6130 of 1998
2. Wagyl Kaip – WAG 6286 of 1998
3. South-West Boojarah – WAG 6279 of 1998
4. Gnaala Karla Booja – W6274 of 1998
5. Yued – WAG 6192 of 1998
6. Ballardong – WAG 6181 of 1998

It is necessary to deal firstly with the motions under [s 66B](#).

Statutory Framework

4 [Section 61](#)(1) of [the Act](#) sets out the applications that may be made to the Federal Court under Div 1 of Pt 3. The first class of applications specified is Native Title Determination Applications. The persons who may make such applications are defined as follows:

‘Persons who may make application

*(1) A person or persons authorised by all the persons (the **native title claim group**) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group; or*

Note 1: The person or persons will be the applicant: see subsection (2) of this section.

*Note 2: [Section 251B](#) states what it means for a person or persons to be **authorised** by all the persons in the native title claim group.’*

Paragraphs (2), (3) and (4) are not material for present purposes.

5 [Subsections 61](#)(2) to (5) provide:

‘(2) In the case of:

(a) a native title determination application made by a person or persons authorised to make the application by a native title claim group; or

(b) a compensation application made by a person or persons authorised to make the application by a compensation claim group;

the following apply:

*(c) the person is, or the persons are jointly, the **applicant**; and*

*(d) none of the other members of the native title claim group or compensation claim group is the **applicant**.*

(3) An application must state the name and address for service of the person who is, or persons who are, the applicant.

(4) A native title determination application, or a compensation application, that persons in a native title claim group or a compensation claim group authorise the applicant to make must:

(a) name the persons; or

(b) otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

(5) An application must:

(a) be in the prescribed form; and

(b) be filed in the Federal Court; and

(c) contain such information in relation to the matters sought to be determined as is prescribed; and

(d) be accompanied by any prescribed documents and any prescribed fee.'

The reference to 'authorisation' in [s 61](#) and subsequently in [s 66B](#) is explained by its definition in [s 251B](#) which provides:

*'For the purposes of [this Act](#), all the persons in a native title claim group or compensation claim group **authorise** a person or persons to make a native title determination application or a compensation application, and to deal with matters arising in relation to it, if:*

(a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind – the persons in the native title claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

(b) where there is no such process – the persons in the native title claim group or compensation claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group or compensation claim group, in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.'

6 The Court has a general power to amend applications under O 13 r 2 but that power is subject to the constraints imposed by [ss 64](#) and [66B](#) of [the Act](#) – *Anderson v Western Australia* (2003) 204 ALR 522 at 531 [36]; *Queensland v Hutchison* (2001) 108 FCR 575 at 583 [22]; *Strickland v Western Australia* (1999) 89 FCR 117; *Wulgurukaba People (No 1) v Queensland* [2002] FCA 1555 at [9].

7 [Section 64](#) specifically authorises the amendment of applications to reduce the area of land or waters covered by them. Such amendments, however, must not result in the inclusion of any area of land or waters not covered by the original application (s 64(1)). This is subject to [s 64\(2\)](#) which permits combination applications to provide for the inclusion in one application of an area of land or waters covered by another. [Section 64\(5\)](#) expressly contemplates amendments which change the named applicants in an application:

'If a claimant application, or a compensation application whose making was authorised by a compensation claim group, is amended so as to replace the applicant with a new applicant, the amended application must be accompanied by an affidavit sworn by the new applicant:

- (a) that the new applicant is authorised by the other persons included in the native title claim group, or the compensation claim group, to deal with matters arising in relation to the application; and*
- (b) stating the basis on which the new applicant is authorised as mentioned in (a).'*

8 [Section 66B](#) provides for applications to replace applicants in claimant applications thus:

*'(1) One or more members of the native title claim group (the **claim group**) in relation to a claimant application, or of the compensation claim group (also the **claim group**) in relation to a compensation application, may apply to the Federal Court for an order that the member, or the members jointly, replace the current applicant for the application on the grounds that:*

(a) either:

(i) the current applicant is no longer authorised by the claim group to make the application and to deal with matters arising in relation to it; or

(ii) the current applicant has exceeded the authority given to him or her by the claim group to make the application and to deal with matters arising in relation to it; and


(b) the member or members are authorised by the claim group to make the application and to deal with matters arising in relation to it.

(2) The Court may make the order if it is satisfied that the grounds are established.

(3) If the Court makes the order, the Registrar of the Federal Court must, as soon as practicable, notify the Native Title Registrar of the name and address for service of the person who is, or persons who are, the new applicant.

(4) If the claim contained in the application is on the Register of Native Title Claims, the Registrar must amend the Register to reflect the order.'

