HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

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

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

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
Kimberley Land Council Aboriginal Corporation
Fourth Appellant

and

State of Western Australia
Respondent

RESPONDENT'S 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

The statutory procedures

2. The Act establishes a comprehensive regime by which future acts may be validly done. That regime is set out in Part 2, Division 3 of the Act and is directed to the objects of protecting native title and prescribing ways in which acts may be validly done that affect native title: **RS [16]-[18]**.

3. Subdivision P is concerned with the right to negotiate and prescribes a series of procedures that determine whether, and how, a relevant future act may be validly undertaken. The relevant provisions include ss 28, 29, 31, 32, 237 of the NTA**.** The Respondent's oral submissions will address that statutory scheme: **RS [23]-[36]**.

The Act does not impose the pleaded duty

4. The use of "considers" in s 29(7) does not carry the usual legal requirements for forming a statutory opinion (cf **AS [29]-[35], [42]-[44]; Reply [3]-[4], [7]**). Properly construed, that is not what ss 29, 31 and 32 require the Government party to do.

5. Section 29(7) permits for a statement of a view, made at the commencement of the notification process, while s 32(4) requires the Tribunal to determine whether the criteria in s 237 are satisfied only if an objection is made.

6. Sections 31 and 32 provide different procedural routes and defines when those routes are engaged. A conclusion that there is an anterior obligation, unstated in the provisions, to be satisfied before the first step in the procedural pathway would be surprising.

7. The surrounding provisions turn on **inclusion** of the statement and not an anterior assessment undertaken by the Government party prior to the giving of a notice containing the s 29(7) statement. The extrinsic materials support this construction: Explanatory Memorandum, Native Title Bill 1997, **[20.24] (JBA, Tab 32, p 1894).**

8. The Appellants' alleged duty duplicates the task of the Tribunal and fails to account for the distinction between the function of a s 29(7) statement and a Tribunal determination: *Cheinmora v Striker Resources NL; Dann v Western Australia* (1996)

142 ALR 21, 41, 42 (**JBA, Tab 26, pp 1515, 1516)**; **RS [43]**). The Act preserves that distinction and expressly regulates fairness in the Tribunal inquiry: Act, ss 75, 139, 141, 142, 151 and 152 (**JBA, Tab 3, pp 279, 382-385, 388-389**). That distinction is also recognised in *Holt v Manzie* (2001) 114 FCR 282, [22]-[25] (**JBA, Tab 28, pp 1540-1541**); **RS [38], [40]**); FC [63]-[72] (**CAB, Tab 4, pp 109-111**).

9. The right to negotiate is an important protection for native title and is comprised of all its parts. It provides a process to address the effects of the proposed act. It is the process Parliament has determined to apply in protecting native title and establishing the ways in which future dealings may validly affect native title. A different conclusion is not demanded, or supported, by *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 or *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332. *Connell* identifies what may ordinarily be required where statute makes the formation of an opinion a condition of exercising a power but does not establish that s 29 imposes such a condition here. *Li* starts from the presumption that a statutory discretionary power is conditioned by legal reasonableness: at [23]-[25], [63], [67], [92] (**JBA, Tab 20, pp 1165-1166, 1179, 1181, 1188**). The nature and statutory context of the function under s 29(7) is against that presumption.

10. The Appellants' construction creates uncertainty as to the legal basis for proceeding to do a proposed act and is not consistent with the Parliament's intention. Such consequences tend to suggest the Respondent's construction, which does not raise uncertainty, is to be preferred: *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297, 300, 302-304, (**separately provided authority**).

Reviewability does not establish an invalid or ineffectual statement

11. Whilst including a s 29(7) statement will displace the normal negotiation procedure from immediately applying to a particular act, that procedure may be restored by the statutory scheme. The Act attaches that effect to the fact of the inclusion of the statement, not to a determination by the Government that s 237 is satisfied: FC [61]-[67] **CAB, Tab 4, pp 108-110**. Procedural consequences do not establish a substantive determination: *Australian Broadcasting Corporation v Bond* (1990) 170 CLR 321, 337, 339 (**JBA, Tab 14, pp 866, 868**). *Griffith University v Tang* (2005) 221 CLR 99 identifies two requirements for a decision to be made under an

"enactment" at [89] (**JBA, Tab 18, pp 1055-1056**). It does not displace *Bond*: *Tang* at [59]-[61], [64] (**JBA, Tab 18, pp 1046-1048**).

12. The consequences attached by ss 31 and 32 to inclusion of a relevant statement, the lodging or absence of an objection or a Tribunal determination do not depend on a lawful governmental determination as to s 237. That is a distinguishing feature of the statutory scheme here and that considered in *Fuller v Lawrence* (2024) 282 CLR 646, [1]-[4], [16]-[24] (**JBA, Tab 17, pp 1016-1017, 1020-1023**).

13. *Forrest & Forrest v Wilson* (2017) 262 CLR 510 does not support a conclusion that compliance with the alleged duty is an essential step before s 32 will apply (cf **AS [41], [46]; Reply [3]-[4]**).

14. Further, even if the alleged duty did exist, which is denied, its breach would not remove the effect which ss 28, 31 and 32 attach to the inclusion of the statement. Identification of a statutory breach and the consequence of its breach raise separate questions of construction: *Attorney-General (Tas) v Casimaty* (2024) 283 CLR 1, [31]-[32] (**Separately supplied authority**). Section 28 must be read with s 32. It identifies alternative paths relevant to the validity of a future act and s 32(1) makes the inclusion of the statement the express condition for the section to apply.

15. No different result is achieved by the general law claims or the claim as to the asserted policy.

16. The mischief asserted by the Appellants is self-defeating. The Appellants' construction would essentially duplicate that process by requiring the Respondent to undertake the fulsome assessment in a legally reasonable way, and presumably by inviting both the native title and grantee parties to be heard on a proposal to include, or not include, a s 29(7) statement on a proposed notice.

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