FEDERAL COURT OF AUSTRALIA

Singleton on behalf of the Yirrganydji Peoples v State of Queensland (No 2)

[2021] FCA 1350

File numbers:	QUD 14 of 2019 QUD 337 of 2015
Judgment of:	**CHARLESWORTH J**
Date of judgment:	3 November 2021
Catchwords:	**NATIVE TITLE** – application for orders under s 31A(2) of the *Federal Court of Australia Act 1976* (Cth) for the summary dismissal of two native title determination applications in part – alternate application for orders under r 28.67(1)(e) of the *Federal Court Rules 2011* (Cth) dismissing the native title applications in part as a consequence of the Court's adoption of a referee report – native title applications untenable in part by virtue of the adoption of the referee report – consideration of the appropriate power to exercise in the circumstances of the case – claims dismissed in part under r 28.67(1)(e)
Legislation:	*Federal Court of Australia Act 1976* (Cth) ss 31A, 54A *Native Title Act 1993* (Cth) s 67 *Federal Court Rules 2011* (Cth) rr 28.61, 28.67
Cases cited:	*Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd (No 2)* [2018] FCA 978 *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* (2008) 167 FCR 372 *Rogers v Asset Loan Co Pty Ltd* [2008] FCA 1305; 250 ALR 82 *Singleton on behalf of the Yirrganydji Peoples v State of Queensland* [2021] FCA 316
Division:	General Division
Registry:	Queensland
National Practice Area:	Native Title
Number of paragraphs:	30

Date of hearing:	28 October 2021

QUD 14 of 2019

Counsel for the Applicants:	Mr D O'Gorman SC with Ms A English
Solicitor for the Applicants:	Atherton Tablelands Law
Counsel for the First Respondent:	Ms M Barnes with Ms A Wilson
Solicitor for the First Respondent:	Crown Law
Counsel for the Second and Third Respondents:	Mr M Wright
Solicitor for the Second and Third Respondents:	Preston Law
Counsel for the Fourth, Fifth, Sixth and Eighth Respondents:	Ms S Addo
Counsel for the Ninth and Tenth Respondents:	Mr D Yarrow
Solicitor for the Ninth and Tenth Respondents:	P & E Law

QUD 337 OF 2015

Counsel for the Applicant:	Mr D O'Gorman SC with Ms A English
Solicitor for the Applicant:	Atherton Tablelands Law
Counsel for the First Respondent:	Ms M Barnes with Ms A Wilson
Solicitor for the First Respondent:	Crown Law
Counsel for the Second Respondent:	Mr G Kennedy
Solicitor for the Second Respondent:	Australian Government Solicitor
Counsel for the Third and Fourth Respondent:	Mr M Wright

Solicitor for the Third and Fourth Respondent:	Preston Law
Counsel for the Eighth Respondent:	Mr D Yarrow
Solicitor for the Eighth Respondent:	P & E Law

ORDERS

QUD 14 of 2019

BETWEEN:	**JEANETTE SINGLETON, KERRI SHEPPARD AND GEORGE SKEENE ON BEHALF OF THE YIRRGANYDJI PEOPLES #1** Applicant
AND:	**STATE OF QUEENSLAND** First Respondent
	CAIRNS REGIONAL COUNCIL Second Respondent
	DOUGLAS SHIRE COUNCIL (and others named in Schedule A) Third Respondent

ORDER MADE BY: **CHARLESWORTH J**

DATE OF ORDER: **3 NOVEMBER 2021**

THE COURT ORDERS THAT:

1. The originating application be dismissed pursuant to r 28.67(1)(e) of the *Federal Court Rules 2011* (Cth) insofar as it relates to the area of land and waters delineated as "Part B" in the bundle of maps and descriptions marked "MFI-Y1 map" as noted in the orders made on 2 August 2021.
2. On or before 24 November 2021 the applicant is to file and serve a further amended Form 1 that:
   (a) amends Schedules B and C to remove the Part B area;
   (b) includes such corresponding or incidental amendments as are necessary to give effect to (a).