Evidence Relating to Change of Applicants **Southern – No WAG 6134 of 1998**

9 The Southern  native title determination application was lodged with the National Native

Title Tribunal ('NNTT') on 18 November 1996. It became a proceeding in the Federal Court on 1 September 1998 by operation of the amendments to [the Act](#) that came into effect on that date. The seven named applicants are:

'Aden Eades, Allan Bolton, Cedric Roberts, Dallas Coyne, Glen Colbung, Joyce Winsley and Rita Dempster'

The proposed new applicants comprise five of the seven named applicants and two new applicants. They are:

'Aden Eades, Allan Bolton, Dallas Coyne, Glen Colbung, Lomas Roberts, Rosemary Pickett and Rita Dempster.'

Cedric Roberts is now deceased. The motion to replace the applicants also names Marlene Ware as a deceased applicant but this is an error as she is not a named applicant in WAG 6134.

10 The authority for the proposed change of applicants is said to derive from resolutions passed at a meeting held in Albany on 18 February 2004. The resolutions were in the following terms:

'RESOLUTION ONE - DECISION MAKING PROCESS

*The native title claimants at this claim group meeting acknowledge that we are members of the Southern **Noongar** native title claim group. There is no Southern **Noongar** traditional decision making process that is binding on the decisions required under the NTA to replace an Applicant. There are enough members of the claimant group present to make decisions about this native title claim. We agree to and adopt the following decision making process:*

- 1. Each native title claimant attending this claim group meeting has a right to vote upon any resolutions that are considered at the meeting.*
- 2. Voting on the resolutions will be by a show of hands.*
- 3. The resolutions will be passed on a majority decision of all Southern **Noongar** Native Title Claimants present.*

RESOLUTION TWO - INSTRUCTIONS TO REMOVE THE SOUTHERN **NOONGAR** APPLICANT

*Authorisation of the Applicant was initially given to bring the Southern **Noongar** claim WAG 6134 of 1998. That authorisation did not extend to authorisation of a claim over the south west of WA for all **Noongar** people. Due to the proposed amendment of the Southern **Noongar** claim the current Applicant is no longer authorised. The Southern **Noongar** native title claim group resolve that:*

The current Applicant in WAG 6134 of 1998 – comprising Aden Eades, Allan Bolton, Cedric Roberts, Dallas Coyne, Glen Colbung, Joyce Winsley and Rita Dempster – is no longer authorised by the claim group to make the application and to deal with matters arising in relation to it.

RESOLUTION THREE - AUTHORISATION OF APPLICANT

We authorise Aden Eades, Allan Bolton, Dallas Coyne, Glen Colbung, Lomas Roberts, Rosemary Pickett and Rita Dempster, to be the Applicant in WAG 6134 of 1998, to make the application and to deal with all matters arising in relation to it.

RESOLUTION FOUR - AUTHORISE MEMBERS TO BRING [s66B](#) APPLICATION

We authorise Aden Eades, Allan Bolton, Dallas Coyne, Glen Colbung, Lomas Roberts, Rosemary Pickett and Rita Dempster, members of the claim group, to bring the application under [s 66B Native Title Act](#) (1993) and to deal with matters arising in relation to it.

RESOLUTION FIVE - INSTRUCTIONS TO AMEND CLAIM

*We, the Southern **Noongar** native title claimants confirm our support for Resolution 2 from the February 2003 community meetings and resolve that:*

*We authorise the proposed Applicant to take the steps necessary to amend the Southern **Noongar** native title claim, WAG 6134 of 1998 to reflect a single **noongar** claim application and combine WAG 6134 of 1998 with other claims in the south west where those claimant groups also agree.'*

11 Evidence relating to notice of the meeting and the conduct of the meeting appeared from a number of affidavits. Kevin Fitzgerald, a senior project officer with the SWALSC, is a **Noongar** man who worked with the predecessor native title representative body, the **Noongar** Land Council, from April 2001 and then transferred to the SWALSC. He said that notices of the Albany meeting of 18 February were given in various ways. Generic notices were published in the West Australian newspaper on 28 and 31 January, the Great Southern Herald on 12 February and the Albany Advertiser on 14 February. All 212 members of the SWALSC who identified as Wagyl Kaip claimants were sent an agenda on 28 January 2004 setting out details of the meeting, including the proposed resolutions. According to Mr Fitzgerald, these persons are also members of the Southern **Noongar** native title claim group as the boundaries of the two claims and their descriptions are the same. He also said, without descending to particulars, that there is an agreement between the two native title claim groups to be dealt with as one by the SWALSC. In addition to the above, the agenda for the meeting was sent out on 5 February 2004 'to all members of the relevant Working Party, including Kevin Miller and Mark Smith'. The affidavit did not explain the composition, origins or purpose of the Working Party. In addition to the above, the agenda was sent to a number of Aboriginal organisations in the metropolitan area and that covered by the Southern **Noongar** claim.

