FEDERAL COURT OF AUSTRALIA

Rainbow on behalf of the Kurtijar People v State of Queensland [2019] FCA 1683

File number:	QUD 483 of 2015
Judge:	**RARES J**
Date of judgment:	13 August 2019
Catchwords:	**PRACTICE AND PROCEDURE** – application for leave to file expert addendum report – where addendum report sought to qualify materially what expert agreed in joint expert report – where joint expert report prepared in accordance with Court's expert evidence practice note and with assistance of Registrar – where statement in joint expert report unambiguous – where no explanation why expert came to make addendum report three months after signing joint expert report and one month before trial – where allowing addendum report would revive substantial issue requiring further evidence
Legislation:	*Federal Court of Australia Act 1976* (Cth) s 37M *Native Title Act 1993* (Cth) s 223 Expert Evidence Practice Note (GPN-EXPT)
Cases cited:	*Ansell Healthcare Products LLC v Reckitt Benckiser (Australia) Pty Limited (No 2)* [2016] FCA 765 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 *National Justice Compania Naviera SA v Prudential Assurance Company Limited (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68 *Salzke v Khoury* (2009) 74 NSWLR 580 *Samsung Electronics Co. Limited v Apple Inc.* [2013] FCAFC 138
Date of hearing:	13 August 2019
Registry:	Queensland
Division:	General Division

National Practice Area:	Native Title
Category:	Catchwords
Number of paragraphs:	54
Counsel for the Applicant:	Mr V Hughston SC with Mr C Athanasiou
Solicitor for the Applicant:	HWL Ebsworth Lawyers
Counsel for the First, Second, Third, Fourth and Fifth Respondents:	The first, second, third, fourth and fifth respondents did not appear
Counsel for the Sixth, Eighth and Ninth Respondents:	Ms Carla Klease with Ms M Barnes
Solicitor for the Sixth, Eighth and Ninth Respondents:	Clayton Utz
Solicitor for the Seventh Respondent:	Mr M Boge of Thynne + Macartney

ORDERS

QUD 483 of 2015

BETWEEN:	**JOSEPH RAINBOW** First Applicant
	SHIRLEY MCPHERSON Second Applicant
	IRENE PASCOE Third Applicant
AND:	**STATE OF QUEENSLAND** First Respondent
	CARPENTARIA SHIRE COUNCIL Second Respondent
	CROYDON SHIRE COUNCIL (and others named in the Schedule) Third Respondent
JUDGE:	**RARES J**
DATE OF ORDER:	**13 AUGUST 2019**

THE COURT ORDERS THAT:

1. The interlocutory application filed on 31 July 2019 be dismissed.

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

REASONS FOR JUDGMENT

(REVISED FROM THE TRANSCRIPT)

RARES J:

1 This is an interlocutory application by three of the active respondents in this native title application, Vanrook Station Pty Limited, Dorunda Station Pty Limited and Stirling Lotus Vale Station Pty Limited (**the Gulf Coast parties**) to file and serve an **addendum** report by their expert anthropologist, **Dr** Kevin **Murphy**, dated 25 July 2019.

Background

2 The proceeding is fixed for hearing to commence on country in the Gulf of Carpentaria on 27 August 2019. On 14 November 2018, when case managing the proceeding, Mortimer J made a number of interlocutory orders providing for, among other steps, the filing of evidence or statements that each of the parties proposed to lead from witnesses, and listing the trial to commence on 2 July 2019. The orders required the preparation of joint expert anthropological reports with the assistance of the Registrar in accordance with the Court's normal practice in native title cases.

3 Subsequently, the matter was docketed to me and, on 21 February 2019, I varied, to some extent, the orders made by her Honour. The varied orders continued to require a joint conference of the experts to take place with the Registrar on 28 and 29 March 2019 for the purposes of the experts recording their positions in respect of the connection issue, that is, whether the applicant could establish the existence of native title rights and interests in the land or waters over the then claim area in accordance with the requirements of s 223 of the *Native Title Act 1993* (Cth).

4 In the event, the experts prepared two joint reports with the assistance of the two Registrars of the Court, the first recording the experts' conclusions at the 28 and 29 March 2019 conference, and the second, that occurred on 16 April 2019, recording their answers to questions prepared by the legal representatives of the parties. Relevantly, the Registrars assisted in the formulation of the second joint expert report (**the second report**).

