HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	P23/2026
File Title:	Yanunijarra Aboriginal Corporation RNTBC & Ors v. State of
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **Yanunijarra Aboriginal Corporation RNTBC**

First Appellant

Walalakoo Aboriginal Corporation RNTBC

Second Appellant

Malarngowem Aboriginal Corporation RNTBC

Third Appellant

10 **Kimberley Land Council Aboriginal Corporation**

Fourth Appellant

and

State of Western Australia

Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

2. **Facts**: Summary judgment was given (and affirmed) that inclusion in a notice under s 29 of the *Native Title Act 1993* (Cth) (**NTA**) of a statement that the Government party considers a future act is an act attracting the expedited procedure (s 237) is not amenable to judicial review under the ADJR Act or s 39B of the *Judiciary Act 1903* (Cth) and ss 21, 23 of the *Federal Court of Australia Act 1976* (Cth): PJ[8]; FC[53], [76].

3. The native title parties' case for trial is that in including an expedited procedure statement the State did not perform the task required by ss 29(7) and 237; in particular, it applied a policy that is inconsistent with the Act's requirements, or failed to consider if the s 237 criteria were met, or failed to do so reasonably, on a correct understanding of the law, on the basis of some material: see second YAC notice (**AFM198**) re EL80/5931; proposed amended originating application (**AFM184**) [3] and concise statement (**AFM191**) [7]-[8], [11A]-[12], [15A], [24A]-[24B]; PJ[90]-[96], [177]-[178], [181]; Cocksey affidavit (**AFM 43**) [34]-[44], [57], [63], [69], [78]-[81], risk matrix (**AFM85**); Toohey affidavit (**AFM161**) [62]-[67], map (**AFM210**); Tromp affidavit (**AFM142**) [11], [56]-[71].

4. The **constructional issue**, which the Full Court called the "legal premise", is whether the inclusion of an expedited procedure statement in a s 29 notice so as to invoke s 32 is conditioned by a Government party's consideration of the s 237 criteria: FC[73].

5. **Statutory architecture**: In the case of certain *future acts* (s 233) within Pt 2 Div 3 that pass the freehold test (s 24MB), for the acts to be *valid* (s 253) and extinguish or impair native title (s 24MD) it is also necessary to comply with the procedures in Sub-div P: ss 24AA(5), 24MD(1), 25(4). By s 28(1), an act to which Sub-div P applies "is invalid to the extent it affects native title unless, before it is done, the requirements of one" of pars (a) to (h) of s 28(1) are satisfied. By s 29(1), "[b]efore the act is done, the Government party must give notice of the act in accordance with" s 29, and s 29(7) provides that:

> The notices under this section may include a statement that the Government party considers the act is an act attracting the expedited procedure.

If a notice includes a statement under s 29(7), the expedited procedure (s 32) applies in place of the normal negotiation procedure (s 31), which affects how s 28(1) may be satisfied: s 28(1)(c) to (h) (if there is a native title party). A future act is an act *attracting the expedited procedure* (s 237) if it "is not likely" to (a) interfere with the community or

social activities of the native title holders, (b) interfere with sites of particular significance to the native title holders, (c) involve major disturbance of the land or waters concerned.

6. **Construction**: While accepting that to include a statement under s 29(7) is "a decision of some kind" that "triggers certain statutory consequences" (FC[61]-[62]), the Full Court reasoned that it is not reviewable as it does not involve a "substantive determination" of whether the act attracts the expedited procedure and is not conditioned by a Government party's consideration of the s 237 criteria: FC[63]-[65], [71], [74]. That jars with:

   (1) ss 29(7) and 237 being expressed as an evaluative discretion ("may", "considers", "not likely") and by which a Government party states (represents) its view on s 237;

   (2) the effect of the decision under s 29(7) to invoke s 32 and displace the normal negotiation procedure in s 31 as the pathway to s 28 by which native title will be extinguished or impaired (s 24MD) (and see [9] below);

   (3) the evident object that negotiation about doing an act that will affect the interests and traditions of native title holders (as a RDA special measure: NTA Preamble) is not required if the act is not likely to have the effects in s 237, attained by the mechanism that a Government party may state in the notice that it considers the act is not likely to have those effects: AS[30], [44].