12 The generic advertisement which appeared in various newspapers was in the following terms:

'Meetings for Native Title claimant groups in the south west of WA

*Important note: These meetings do not affect previous decisions authorising the named applicants for the Single **Noongar** claim.*

*At the community meetings held across the south west of Western Australia in February 2003, **Noongar** People voted to merge their individual native title claims into a Single **Noongar** Claim ("SNC"). The paper work for the SNC has been put into the Federal Court.*

A recent decision in the Federal Court has clarified the technical process for combining native title claims. To continue the combination process, the existing claimant groups need to make decisions at claimant group meetings to:

- 1. Remove the current named applicants;*
- 2. Authorise the named applicants nominated at the community meetings in February 2003; and*
- 3. Authorise claimants to bring applications to amend the existing claims.*

If you are part of any of the following native title claims and want to be involved in making decisions, come along to your claimant group meeting.

WHEN WHERE

Yued Native Title Claim Tuesday Moora Bowling Club
10 February 2004 Gardiner Street,
at 10am MOORA

Gnaala Karla Booja Thursday CEDP Hall
Native Title Claim 12 February 2004 100 Spencer Street
at 10am BUNBURY

South West Boojarah Tuesday Busselton Civic Centre
Native Title Claim 17 February 2004 Southern Drive
at 10am BUSSELTON

Wagyl Kaip & Southern Wednesday Albany Regional
Noongar Native Title 18 February 2004 Corporation
Claims at 10am Cnr Serpentine &
Hanrahan Roads
ALBANY

As decisions will be made that affect your claim, it is important that you stay until the voting on resolutions is finished. Please pass on this information to other south west native title claimants.

As this is a claimant group meeting no travel assistance or petrol money is available.

For further information and to obtain a copy of the agenda and claim map call the South West Aboriginal Land and Sea Council. Country callers please use Freecall: 1800 617 617 or metropolitan callers phone: 9222 6200.

(Logo)

South West Aboriginal

Land & Sea Council'

The reference in the advertisements to community meetings held in February 2003 is a reference to meetings organised by the SWALSC in areas covered by the various South West Claims to obtain support and authority for the creation of a Single **Noongar** Claim with which other claims could be combined.

13 The Southern **Noongar** meeting was held at the offices of the Albany Aboriginal Corporation in Albany which is within the claim area of the Southern **Noongar** claim and where, according to Mr Fitzgerald, previous meetings dealing with native title and related matters had been held. Twenty-nine persons attended and signed the register. Mr Tony Lee, formerly a member of the NNTT, acted as a facilitator at the meeting which, according to its minutes, was addressed by Darryl Pearce, the Chief Executive Officer of the SWALSC, and by Christine Cooper, a legal officer. All the resolutions were passed without any apparent or significant dissent.

14 The description of the native title claim group for the Southern **Noongar** claim is as follows:

"1. The biological descendants of the unions between:-

Billy Colbung + Clara Brockman + Nina Bayla Brockman
Helen Williams + Billy Woods;
Sarah Yettung James + Jack Woods;
Sammy 'Hunnt' Miller + Polly, from Gnowangerup;
Alice Davidson and Alice Williams + Henry Woods;
Charles or Peter Eades + Lucy Coyne;
William Hayward + Minnie Knapp;
Emily Coyne + William 'Peg' Farmer;
Fred Coyne + Margaret Davidson;
Johnny Penny + Margaret 'Maggie' Piggott (Starlight);
Charles Williams + Ellen Nelly Foot;
Elijah Quartermaine + Mary 'Wartum';
Ah-Lee + Mary Bateman;
Perrup Roberts + Monkey + Emily (Mudah) + D'Abb;
Edward Smith + Sarah Punch;
Ernie or George Moir or Muir + Aboriginal woman named Karlbyirt;
Eddie 'Womber' Williams + Lily 'Tjorlian' Burchell;
George 'Bordriditch' Riley + Elizabeth Smith

2. those persons adopted by the individuals named in 1 above and those persons adopted by the biological descendants of the unions between the individuals named in 1 above;

3. those persons that are the biological descendants of the adopted persons included in 2 above.

Adoption occurs in the following manners: if a man dies and his brother or cousin marries the widow, any of the widow's children are adopted as the children of the new husband.

Specifically excluded from being claimants are the persons listed in attachments A(1) and A(2)."

(Note: The names at Attachment A(1) and A(2) are those persons who are members of the Wom-Ber native title claimant application WC96/105).'

There was no direct evidence to show that the persons who attended the meeting of 18 February at Albany fell within the membership of the native title claim group as defined in the application. The addresses of 20 of the attendees were located in Albany. The remainder were from Armadale, Balga, Bentley, Parkwood and Mt Barker.