5 The Gulf Coast parties seek to rely on the addendum to qualify, in a material respect, what Dr Murphy had agreed with the other three experts as a joint position.

The second report

6 The second report recorded in its introduction that, prior to their first conference, the four experts, Dr Richard **Martin** called by the applicant, Dr Kingsley **Palmer** called by the **State** of Queensland, Dr Ron **Brunton** called by another of the active respondents which also opposes the applicant's claim, **Stanbroke** Pty Limited, and Dr Murphy, each had received a common set of materials, called "**the basis material**", and that each had considered the basis material before their first meeting and discussions on 28 and 29 March 2019.

7 The introduction also recorded that:

- certain other material became relevant during their first conference and that the experts had subsequently exchanged some further material electronically among themselves;
- some relevant original source material had not been available to them at the first conference;
- at the second conference, each expert had been reminded of his role as an expert witness, including his duty to the Court; and
- in that conference, the experts had considered the issues and questions set out in the second report and in doing so, had regard to the maps attached to that report.
- each expert had expressed the opinions attributed to him at the second conference, as set out in the second report; and
- each expert indicated, by signing the declaration at the conclusion of the second report, that he had reached those opinions taking into account and applying his training, knowledge and experience as an anthropologist to the basis material, the new material that each had received in their exchanges or within their knowledge, the consideration of the issues and questions considered during the second conference and the views of each other expert.

8 Each expert signed a declaration, including Dr Murphy who did so on 24 April 2019, in which he said that:

> [i]n expressing the opinions attributed to me in this report, [I] have had regard to the basis material and the statements made at the conference of experts and have made all the inquiries which I believe are desirable and appropriate and that no matters of significance which I regard as relevant have, to my knowledge, been withheld.

9 It is common ground that the legal representatives for the parties agreed on the questions which the experts were to answer in the second report. The first question asked whether, at the time of effective sovereignty, a person or persons other than those whose descendants now identify as the **Kurtijar People** (who are represented by the applicant) held rights to country within what was the then claim area in the then version of the form 1 in this proceeding and, if so, in which area or areas. The first question defined any such areas as the "Succession Area". The experts agreed that there were other native title holders, perhaps more correctly called tribes, claim groups, or groups, that held interests in what appeared to be a substantial part of the then claim area. But there was no unanimity amongst the experts as to that topic. I note that amendments to the then form 1 in this proceeding have since reduced the claim area, but this change is not material to the present issue.

10 The second question and the experts' joint statement in answer to it were as follows:

> Do the experts agree that the Kurtijar People hold rights to the Succession Area? If so:
>
> > (a) by what process have the Kurtijar People come to hold rights to the Succession Area?
> >
> > (b) does that process accord with the traditional laws and customs applying to the Succession Area?
>
> Joint Statement
>
> The experts do not agree on any single 'succession area'. Instead the experts have agreed to address the question separately, by reference to particular areas and through their discussion of the apical ancestors. **The experts agree that Kurtjar [sic] People hold rights and interests in Macaroni, part of Lotus Vale, and other areas as depicted in Black and Gilbert's 1996 map**. Dr Martin and Dr Palmer understand Kurtjar [sic] People to hold rights and interests in areas beyond the areas identified in Black and Gilbert's 1996 map for the reasons given elsewhere in the expert conference reports.
>
> (emphasis added)

11 The areas about which the experts agreed, namely, Macaroni, part of Lotus Vale and other areas as depicted in Black and Gilbert's 1996 map (**the 1996 map**), comprised areas that the parties have called the **northern** and **western** areas. The experts had agreed in the second report that the strength of the Kurtijar People's claim attenuated the further east one went within the then claim area (some of which has now been excised from the current claim in the amended form 1). Question 6 asked:

> Do the experts consider, based on the material available, that the Kurtijar People have

retained cultural knowledge and observances relating to, all or part of the Claim Area? If not all, which parts having regard to the site map?

12 Each of the experts gave a separate answer to question 6. Relevantly, Dr Murphy stated that, aside from the coastal area in the north-west of the claim area, there were very few sites recorded in the claim area in comparison to the country to the west of the claim area. West of the claim area is, among others, a property now owned by or on behalf of the Kurtijar People known as Delta Downs.