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

ORDERS

QUD 337 of 2015

BETWEEN:	**JEANETTE SINGLETON, KERRI SHEPPARD AND GEORGE SKEENE ON BEHALF OF THE YIRRGANYDJI PEOPLES #2** Applicant
AND:	**STATE OF QUEENSLAND** First Respondent
	COMMONWEALTH OF AUSTRALIA Second Respondent
	CAIRNS REGIONAL COUNCIL (and others named in Schedule B) Third Respondent

ORDER MADE BY: **CHARLESWORTH J**

DATE OF ORDER: **3 NOVEMBER 2021**

THE COURT ORDERS THAT:

1. The originating application be dismissed pursuant to r 28.67(1)(e) of the *Federal Court Rules 2011* (Cth) insofar as it relates to the area of land and waters delineated as "Part B" in the bundle of maps and descriptions marked "MFI-Y2 map" as noted in the orders made on 2 August 2021.

2. On or before 24 November 2021 the applicant is to file and serve a further amended Form 1 that:

   (a) amends Schedules B and C to remove the Part B area;

   (b) includes such corresponding or incidental amendments as are necessary to give effect to (a).

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

REASONS FOR JUDGMENT

CHARLESWORTH J

1 These two native title claimant applications are made on behalf of the Yirrganydji People under the *Native Title Act 1993* (Cth) (NT Act). They relate to an area of land and waters in the vicinity of the city of Cairns in northern Queensland. The claims may be referred to as "Yirrganydji No 1" (QUD337/2015) and "Yirrganydji No 2" (QUD14/2019). The applicants in the two proceedings will be referred to together as the Yirrganydji Applicant.

2 The two claims are among a number of overlapping native title determination applications affecting the same region. The other claims are those brought on behalf of the Gimuy Walubara Yidinji People (QUD23/2019) (GWY Claim), the Cairns Regional Claim Group (QUD692/2016) and the Kunggandji Gurrabuna People of Kamoi (Kimoi or Kumuy) (QUD21/2019) (KGP Claim). The **State** of Queensland is the first respondent to each of the claims. Together with these proceedings, they will be referred to collectively as the Cairns proceedings.

3 The Court has before it two interlocutory applications for orders dismissing Yirrganydji No 1 and Yirrganydji No 2 in part and a further interlocutory application seeking to have the whole of both claims struck out in their entirety.

4 For the reasons that follow, on the application of the State (as varied in the course of submissions) the Court will make orders under r 28.67(1)(e) of the *Federal Court* ***Rules*** *2011* (Cth) dismissing Yirrganydji No 1 and Yirrganydji No 2 in part.

BACKGROUND

5 On 22 May 2019, the applicants in the Cairns proceedings and certain Aboriginal respondents entered into an agreement titled "Protocol Deed". Pursuant to that agreement, they approached the Court for orders providing for the referral of questions under s 54A(1) of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) and r 28.61 of the Rules. On 5 April 2019, Robertson J made orders by consent in each of the Cairns proceedings in terms consented to by the parties. The referred questions were expressed as follows:

> 1. Immediately before the acquisition of sovereignty, what group or groups held native title rights and interests in the specified area outlined in the map attached to this Annexure as Attachment 1?
>
> (In answering that question, have particular regard to the area that is subject to

an overlap between the proceedings QUD23/2019, QUD14/2019, QUD337/2015, and part of QUD21/2019, and consider the relevance, if any, of a moiety system at the time immediately before sovereignty and the possible existence of any regional society. If more than one group is found to have interests in the specified area, then identify the relevant areas on a map.)

2. What was the normative system of law and custom pursuant to which that landholding group or those landholding groups held native title rights and interests?

3. If the normative system of law and custom was based on filiation, which particular individuals are likely to have occupied the specified area at a time closest to the acquisition of sovereignty (the apical ancestors)?

   (In answering the question, identify the particular individuals earliest in time for whom evidence of occupation of the specified area exists, and identify which landholding group or groups they belonged to.)