15 Affidavits in support of the motion were sworn by a number of the named applicants. Aden Eades who attended the meeting and voted for the resolution said that the membership of the Southern **Noongar** native title claim group was discussed before any decisions were taken at the meeting. Of the 29 persons present at the meeting, 27 identified themselves as Southern **Noongar** claimants. I take that to mean that they identified themselves as members of the Southern **Noongar** native title claim group. Evidence to like effect in common form affidavits, was given by Dallas Coyne, Glen Colbung and Rosemary Pickett. Identical affidavits sworn by Allan Bolton and Rita Dempster, who were unable to attend the meeting but endorsed the process, also stated that:

*'The Southern **Noongar** people make native title decisions at claimant group meetings and working party meetings. There is always discussion and consultation between members of the group, both before and during the meeting. Community meetings and working party meetings are accepted by the Southern **Noongar** people as the proper way to make decisions. We have done it this way since our claim was lodged in 1998. We still make decisions this way.'*

Wagyl Kaip – WAG6286 of 1986

16 The Wagyl Kaip native title determination application was lodged with the NNTT on 27 September 1998. It became a proceeding in the Federal Court on 30 September 1998 by operation of the 1998 amendments to [the Act](#). The named applicants are:

'Allan Bolton, Cedric Roberts, Glen Colbung, Ken Colbung, Kevin Miller, Mark Smith, Sam Miller, Hazel Brown, Marlene Ware, Mingli Wanjurri-Nunjgala, Rita Dempster and Rose Pickett.'

Cedric Roberts and Marlene Ware are both deceased. The proposed new applicants are the same as for the Southern **Noongar** application.

17 The authority for the proposed change of applicants is said to derive from resolutions passed at the meeting held in Albany on 18 February 2004 which also considered resolutions relating to the Southern **Noongar** applicants. The resolutions followed the same form. All were passed without any apparent or significant dissent.

18 The advertising for, and notification of, the Wagyl meeting was the same as the advertising and notification for the Southern **Noongar** meeting. The meeting of both groups was advertised and notified as one.

19 The description of the native title claim group for Wagyl Kaip is identical to that of the Southern **Noongar** native title claim group except that it does not include the apical ancestors, Eddie 'Womber' Williams + Lily 'Tjorlian' Burchell and George 'Bordriditch' Riley + Elizabeth Smith. A list of

excluded persons is set out in Attachment A(1) which comprises the same persons as are shown in the Southern **Noongar** applications in Schedules A(1) and A(2). These excluded persons are members of the Wom-ber native title claim group.

20 Kevin Fitzgerald swore an affidavit in support of the Wagyl Kaip [s 66B](#) motion that was in all material respects identical to the affidavit he swore in relation to the Southern **Noongar** motion. An array of common form affidavits, similar to those used in the Southern **Noongar** application, was also sworn by the proposed new applicants other than Lomas Roberts. There were no affidavits from the applicants to be removed. The minutes of the meeting were exhibited to Mr Fitzgerald's affidavit. They recorded that a question was asked by one of those present whether there were enough Wagyl Kaip people present to make the decisions. An explanation was given by a legal officer with the SWALSC of the steps taken to notify members of the native title claim group of the meeting.

21 A claimant in the Wom-ber application, Mrs Patricia Morich, addressed the Court at the hearing of the motions and considered that the majority of the names in the attendance list for the meeting were members of the one family or its friends. There was however no evidence of the extent of the connection between the attendees nor was a connection suggested by their names.

22 Kevin Miller, an applicant in the Wagyl Kaip application, said he opposed the proposed changes. He asserted orally that some of the applicants had no legitimate interest in the area of the application. He also filed a short written submission in which he objected to the one claim proposal by the SWALSC. Mr Mark Smith, another named applicant in the Wagyl Kaip application, objected to the SWALSC. He also submitted that the 29 people in attendance at the Albany meeting had no right to speak for the whole of the South West or the Wagyl Kaip application. He said there were no senior or elder decision-makers present at the meeting.

South West Boojarah – WAG 6279 of 1998

23 The South West Boojarah native title determination application was lodged with the NNTT on 25 September 1998 and became a proceeding in the Federal Court on 30 September 1998. The 18 named applicants are:

'Glen Colbung, Ken Colbung, Donald Corbett (dec'd), Ivan Corbett, Glen Councillor, Frances Gillespie, Donna Hill, Jack Hill, Kevin Miller, Sam Miller, Teresa Miller, Benjamin Nannup, Franklyn Nannup Jr, Phillip Prosser, Barbara Stammner-Corbett, George Webb (dec'd), Vilma Webb and Wendy Williams.'

The proposed new applicants are:

'Jack Hill, Ken Colbung, Phillip Prosser and Barbara Stammner-Corbett.'

Donald Corbett and George Webb are both deceased. The remaining 12 applicants to be removed are said no longer to be authorised by the claim group to make the application and to deal with matters arising in relation to it.

24 The authority for the proposed change of the applicants is said to derive from five resolutions passed at a meeting held in Busselton on 17 February 2004. The terms of the resolutions were the same (save for the names of present and proposed applicants) as those passed at the Southern **Noongar** and Wagyl Kaip meetings.