13 Dr Murphy did not think that the Kurtijar People would be likely to regard the country in which there were few recorded sites as culturally void. But, in his view, there was not sufficient evidence that they held rights in that country. That was because he said that no indigenous people would regard country as culturally void. He noted that, on the basis of Dr Martin's maps of the claim area, there appeared to be little continuity of knowledge relating to sites that had been passed, since the 1970s, from the informants of two anthropologists, known as Black and Layton, to the current claim group. He said that one would not expect to see total or even majority reproduction of knowledge of the sites and dreamings over this time period, but that the very small degree of overlap between respectively what was recorded in the 1970s and 2010s was notable.

14 The Gulf Coast parties suggested that the 1996 map was derived from the research in the 1970s of Black and Layton in some relevant way. However, in my opinion, the joint statement in answer to question 2 that the Kurtijar People held native title rights and interests in the Macaroni part of Lotus Vale and other areas depicted in the 1996 map, is unambiguous. The process under which the experts produced their joint reports was in accordance with the Court's expert evidence practice note (GPN-EXPT). That created a duty for each expert to take into account, among other matters, the views of his fellow experts and leaves no room for ambiguity as to what they stated that they agreed. Here, each expert agreed in the joint statement in the answer to question 2 that the Kurtijar People did hold native title rights and interests (without specifying the nature and extent of those rights and interests) in the northern and western areas which comprise areas covered by pastoral leases that the Gulf Coast parties hold. That agreement did not include areas covered by Stanbroke's pastoral lease.

15 In his report of 12 March 2019, Dr Murphy had opined, in relation to what he called the "succession area", being the area about which question 2 in the second report sought to elicit the experts' identification of what they agreed and disagreed:

> Kurtijar People evidently regard the **succession country** as their own ancestral domain and in their own minds and their interactions with each other[.] **[I]n my opinion, it is likely that they continue to maintain a spiritual connection with that country even if they do not maintain a physical presence there**.
>
> (emphasis added)

16 He went on to state that those were his provisional opinions on the maintenance of connection. He said that he based those opinions on limited specific information that he had at that point of time relating to the limited areas under discussion and involved considerable supposition and inference.

17 However, by the time that he came to sign the second report, it was Dr Murphy's duty to take into account the views of his colleagues, as well as his own opinions formed on the basis of his research. In the joint statement in answer to question 2, he joined in the unequivocal statement that the Kurtijar People now hold native title rights and interests in the northern and western areas.

18 In my opinion, that statement by an anthropologist giving expert evidence in a native title case in a joint report with his colleagues that had been guided by the Registrars' participation, conveyed his informed agreement with the other experts that the Kurtijar People continue to observe their traditional laws and customs that have existed since before British sovereignty and up to the present day, and that they maintain a connection with the land and waters concerned so as to give them native title rights and interests over those areas.

19 That is certainly how the applicant understood what the joint statement in answer to question 2 reflected when its solicitors prepared, and on 29 April 2019 sent to the active respondents, shortly before the case management hearing on 1 May 2019, a **draft** of a joint statement of agreed facts and substantive issues in dispute as to connection. The draft identified the then remaining substantive issues. Those included the issue of connection in respect of areas *other than* those identified in the joint statement in answer to question 2, and whether the Kurtijar People had succeeded to the rights and interests of the native title holders in those other areas, other than the Gulf Coast parties' pastoral leases, where there is no longer alive any person

who held the original rights and interest. In other words, the draft raised the question whether the Kurtijar People had succeeded to those other holders' native title rights and interests and whether they maintained a spiritual connection with that land and waters. The source of the proposed agreed fact in the draft was the answer to question 2 in the second report.

20 No party at the case management hearing on 1 May 2019 raised any issue that there was a problem with understanding what the experts had agreed, but all the parties recognised that there were issues that would require further evidence if the applicant were to be able to establish at the final hearing that the current dispute between the experts should be resolved in their favour. Because the long wet season had impeded preparation for the hearing, the parties agreed to the trial commencing later on country on 27 August 2019.

21 On 17 May 2019, in the orders that the parties finalised, I gave leave to the applicant permitting the applicant to lead evidence at the on country hearing from other lay witnesses on the connection issue provided that any statements or outlines of evidence of such witnesses were filed on or before 7 June 2019. I allowed the applicant to file any further expert report based on the material concerning the issues that had not been agreed by the experts on or before 19 June 2019. I required, by 19 June 2019, the applicant to file points of claim having regard to the evidence filed in the proceeding including the joint reports. I also ordered that each of the State, the Gulf Coast parties and Stanbroke file its response to the points of claim having regard to the evidence filed in the matter including the joint reports.