6 The area referred to in the first question is known in the Cairns proceedings as the "study area".

7 The referees prepared a report dated 6 March 2020 (the Report), and provided it to the Court. Schedule 21 to the Report is a map of the study area (the findings map), which graphically depicts the referees' conclusions as to which groups held native title rights and interests in which parts of the study area at sovereignty. The findings map depicted an area that the referees concluded was occupied at sovereignty by Yirrganydji Patriclans.

8 The referees' conclusions were adverse to the Yirrganydji Applicant to the extent that the Yirrganydji Patriclans' land depicted in the findings map did not encompass southern portions of the claim areas in Yirrganydji No 1 and Yirrganydji No 2, particularly those parts encompassing the city of Cairns and an area to the south of the city.

9 After a contested hearing, on 1 April 2021 the Court made orders pursuant to r 28.67(1)(a) of the Rules in each of the Cairns proceedings adopting the whole of the Report for the purpose of resolving the questions that had been referred to the referees: ***Singleton*** *on behalf of the Yirrganydji Peoples v State of Queensland* [2021] FCA 316.

10 The effect of the Court's order is to adopt the conclusions of the referees in the resolution of a substantive question: *Singleton* at [104] and [173]. The answers to those questions are fatal to the claims made in Yirrganydji No 1 and Yirrganydji No 2 insofar as the claim areas asserted in those proceedings are not included in the Yirrganydji Patriclans depicted on the findings map.

11 The Court has since requested the National Native Title Tribunal to prepare detailed maps and other materials depicting claim areas in Yirrganydji No 1 and Yirrganydji No 2 in a way that enables consequential orders to be made. They are:

(1) a bundle of maps and descriptions marked for identification "MFI-Y2 map" partitioning the claim area in Yirrganydji No 1 into two parts named "PART A" and "PART B"; and

(2) a bundle of maps and descriptions marked for identification "MFI-Y1 map" partitioning the claim area in Yirrganydji No 2 into two parts named "PART A" and "PART B".

12 In each case, the claim in respect of areas named PART B (the Part B areas) cannot be maintained in light of the Court's adoption of the Report.

SECTION 67

13 The claim areas in Yirrganydji No 1 and Yirrganydji No 2 partially overlap the area covered by the GWY Claim (both as originally alleged and as recently amended). The claim areas are also wholly overlapped by the area covered by the KGP Claim (which encompasses the entire study area).

14 Section 67 of the NT Act provides that if two or more proceedings before the Court relate to native title applications that cover (in whole or in part) the same area, the Court must make such orders as it considers appropriate to ensure that, to the extent that the applications cover the same area, they are dealt with in the same proceeding. The Court may provide that different parts of the area covered by an application are to be dealt with in separate proceedings.

15 In recent years, the proceedings collectively referred to as the Cairns proceedings have proceeded by way of concurrent hearings of separate actions. Following the Court's order adopting the Report, the applicants in each of the Cairns proceedings were afforded the opportunity to amend their claims so that the respective claim areas would accord with the conclusions stated in the adopted Report so eliminating the overlaps. Neither the Yirrganydji Applicant nor the applicant in the KGP Claim have amended their claims.

16 On 2 August 2021, the Court made orders in each of these two proceedings granting leave to any party to (relevantly) the GWY Claim and the KGP Claim to file and serve an application to strike out or dismiss the originating applications in Yirrganydji No 1 and Yirrganydji No 2 in whole or in part. The applicants in the GWY Claim and KGP Claim have each exercised that grant of leave. In my view, those applications can and should be heard and determined on

their substantive merits before consideration is given to an order under s 67 of the NT Act in respect of any remaining overlap. The applicants in the GWY Claim and the KGP Claim have asserted an interest in advancing their interlocutory applications and the Yirrganydji Applicant has not submitted that they cannot do so without a s 67 order first being made or without otherwise being formerly joined as parties in the one action. The applicants in the GWY Claim and KGP Claim have been granted leave to be heard within the Yirrganydji No 1 and Yirrganydji No 2 proceedings for that purpose.