25 Notice of the meeting was given in the generic advertisements referred to earlier which appeared in the West Australian newspaper on 28 and 31 January, the Busselton Margaret Times on 12 February and the South Western Times on 12 February. All 82 members of the SWALSC who identified as South West Boojarah claimants were sent a copy of the agenda on 28 January 2004. The agenda set out a copy of the proposed resolutions. On 5 February the agenda was also sent to the South West Boojarah Working Party. It was also sent to various Aboriginal organisations within the metropolitan and South West Boojarah claim areas. All of this appeared in an affidavit sworn by Mr Fitzgerald. The affidavit did not disclose the basis upon which members of the SWALSC 'identified' as South West Boojarah claimants. It did not have anything to say about South West Boojarah claimants who are not members of the SWALSC. Nor did it describe the origins, purposes or composition of the South West Boojarah Working Party. There were, as in the other cases, common form affidavits sworn by proposed applicants. There were no affidavits from the applicants to be removed.

26 In all, 20 persons attended the meeting. The relationship between those people and the native title claim group described in the application was asserted in the following paragraph of Mr Fitzgerald's affidavit:

'11. Prior to making any decision the membership of the South West Boojarah native title claim group as defined by reference to the application for determination of native title was discussed. Those present were asked to identify themselves for the purpose of voting in the meeting. It was identified that there were seventeen South West Boojarah claimants present at the meeting.'

All the resolutions were passed without apparent or significant dissent.

27 The description of the native title claim group for the application is as follows:

'1. The biological descendants of the unions between:-
. Ryan + Wooragan, an Aboriginal woman from August (sic);
. Saul Isaacs + Dorinder, a Wardandie Aboriginal woman;

. John Herring + Elizabeth, an Aboriginal woman from Busselton;
. Billy Colbung + Nina Bayla Brockman + Cloe Wynn;
. James Wynne and Bussels Fanny;
. Timothy Harris + Caroline 'Cleo' 'Yorjup'
Mallane/Malony/Milany;
. George 'John' Dawson + Rebecca, an Aboriginal woman from
Busselton;
. James Mippy, an Aboriginal man + Edie Ann, an Aboriginal
woman from Margaret River;'

The standard reference to persons adopted by these individuals and their descendants, and biological descendants of those persons and their adopted persons and the description of the mode of adoption followed. A list of persons who are members of the native title claim group for the Harris native title determination application WAG 6085/98 was set out as persons excluded from the native title claim group.

Gnaala Karla Booja – WAG 6274 of 1998

28 The Gnaala Karla Booja native title determination application was lodged with the NNTT on 19 September 1998. It became a proceeding in the Federal Court on 30 September 1998 by operation of the 1998 amendments to [the Act](#). The nine named applicants are:

'Mervyn Abraham, Lorraine Bellotti, Peter Michael, Franklyn Nannup (Jr), Harry Narkle, Joseph Northover, Derrick Smith, Barbara Stammner-Corbett and Joseph Wally'

The proposed five replacement applicants are:

'Peter Michael, Harry Narkle, Joseph Northover, Barbara Stammner-Corbett and Joseph Wally'

29 The authority for the proposed change of applicants is said to derive from five resolutions passed at a meeting held on 12 February 2004 at Bunbury. The form of the resolutions was the same as that of the resolutions passed at the Southern **Noongar** meeting which have been set out in full earlier.

30 Affidavits similar to those filed in support of the [s 66B](#) motions in the earlier matters were filed in support of the Gnaala Karla Booja motion. There was no affidavit from those to be removed as applicants. The principal affidavit was again that of Kevin Fitzgerald. Notice of the meeting was given in the form of the generic advertisements which appeared on 28 and 31 January in the West Australian newspaper and 5 February in the Collie Miner and the Mandurah Mail and the South Western Times. All 233 members of the SWALSC who are said to identify as Gnaala Karla Booja claimants were sent an agenda on 28 January 2004. A copy was also sent to the Gnaala Karla Booja Working Parties and the current applicants. Copies of the agenda were sent to a number of Aboriginal organisations in the metropolitan area and in the area covered by the application.

31 Forty-three people attended the meeting and signed a register. According to an affidavit sworn by one of the applicants, Joseph Northover, 37 of those people identified themselves as Gnaala Karla Booja claimants. All resolutions were passed without any apparent or significant dissent.

32 The description of the native title claim group in the application is:

'1. The biological descendants of the unions between:-

- . An Aboriginal man from Pinjarra named Walley and an Aboriginal woman from Pinjarra named Tundop*
- . Billy 'Culinbert' Colbung and Nina Bayla Brockman and Clara Bayla Brockman and Eva Wynn*
- . Calyan and Patrick Abraham and Sarah Corrup*
- . Edward 'Ted' Smith and Elizabeth 'Bessie' Punch (Quartermaine) and Sarah Punch*
- . George Riley and Elizabeth (Lizzie) Smith*
- . Jack 'Milberan' Cornwall and Minnie 'Wajeran' Humphries*
- . Jack Hart and Tottie Cockie and Annie Dickie*
- . James Joseph Collard and Jane Smith/Ayre/Hare/Winmar*
- . Jim Cockie and 'Wyan' Regan*
- . Kitty Nordy and Jimmy Wynne*
- . Maggie Penny/Pickett and Jogunny Penny*
- . Mary Campbell (Alias Mary Madeline Bunnaro) and William*

Harris

- . *Robert Edgil and Mary Oracle*
- . *Robert Ernst Ugle and Jane Fleay/Dickei*
- . *Sarah Kelly and Johnny Narkle and Jack Mungar*
- . *Thomas Reidy and Mable Collard*

Paragraphs 2 and 3 relating to adopted and biological descendants followed the same format as the other native title claim group descriptions. The members of the Harris native title determination application were expressly excluded.