7. The procedure, to be *expedited*, depends upon a Government party first observing the s 237 criteria, minimising objection. Constructional choice would not favour avoiding administrative inconvenience at the expense of native title: *Forrest & Forrest* (2017) 262 CLR 510, [63], [77], [84]-[88] **JBA4/16** cf RS[44]; FC[67]. The NTA does not reveal an intention that in a case where there is no objection (as here on the second YAC notice), native title would be extinguished or impaired via ss 28(1)(c), 29(7) and 32(2) without any consideration of the effects in s 237 by the Government party concerned.

8. If s 29(7) requires consideration of the s 237 criteria, to include an expedited procedure statement without doing so has no legal effect to apply s 32 as the notice has not been given "in accordance with" s 29 and conformity with the code set by Div 3 is essential to validly affect native title: ss 11, 24MD(1), 24OA, 28; *Native Title Act Case* (1995) 183 CLR 373, 453, 468-72 **JBA5/23**. The s 29(7) statement would not be within the ambit of s 32 through which the terminal points in s 28(1)(c), (d) or (e) can be reached. By s 28(1), the proposed act (to grant EL80/5931) "is invalid to the extent that it affects native title unless, before it is done", the requirements of one of pars (f), (g) or (h) are satisfied via s 31. Alternatively, if a notice cannot be read to exclude such a statement (PJ[158] cf

s 32(5)), non-compliance with the means for validation may result in the act being unable to be done, at least to affect native title (*Yanunijarra* (2020) 276 FCR 53, [93] **JBA6/31**), absent agreement of the native title holders (ss 24AA(3), 24EB(1)(c), 26(2)(a)) (or a Government party may commence the process afresh).

9. **Reviewable**: If the legal premise is made good (see [4]), general law declaratory relief that an exercise of the power in s 29(7) has miscarried, and does not engage s 32, would be open: AS[49]; FC[74] cf RS[53]. As for ADJR review, the Full Court treats inclusion of a statement under s 29(7) as a "procedural step" and not a "substantive determination", reasoning the latter is done by the Tribunal upon objection: FC[62]-[65]. But as the NTA provides for inclusion of an expedited procedure statement by a Government party (s 29(7)) and the consequences of how an act can then be done (s 32) that, if done, will defeat native title (ss 24MD, 28), the *Tang* criteria are met: *Fuller* (2024) 282 CLR 646, [16] **JBA4/17**; *Tang* (2005) 221 CLR 99, [76] **JBA4/18**; AS[50]; AR[10]. What a Government party does under s 29(7) controls how the act can be done to validly affect native title: cf *Tang* [87]. And in the case of s 28(1)(c), that is done by the Government party's decision under s 29(7) to invoke s 32, which does not turn on whether the act in fact attracts the expedited procedure, and in that instance there is no determination of that (or any) question by the Tribunal: cf FC[63]-[66], [71]; RS[30]-[31], [38].

10. The State accepts that some (unspecified) "executive conduct associated" with s 29(7) might be reviewable, yet propounds that consideration of the s 237 criteria does not condition the efficacy of the inclusion of an expedited procedure statement: RS [15], [17], [52]-[53]. But if some executive action is reviewable, the mere fact of a statement cannot be conclusive of whether s 32 applies: AR[8] cf RS[52]; PJ[10], [139], [145]. And if reviewable, including an expedited procedure statement under s 29(7) to invoke s 32 is to be done reasonably within the limits set by subject matter, scope and purpose: AS[43]; AR[7]; *Li* (2013) 249 CLR 332, [23], [72], [90] **JBA4/20**. This (usual) implied condition accords with the legislative object (see [6]) and the default position (the *normal* negotiation procedure) that a Government party negotiate in good faith and have regard to the effects of the act on the interests and traditions of the native title holders (ss 31, 35, 39) that effectuate the presumption that governments deal fairly with Indigenous peoples: AS[44]; *Brownley* (1999) 95 FCR 152, [18], [21], [24] **JBA6/25**.

10 November 2026

Sturt Glacken **Emrys Nekvapil** **Tessa Herrmann**