17 In any event, the orders to be made are those sought on interlocutory applications filed by the State in Yirrganydji No 1 and Yirrganydji No 2 as the first respondent in those proceedings. Those orders will have the effect of eliminating the overlap between the claims in Yirrganydji No 1 and Yirrganydji No 2 on the one hand, and the GWY Claim on the other.

18 The question of whether the remaining overlap with the KGP Claim should necessitate s 67 orders being made at this stage of the proceeding may be deferred to a hearing of separate applications affecting the future prosecution of the KGP Claim.

APPLICATIONS OF THE STATE AND THE GWY APPLICANT

19 The State seeks orders to the effect that the Yirrganydji No 1 and Yirrganydji No 2 proceedings be summarily dismissed pursuant to s 31A(2) of the FCA Act insofar as they relate to areas of land and waters delineated as "Part B" in the bundles of maps and descriptions marked MFI-Y2 and MFI-Y1 respectively. Consequential orders are sought for the filing of amended originating processes retracting the claim areas in accordance with the order.

20 Section 31A of the FCA Act provides that the Court may give judgment against a party in whole or in part if the Court is satisfied that the party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding. Section 31A(3) provides that a proceeding or part thereof need not be "hopeless" or "bound to fail" for it to have no reasonable prospect of success. A reasonable prospect of success is one which is real, not fanciful or merely arguable: *Rogers v Asset Loan Co Pty Ltd* [2008] FCA 1305; 250 ALR 82, Logan J (at [41]). As the State correctly submits, if a *prima facie* case in support of summary judgment is established, the onus shifts to the opposing party to point to some factual or evidentiary issues making a trial necessary: *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* (2008) 167 FCR 372, Gordon J (at [127]), cited in *Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd (No 2)* [2018] FCA 978, McKerracher J (at [3]).

21 The State's submission is that the claims in respect of the Part B areas are factually untenable as a consequence of the Court's order adopting the Report. I accept that submission. In that respect, I observe that the Yirrganydji Applicant has not made an application (previously foreshadowed) that the adoption of the Report did not preclude an amended claim alleging native title rights and interests in the Part B area acquired by a process of succession: see *Singleton* at [108] – [109]. Counsel for the Yirrganydji Applicant has confirmed that no such application is to be made. Counsel has informed the Court that the Yirrganydji Applicant disagrees with the factual conclusions expressed in the Report, but nonetheless acknowledges the legal consequences that follow from the Court's adoption of it.

22 The interlocutory application filed on behalf of the applicant in the GWY Claim also seeks orders dismissing the Yirrganydji No 1 and Yirrganydji No 2 proceedings insofar as the claims include the Part B areas. However, it was submitted that the appropriate source of power is that conferred under r 28.67(1) of the Rules. It provides:

> (1) After a report has been given to the Court, a party may, on application, ask the Court to do any of the following:
>
> (a) adopt, vary or reject the report, in the whole or in part;
>
> (b) require an explanation by way of a further report by the referee;
>
> (c) remit on any ground, for further consideration by the referee, the whole or any part of the matter that was referred to the referee for inquiry and report;
>
> (d) decide any matter on the evidence taken before the referee, with or without additional evidence;
>
> (e) give judgment or make an order in relation to the proceeding or question.

23 In *Singleton*, I exercised the power in r 28.67(1)(a). That order was justified in part because the parties to the Protocol Deed had agreed not only to submit to the referral procedures (conducted by the referees of their choosing), but also because they had agreed that in their capacities as applicants in the Cairns proceedings, they would amend their originating applications in a manner consistent with the conclusions of the referees' Report: *Singleton* at [14] and [49].

24 It appears to the Court that if the Protocol Deed had operated in accordance with its terms, the overlaps would have resolved in the performance of the parties' contractual obligations, without the need for judicial intervention either under r 28.67(1)(a) of the Rules.