22 In the event, the Gulf Coast parties' filed points of defence did not admit that the Kurtijar People held any rights or interests capable of being recognised in any part of the claim area because they could not admit the continuity or acknowledgment and observance of traditional laws and customs by the claim group necessary to maintain traditional rights to country. The Gulf Coast parties' points of defence also contended that the applicant had not established, on the balance of probabilities, that the claim group possessed interests in the claim area in accordance with their traditional laws and customs that were relevant and had not demonstrated that continuity of those native title rights and interests existed. That was similar to the position that Stanbroke took. The applicant then filed its response to those contentions and put them in issue.

How the Gulf Coast parties raised the current issue

23 Ross Perrett, the solicitor for the Gulf Coast parties, said that, on 22 July 2019, the applicant had raised an issue in its reply to his clients' defence as to the meaning and effect of the joint

statement in answer to question 2 in the second report. Mr Perrett's sole explanation for seeking now to adduce Dr Murphy's addendum of 25 July 2019 is that the applicant's reply had raised a dispute.

24 Mr Perrett gave no explanation about why his firm had given instructions to Dr Murphy on 25 July 2019 to prepare his addendum that he made on the same day. The instructions retained Dr Murphy as an expert anthropologist, reminding him of, and attaching, the Court's expert evidence practice note. They identified the agreement that the experts had expressed in the second sentence in the joint statement in answer to question 2 in the second report. Those instructions then asked Dr Murphy as to his understanding "of the nature and extent of the agreement expressed in" what, they said, was the third sentence of that joint statement and requested that he provide a report the same day.

25 Dr Murphy's addendum asserted that at the second conference of experts on 16 April 2019:

> …we were focussed on the issue of succession, and did not give consideration to the issue of ongoing or current connection to country in that context.

26 He asserted that, in the course of the experts' discussion of question 1, the relevance of various ancestors and geographical locations of areas within the succession area became a topic of conversation, and that the experts, clearly enough, had disagreed about what parts in the succession area may or may not still be claimable by the Kurtijar People. He said that:

> …the joint statement in response to Question 2 was, in my mind, a reflection of that disagreement. I understood that we all agreed that **there was no issue of succession relevant to the area depicted in Black and Gilbert's 1996 map**. That was my state of mind when agreeing to the joint answer to Question 2. We were then left to write our own individual responses to the question, which we did in the days following the conference.
>
> (emphasis added)

27 He indicated that he had prepared the addendum in a very brief time and had little time available to consider it due to other commitments. The provision of the addendum led the solicitor for the applicant to obtain a report in response from Dr Martin dated 4 August 2019. Dr Martin explained that the way in which the joint statement in answer to question 2 came about was that the four experts could not agree on a single area in which the Kurtijar People had succeeded to the previous peoples' native title rights and interests, as their answers to question 1 revealed.

He said that he had broadly agreed with Dr Palmer about the scope of the succession area but that after this point, the experts had disagreed on any further joint statement in answer to question 1. Dr Martin said that next they moved to discuss where the Kurtijar People held contemporary rights and interests by reference to particular areas and that had led to their agreement as recorded in the joint statement in answer to question 2. He said:

> Our agreement was not about the historical holding of rights and interests by Kurtjar [sic] [P]eople in that area. It was about the rights and interests they hold today, which question 2 asked us to consider…Registrar Stride recorded the joint statement.

28 Dr Martin said that, at the time of his agreement, he understood the joint statement in answer to question 2 as significant. So he asked the Registrar whether what had been recorded was clear enough to convey what the experts had agreed as to where the Kurtijar People held contemporary rights and interests under their traditional laws and customs in the claim area. Dr Martin did not recall that any of his colleagues expressed any concern about the joint statement. He said none of the other three experts appeared to be confused, coerced or pressured when reaching their agreement on the joint statement in response to question 2.

29 It is apparent that if the Gulf Coast parties are permitted to rely on Dr Murphy's substantial attempt to withdraw his unambiguous agreement as to connection in the joint statement in answer to question 2, that he arrived at with the other experts, the whole of the issue as to whether the applicant has been able to establish connection in relation to the northern and western areas will be live at the hearing. Until receiving the addendum, the applicant had not had to prepare for the hearing in respect of the areas the subject of the joint statement and had prepared only in accordance with the Court's detailed case management orders.