Yued – WAG 6192 of 1998

33 The Yued native title determination application was lodged with the NNTT on 10 July 1997. It became a proceeding in the Federal Court on 30 September 1998. The 10 named applicants are:

‘Martha Borinelli, Michael Egan, Arnold Franks, Diane Mippy, Jenny Mogridge, Edna Ryder, Joseph Ryder, Mal Ryder, Charmaine Walley, William Warrell.’

The proposed five new applicants are:

‘Martha Borinelli, Diane Mippy, Mal Ryder, Charmaine Walley, William Warrell.’

Michael Egan is now deceased.

34 The authority for the proposed change is said to derive from resolutions passed at a meeting held in Moora on 10 February 2004. There was the same set of common form affidavits as in the other applications with the principal affidavit as to evidence of notification and conduct of the meeting sworn by Kevin Fitzgerald.

35 Generic advertisements for the meeting were placed in the West Australian newspaper on 28 and 31 January and on 5 February 2004 in the Central Midlands and Coastal Advocate. Notification by way of agendas for the meeting was given to 81 members of the SWALSC who are said, by Mr Fitzgerald, to identify as Yued claimants. All members of the Working Party and all current applicants were also sent copies of the agenda on 5 February. Twenty-eight people attended the meeting at the Moora Bowling Club, which is in the Yued claim area. Of those people, 25 identified themselves as Yued claimants. All the resolutions were passed without any apparent or significant dissent.

36 The Yued native title claim group is described in the application as follows:

- ‘1. The biological descendants of the unions between:-*
- . *Sarah Bundaran of Wyenning + white settler John Ryder*
 - . *Mary Ellen/Helen Tainan + Patrick Yappo*
 - . *William ‘Bill’ Warrel + Delores ‘Olly’ Nettle*
 - . *Johnny Pickett + Joanna Indich*

The standard statements of adoption and biological descent are included. Arnold Franks is also expressly included.

Ballardong – WAG 6181 of 1998

37 The Ballardong native title determination application was lodged with the NNTT on 10 July 1997. It became a proceeding in the Federal Court on 30 September 1998 by operation of the 1998 amendments to [the Act](#). The present 16 named applicants are:

'Cedric Anderson, Donald Collard, Sylvia Rachel Collard, Reg Hayden, Alan Jones, Winnie McHenry, Doug Nelson, Ricky Nelson, Robert Riley, Tim Tiley, William Riley (dec'd), Dianne Taylor, Alex Yarran (dec'd), Reg Yarran, Robin Yarran and Saul Yarran'

The proposed four new applicants are:

'Reg Hayden, Doug Nelson, Dorcus Pickett and Reg Yarran'

38 The authority for the proposed change of applicants is said to derive from resolutions passed at a meeting held in Quairading on 11 February 2004. The resolutions were in the same common form as those set out earlier in these reasons.

39 Evidence relating to the notification of the meeting and its conduct was again given by Kevin Fitzgerald and a number of deponents in common form, being the proposed applicants. The newspaper advertisements in this case were specific to the Ballardong application and appeared in the West Australian newspaper on 28 and 31 January and, on 4 February 2004, in the Narrogin Observer and the Wheatblock Mercury. There are 378 members of the SWALSC who are said to identify as Ballardong claimants. Each was sent, on 28 January, a copy of the agenda for the proposed meeting. All current applicants and the Ballardong Working Party were sent copies on 5 February 2004. Copies were also sent to various Aboriginal organisations within the metropolitan area and the Ballardong claim area. Sixty four people attended the meeting and all identified themselves as Ballardong claimants. All the resolutions were passed.

40 The description of the native title claim group for the Ballardong application is as follows:

'1. The biological descendants of the unions between:-

- . Tommy Yarran + Mary Jane Kickett*
- . Winmar, an Aboriginal woman + Edwards, a European man;*
- . William 'Bill' Humphreys + Susan White;*
- . Tirban, an Aboriginal woman of Northam + a European man;*
- . Frederick John Blurton + Mary Jane Juberan;*
- . Thomas Kickett + Mary Mellett;*
- . Jack Nelson + Ada Foss;*
- . George Borndrilditch Riley + Elizabeth Smith;'*

The standard references to adopted and biological descendants also appear in the description. Persons who are members of the Wom-Ber native title claim application WAG 6130 of 1998 are expressly excluded.