25 Whatever be the terms of the Protocol Deed, an order under r 28.67(1)(e) is now justified on the basis that the Court's adoption of the Report has the legal effect that the claims in Yirrganydji No 1 and Yirrganydji No 2 cannot succeed in respect of the Part B areas in any event.

26 I am satisfied that it is appropriate to exercise the power under r 28.67(1)(e) as that is the mechanism that best reflects the procedural history and the choices made by the parties in the litigation. An order under that rule reflects the circumstance that the claims are dismissed in part on their substantive merits because a critical question has been resolved against the Yirrganydji Applicant as a consequence of the referral procedures to which it submitted.

27 In the course of submissions, Counsel for the State acknowledged that orders could be made under r 28.67(1)(e). That submission may be received as an unopposed application to vary the relief sought on the State's interlocutory applications, so as to rely on the rule as an alternative source of power. I will make orders under the rule on the State's applications so as to avoid any unnecessary argument that might conceivably arise as to the standing of any other person to move the Court for the same relief in the within proceedings.

APPLICATION OF THE KGP APPLICANT

28 The orders made in relation to the Part B areas do not resolve the circumstance that the Part A areas presently remain wholly overlapped by the KGP Claim.

29 By an interlocutory application filed on 7 September 2021, the applicant in the KGP Claim (represented by a non-lawyer, Ms Sarah Addo) seeks an order that the Yirrganydji No 1 and Yirrganydji No 2 proceedings be struck out in their entirety. The submissions in support of that application included contentions to the effect that the conclusions expressed in the Report are factually wrong. The reasons for adopting the Report over opposition of the applicant in the KGP Claim are explained in *Singleton* at [115] – [172] and will not be repeated here.

30 A consequence of the Court's adoption of the Report is that the referred questions have been resolved in favour of the Yirrganydji Applicant in respect of the Part A areas. Ms Addo has identified no tenable basis, consistent with the Courts order adopting the Report, for striking out the Yirrganydji No 1 and Yirrganydji No 2 proceedings in their entirety. Accordingly, I

will not make the order sought on the interlocutory application filed by the applicant in the KGP Claim.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Charlesworth.

Associate:

Dated: 3 November 2021

SCHEDULE OF PARTIES A

QUD 14 of 2019

Respondents

Fourth Respondent:	CHARLES KORNELL ADDO
Fifth Respondent:	SAM ADDO
Sixth Respondent:	SARAH ADDO
Seventh Respondent:	DJABUGAY NATIVE TITLE ABORIGINAL CORPORATION RNTB
Eighth Respondent:	BERNICE CAROLE DWYER
Ninth Respondent:	SEITH HARDY FOURMILE
Tenth Respondent:	HENRIETTA LILIAN MARRIE
Eleventh Respondent:	DESLEY UNDERWOOD
Twelfth Respondent:	LEE YEATMAN
Thirteenth Respondent:	ERGON ENERGY CORPORATION LIMITED ACN 087 646 062
Fourteenth Respondent:	FAR NORTH QUEENSLAND PORTS CORPORATION LIMITED

SCHEDULE OF PARTIES B

QUD 337 of 2015

Respondents

Fourth Respondent:	DOUGLAS SHIRE COUNCIL
Fifth Respondent:	DOREEN BALL
Sixth Respondent:	ROSS BOYLE
Seventh Respondent:	ALFRED DIAMOND
Eighth Respondent:	SEITH HARDY FOURMILE
Ninth Respondent:	VERONA KAY FULERTON
Tenth Respondent:	VINCENT MARK HILTON MUNDRABY
Eleventh Respondent:	PATRICK DANIEL MICHAEL O'SHANE
Twelfth Respondent:	NEVILLE RYAN
Thirteenth Respondent:	FAR NORTH QUEENSLAND PORTS CORPORATION LIMITED (TRADING AS PORTS NORTH) ACN 131 836 014
Fourteenth Respondent:	TELSTRA CORPORATION LIMITED