The Gulf Coast parties' submissions

30 The Gulf Coast parties contended that, reading the second report as a whole, what Dr Murphy seeks to add in the addendum is simply to rehearse what they said was already apparent but may have not been so perceived. They argued that question 2 was limited and had to be understood to deal with the current position with respect to succession. They noted that Dr Murphy's 12 March 2019 report expressly qualified the degree of research and persuasion of mind that, at that stage, he had about the rights and interests of the Kurtijar People over the succession area including the northern and western areas (being or including the Gulf Coast parties' pastoral leases) and that the second report, read as a whole, maintained his reservations

in respect of all of the claim area. They submitted that the applicant, itself, had prepared further evidence, including video evidence, taken in respect of the Macaroni area in accordance with the orders of 17 May 2019 and would suffer no prejudice were they allowed to rely on the addendum.

31 The Gulf Coast parties contended that it was open to an expert, as well as a party calling him or her, to supplement an earlier report to clarify or expand on topics that he or she may not have made clear or to deal with further material. They argued that the effect of allowing them to rely on the addendum would be to clarify that question 2 was limited solely to the issue of succession. They submitted that they were not, in any way, seeking to interfere with, or subvert, the overarching purpose in Pt VB of the *Federal Court of Australia Act 1976* (Cth) (***Federal Court Act***), noting that the second report, read as a whole, had left the issues of the Kurtijar People's spiritual connection through knowledge of sites, including their connection to the claim area, in a state of disagreement between the experts.

32 The Gulf Coast parties argued that they had maintained, at all times, that there was an issue about the ability of the applicant to establish the Kurtijar People's connection to all of the claim area and that it would not be appropriate for the Court, in a pre-trial ruling, to deny them the ability to lead evidence from Dr Murphy to qualify what was in the second report so that his true position could be indicated.

33 Stanbroke did not oppose the Gulf Coast parties' application but it did not provide any additional evidence from Dr Brunton on any of the topics. However, it has always been Stanbroke's position that there was an issue as to connection over its pastoral lease of Miranda Downs station and the second report confirmed this. In that circumstance, Stanbroke is still able to maintain that its interests are not affected by the outcome of this application.

Consideration

34 In effect, the Gulf Coast parties are seeking to adduce the addendum so as to enable them to reopen the issue that the joint statement in answer to question 2 in the second report closed, namely, that the Kurtijar People, on the anthropological experts' view, hold native title rights and interests over the northern and western areas, albeit that the experts do not necessarily agree as to the nature and extent of those rights and interests.

35 The principles of case management that are reflected in Pt VB of the *Federal Court Act* are now an established part of the system of administration of justice in Australia. The High Court

has twice endorsed their importance in case management in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 and in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303. Section 37M requires the Court to interpret and apply its rules in a way that best promotes the overarching purpose of the civil practice and procedure provisions, namely to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible.

36 Section 37M(2) identifies, non-exhaustively, the objectives of the overarching purpose. Those include the just determination of all proceedings before the Court, the efficient use of the Court's judicial and administrative resources, the efficient disposal of the Court's overall caseload, the disposal of all proceedings in a timely matter, and the resolution of disputes at a cost proportionate to the importance and complexity of the matters in dispute. As French CJ, Kiefel, Bell, Gageler and Keane JJ held in *Expense Reduction* (250 CLR at 323 [56]-[57]), of an analogue of Pt VB of the *Federal Court Act*, namely Pt 6, Div 1 of the *Civil Procedure Act 2005* (NSW):

> The evident intention and the expectation of the CPA is that the court use these broad powers to facilitate the overriding purpose. Parties continue to have the right to bring, pursue and defend proceedings in the court, **but the conduct of those proceedings is firmly in the hands of the court. It is the duty of the parties and their lawyers to assist the court in furthering the overriding purpose**.
>
> That purpose may require a more robust and proactive approach on the part of the courts. Unduly technical and costly disputes about non-essential issues are clearly to be avoided. However, the powers of the court are not at large and are not to be exercised according to a judge's individualistic idea of what is fair in a given circumstance. Rather, the dictates of justice referred to in s 58 require that in determining what directions or orders to make in the conduct of the proceedings, regard is to be had in the first place to how the overriding purpose of the CPA can be furthered, together with other relevant matters, including those referred to in s 58(2). The focus is upon facilitating a just, quick and cheap resolution of the real issues in the proceedings, although not at all costs. The terms of the CPA assume that its purpose, to a large extent, will coincide with the dictates of justice.
>
> (emphasis added)