41 The earlier history of attempts to change the applicants in this native title determination application and to amend its boundaries appear from the report of the decision in *Anderson v Western Australia*. At the close of the hearing in this case I made directions in relation to the Ballardong application for the filing of an amended motion and service on Robin and Saul Yarran. These matters are referred to at the end of these reasons.

Whether the Applications for Amendment under Section 66B Should be Allowed


42 The conditions under which an order under [s 66B](#) replacing applicants will be made were set out in *Daniel v Western Australia* (2002) 194 ALR 278 at [17] and were repeated recently in *Anderson v Western Australia* at [39]. They are:

- ‘1. There is a claimant application.
2. Each applicant for an order under [s 66B](#) is a member of the native title group.
3. The person to be replaced is no longer authorised by the claim group to make the application and to deal with matters arising in relation to it.
4. Alternatively, the person to be replaced has exceeded the authority given to him or her by the claim group.
5. The persons making the application under [s 66B](#) are authorised by the claim group to make the application and to deal with the matters arising under it.’

Provided that the decision is made by a representative or other collective body exercising authority on behalf of the group under customary law or, absent applicable and mandatory customary law, by an agreed process, that will suffice to prove the decision-making processes required by [s 66B](#).

43 As I observed in *Daniel v Western Australia* at [11] it is of central importance to the conduct of native title determination applications that those who purport to bring them and to exercise, on behalf of the native title claim groups, the rights and responsibilities associated with such applications, have the authority of their groups to do so. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title – *Western Australia v Strickland* (2000) 99 FCR 33 at 52; see also *Moran v Minister of Land and Water Conservation (NSW)* [1999] FCA 1637.

44 If, as may well be the case, there is no relevant and mandatory traditional decision-making process applicable to the making and conduct of a native title determination application then a process ‘agreed to and adopted by the persons in the native title claim group’ will suffice as the source of authority for applicants representing members of the group. That is no light requirement. It means that the authorisation process must be able to be traced to a decision of the native title claim group who adopt that process. The conferring and withdrawal of authority for the purposes of a [s 66B](#) application must be shown as flowing from the relevant native title claim group.

45 In relation to the present motions I regret to say that the evidence and the processes adopted were not adequate to meet the conditions necessary for an order under [s 66B](#). For each of the applications there is a defined native title claim group which is set out earlier in these reasons. The connection between those who attended the various meetings referred to and the respective native title claim groups was not established either in respect of notification nor, more importantly, in respect of attendance. The native title claim groups are defined in each case by reference to apical ancestors and biological descendants of those persons and persons adopted by them. The advertisements and notices did not refer to the relevant native title claim groups except by use of the generic title of the applications in question. The membership of the native title claim group by those who attended each meeting was not demonstrated. Rather it was reported as an asserted self-identification. Mrs Morich made some statements from the bar table doubting the representativeness of those who attended at the Southern  meeting. Her statements might be right or wrong. They were not evidence. But my inability to make any judgment about them illustrates the inadequacy of the evidence as it presently stands for the purposes of a [s 66B](#) application. And even if it be accepted that each of the members who attended each of the meetings was a member of the relevant native title claim group, it is not established that they were in any sense representative of the various components of the native title claim group concerned.

46 In my opinion, each of the motions for amendment under [s 66B](#) suffers from the same fatal deficiency. The evidence is insufficient to demonstrate that there has been notification to members of the native title claim group as defined or that those who attended belonged to it. A fortiori, there is no evidence that the meetings were, in any sense, fairly representative of the native title claim groups concerned. In so saying I do not wish to be taken to be critical of the SWALSC. It may be that there is a chronic difficulty that cannot be overcome despite its most heroic efforts because of the apathy, lack of interest, or divided opinions held by members of the relevant native title claim groups. If that be so, then that may be a reason for reconsidering whether the applications should proceed at all. It is not a basis for accepting a constructed 'decision-making' process which cannot be demonstrated, to reflect in any legitimate sense, the informed consent of the members of the native title claim group or persons properly representing them as a substitute for the authorisation required by [the Act](#).

47 In my opinion each of the [s 66B](#) motions should be dismissed.

The Combination Applications

48 Notices of motion were filed on 27 November 2003 by the SWALSC seeking to amend and combine the applications already mentioned in connection with the [s 66B](#) motions (other than Ballardong) and in addition the following applications:

1. The Collard Polygon applications – WAG6102, WAG 6091, WAG 6142, WAG 6171 and WAG 6223 of 1998.
2. The Single **Noongar** claim (Area 1) ('SNC 1') – WAG 6006 of 2003.

49 Under the motions the boundaries of the areas covered by each of the applications would be expanded to be contiguous with the area covered by SNC 1. In each case the native title claim group is to be defined as the native title claim group identified in SNC 1. All of the applications are to be combined into an amended Southern **Noongar** claim – WAG 6134 of 1998 which is to be the 'lead application'. The evidence in support of the motions is conveniently summarised in the Commonwealth's submissions.

50 In relation to the Southern **Noongar** claim, the combination motion is supported by an affidavit of Ken Colbung sworn 26 November 2003. He is a named applicant in those proceedings. He wants his interests represented as part of a single claim in the South West of Western Australia. He and other **Noongar** claimants attended meetings in February 2003, the result of which was a decision to bring a single claim.

51 Affidavits of Anthony Bennell sworn 4 December 2003 and an anthropologist, Dr Bruce Shaw sworn 28 August 2003, were also filed in support of the amendment of the Southern **Noongar** claim. These two affidavits were identical to affidavits sworn by these deponents in support of the Single **Noongar** Claim WAG 6006/03 which was filed on 10 September 2003. They describe the process of decision-making and the meetings which had been convened to support the lodgment of SNC 1.

52 In relation to the Collard Polygon applications, an order is sought that each of them be amended in accordance with the proposed amended application attached to the affidavit of Ken Colbung filed in the Southern **Noongar** claim. Each of the applications to amend is supported by an affidavit of Kevin Fitzgerald sworn 28 September 2003. The general effect of his affidavit is that he is a **Noongar** man who wants his interest represented as part of the single claim in the South West of Western Australia. He and other **Noongar** claimants attended meetings in February 2003. They decided to bring a single claim. He refers to the affidavit of Don Collard, annexed to a minute of proposed amendments filed in

the Southern **Noongar** claim on 27 September 2003 confirming Mr Collard's intention that the Collard and **Noongar** claims be combined with the Single **Noongar** Claim. Notwithstanding this, Mr Collard's affidavit was not annexed to that minute.

53 In respect of the Yued, Wagyl Kaip, Gnaala Karla Booja and South West Boojarah applications and also in respect of the Single **Noongar** Claim, the applications to amend are supported by an affidavit of Kevin Fitzgerald sworn 28 September 2003. This is identical to the affidavit sworn in support of each of the Collard Polygon applications save for the omission of one paragraph. Again, this goes to the decision-making process leading to the lodgment of a single claim.

54 The difficulties underlying the [s 66B](#) motions in this case go to the heart of the proposed combination applications. Counsel for the applicants in each of the matters, Ms Phillips, accepted, without making any formal concession that failure to achieve the orders sought under [s 66B](#) would have the practical consequence that there would be no authority to proceed with the combination applications. In my opinion, that is a correct appreciation of the position. The combination motions cannot succeed as they want authority. They must therefore be dismissed.

The Ballardong Application – Amended Motion

55 Pursuant to directions I gave at the hearing an amended motion was filed in the Ballardong application on 5 May 2004. It sought the [s 66B](#) order referred to in the earlier motion and also sought to amend the application in accordance with a minute filed in October 2003. The amendment would contract the Ballardong application so that it does not overlap with the SNC.

56 The amended motion and supporting affidavits were served on Robin and Saul Yarran. Robin Yarran has filed an affidavit opposing the SNC and it would seem any contraction of the Ballardong application. He is a named applicant in Ballardong and is Chairman of the former native title representative body, the **Noongar** Land Council. On 10 May 2004, Mr Saul Yarran swore an affidavit supporting the motion. Fourteen days later, he swore another affidavit repudiating his earlier affidavit and stating his opposition to the SNC and the application seeking to amend the Ballardong claim. Mr Saul Yarran did exactly the same thing in the earlier proceedings relating to the Ballardong application – see *Anderson v Western Australia* at [43]. It would seem that his conduct demonstrates the potential for manipulation by vested interests of some applicants in pursuit of agendas which have nothing to do with the merits of their application.

57 For the reasons already discussed, the order sought under [s 66B](#) in respect of the Ballardong application cannot be made and the motion must be dismissed in that regard. Because of the internal difficulties among the applicants and the absence of evidence of a truly representative meeting I am not prepared to allow the amendments. At this stage I am prepared to make directions for mediation for a limited period in accordance with proposals set out in the motion but I will hear the parties as to that. I am also inclined to see this matter referred to a docket judge. The application seems to have reached a stalemate and I suspect little will be achieved by further mediation.

Conclusion

58 For the preceding reasons, all the motions for amendment by way of combination and for change of applicants will be dismissed. The motion for the amendment of the Ballardong application will be dismissed and consequential orders made on which I will hear the parties.

I certify that the preceding fifty-eight

(58) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice French.

Associate:

Dated: 15 June 2004

Counsel for the Applicants: Ms S Phillips

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

Ms P Morich appeared on her own behalf

Mr K Miller appeared on his own behalf

Mr M Smith appeared on his own behalf

Counsel for the State of Western Australia: Mr GJ Ranson

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

Counsel for the Commonwealth of Australia: Ms R Webb

Solicitors for the Commonwealth of Australia: Australian Government Solicitor

Counsel for the West Australian Fishing Industry Council (Inc): Mr M Mckenna

Solicitors for the West Australian Fishing Industry Council (Inc): Hunt & Humphry

Date of Hearing: 21 April 2004

Date of Judgment: 15 June 2004