37 Ordinarily, where a party seeks to change the substantive direction of a case either by an amendment, a withdrawal of an admission or, in this case, an attempt to qualify or withdraw an agreed statement in a joint expert report arranged and facilitated by the Registrar, an explanation for the change of position and the circumstances in which the change came about should be given to the Court. This is in order that the Court can weigh the explanation against the effects of any delay, the impact of the change of the position on the proceeding and on the

other parties and the objectives in s 37M (see *Aon* 239 CLR at 215 [103] per Gummow, Hayne, Crennan, Kiefel and Bell JJ).

38 Ultimately, the question comes down to what is in the interests of justice. Those interests are informed, but not concluded, by the objectives in s 37M. The Court must weigh up all of the relevant considerations and arrive at a decision that does justice to all of the parties.

39 The expert evidence practice note provides in par 7.5 for a joint conference so as to ensure the efficient hearing of the experts' evidence. And in par 7.6, the practice note requires that, unless the Court otherwise orders, the parties and their lawyers must not involve themselves in a conference of experts or the process. In particular, the parties and their lawyers must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the outcome of the conference of experts. A joint report must be clear, plain and concise and must summarise the views of the experts on the identified issues including a succinct explanation for any differences of opinion (par 7.10).

40 The harmonised expert witness code of conduct, which forms part of the practice note, provides that where an expert witness has provided a report to a party or a party's legal representative or for use in Court and the expert thereafter changes his or her opinion on a material matter, the expert should forthwith provide to the party or the party's legal representative a supplementary report that states the matters set out in the code. That is not what happened here.

41 Dr Murphy appears to have been asked on the invitation of the Gulf Coast parties' solicitors to provide the addendum about what he meant in the clear and unambiguous terms of the joint statement in answer to question 2. There is no evidence as to whether Dr Murphy had ever expressed any concern about what he said in that joint statement or what he meant prior to being instructed on 25 July 2019 to provide his addendum.

42 In *Ansell Healthcare Products LLC v Reckitt Benckiser (Australia) Pty Ltd (No 2)* [2016] FCA 765 at [49]-[57], I considered the application by a party to withdraw an admission and its impact on the overarching purpose. Here, of course, the Gulf Coast parties have not made an admission and, indeed, wish, steadfastly, to maintain their opposition to the Kurtijar People's claim.

43 The purpose of the joint experts' conferences and reports is to enable the Court to have the assistance of a joint position, expressed by independent experts after discussion among them,

unaffected by the views of parties who retain them. Those conferences and reports enable the experts to express their opinions in accordance with their overriding obligation to the Court as to the matters about which they agree and those on which they disagree. This ensures that the Court will be informed as to the real issues in the expert evidence that it will need to resolve.

44 Here, I am not satisfied that there was any basis to think that Dr Murphy misunderstood, or was misled about, what he agreed with the other experts in the joint statement in answer to question 2 in the second report. That joint statement, in plain English, responded to a simple question, also in plain English, and it is unambiguous. Dr Murphy had the opportunity to read the draft of the second report after that draft recorded the agreed position in the joint statement and he also had the opportunity to correct or supplement it with what he wished to say in elaboration of the matters in the draft on which he disagreed before signing the second report.

45 The parties appear to have proceeded on the basis, thereafter, that the joint statement in answer to question 2 limited the areas in respect of which the experts remained at issue to places other than the Gulf Cost parties' pastoral leases. That was so although the Gulf Coast parties continued to seek to oppose any finding that there were native title rights and interests over the northern and western areas, despite whatever the experts may have agreed. They relied on what they said was a principle that emerged from the decision of the Court of Appeal of the Supreme Court of New South Wales in *Salzke v Khoury* (2009) 74 NSWLR 580. There Ipp JA, with whom Basten JA and Gzell J agreed, noted that the then New South Wales version of what has developed into the harmonised expert witness code of conduct (that is now replicated in this Court's expert evidence practice note) was based on the discussion of the nature of expert evidence in *National Justice Compania Naviera SA v Prudential Assurance Company Limited (The "Ikarian Reefer")* [1993] 2 Lloyd's Rep 68. Ipp JA said (at 591 [63]):

> [t]he report should be construed benevolently and not as if it were a pleading or an affidavit or even a statement of a witness prepared by a lawyer.

46 He said that the Court could allow an expert to provide additional report or reports to clear up any misunderstanding that may arise from a construction of his or her earlier report or reports lest the expert be misunderstood (*Salzke* 74 NSWLR at 591 [63] and 598 [109]). No doubt, as a general principle, that is so. However, their Honours' remarks must be understood in the context that they were dealing with a bespoke rule of Court that required the original report,

that the expert later sought to clarify, to be served with the statement of claim when commencing the proceeding. That is a far cry from the present situation.

47 In *Samsung Electronics Co. Limited v Apple Inc.* [2013] FCAFC 138 at [44], Jacobson, Flick and Griffiths JJ said that, in determining whether or not to allow a party to adduce further evidence on points at a late stage in a proceeding, a court can have regard to the failure to give a reason for the delay in bringing the evidence forward earlier and the probative value of the material.

48 In my opinion, it would not be in the interests of justice or consistent with the overarching purpose in Pt VB of the *Federal Court Act* to permit the Gulf Coast parties to throw open the clear and unambiguous agreement of the experts in the joint statement in answer to question 2 of the second report. Their defence sought to take issue with that agreement after the experts made the second report, hence the applicant's reply that relied on the joint expert position.

49 Moreover, they have given no explanation as to why Dr Murphy had subsequently come to any different view in the three months after his signing the second report on 24 April 2019 when he had acknowledged that he had reached his view in light of what he and his fellow experts had discussed with one another, among other matters, having had regard to each other's views and expertise. That is, ordinarily, the case when experts are able to discuss matters in a neutral environment.

50 What is striking in Mr Perrett's affidavit is the absence of any explanation as to how he or his firm came to issue the letter of instructions to Dr Murphy. He gave no evidence about what, if anything, had occurred that would cause those instructions to be given, other than identifying that the applicant appeared to be on fairly solid ground in suggesting, in the draft (joint statement of agreed facts and substantive issues in dispute) that there was no anthropological evidence of a dispute about the holding of native title in the northern and western areas. Indeed, that position had been plain since the parties received the second report three months earlier, as Dr Martin's evidence confirmed.

51 I have had regard to the hearing being so close in time to the attempt to rely on the addendum, and the difficulties the applicant has encountered in obtaining access to parts of the claim area that appear (on my impressionistic understanding) to be jealously guarded by, at least, the Gulf Coast parties to the point where, earlier, I almost had to resolve disputes about allowing the applicant to go on parts of the claim area to prepare its evidence.

52 It would not be appropriate, at this late stage of the proceeding, to allow the Gulf Coast parties to raise anew the issue that the joint statement in answer to question 2 had resolved. To do so would require the applicant to undertake a very substantial amount of work and preparation, including revising what it had done on the faith of the agreed expert position, to deal with an issue that, for the last three months, it was entitled to consider was no longer in play. That has led the applicant to direct its energies to the preparation of other aspects of the case.

53 Moreover, it is not in the interests of justice to allow a party to seek to reopen an agreement between the experts in a joint report prepared under the supervision of Registrars of the Court in a joint conference.

Conclusion

54 In those circumstances, I am not satisfied that it would be in the interests of justice to allow the addendum to be filed or served. The interlocutory application dated 31 July 2019 must be dismissed.

I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate: 

Dated: 15 October 2019

SCHEDULE OF PARTIES

QUD 483 of 2015

Respondents

Fourth Respondent:	MAREEBA SHIRE COUNCIL
Fifth Respondent:	ERGON ENERGY CORPORATION LIMITED ACN 087 646 062
Sixth Respondent:	DORUNDA STATION PTY LTD (ACN 111 342 468)
Seventh Respondent:	STANBROKE PTY LTD ACN 008 442 939
Eighth Respondent:	STIRLING LOTUS VALUE STATION PTY LTD (ACN 164 248 597)
Ninth Respondent:	VANROOK STATION PTY LTD ACN 128 492 679 ATF THE VANROOK TRUST ABN 88 585 397 383