

LAND TRIBUNAL COURT QUEENSLAND

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# REPORT ON THE OPERATIONS OF THE LAND TRIBUNAL

Established under the Aboriginal Land Act

For the year ended 30 June 2018



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## ABORIGINAL LAND TRIBUNAL QUEENSLAND

Chambers of President FY Kingham

31 October 2018

Brisbane Magistrates Court  
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Queensland 4001 Australia  
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The Honourable Yvette D'Ath  
Attorney-General & Minister for Justice  
Leader of the House  
GPO Box 149  
BRISBANE QLD 4001

Dear Attorney-General

As required by s 245(1) of the *Aboriginal Land Act 1991*, I present my report on the operations of the Aboriginal Land Tribunal for the year ended 30 June 2018.

Yours sincerely

**Fleur Kingham**

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# PRESIDENT'S REPORT

I was appointed Chairperson of the Land Tribunal on a part-time basis effective from 21 December 2017 to 20 December 2018. This report covers the period from my appointment to 30 June 2018.

**Background:** The *Aboriginal Land Act 1991* established the Land Tribunal on 21 December 1991 to receive and hear claims made by groups of Aboriginal people to areas of claimable land. The Act contained a sunset clause, which provided no new claims could be lodged after 22 December 2006. The Land Tribunal determined the last claims, the Boodjumulla (Lawn Hill) National Park claims, on 24 August 2016. Ms MacDonald provided the report and recommendations to the Minister: the grant of land claimed jointly in fee simple to two of the claimant groups and the dismissal of the claims made by two other claimant groups.

**Records of the Land Tribunal:** I draw your attention to the need to provide for custody of and access to the records of Land Tribunal proceedings. The records of proceedings are a valuable historical resource, containing a wealth of information about land and indigenous peoples' connection to it. However, the Land Tribunal made many orders restricting access to evidence filed in support of the claims.

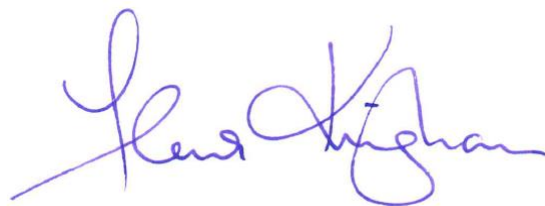
In February 2018, the Principal Registrar of the Land Court, assisting me in my function as Chairperson, commenced a project to identify, organise and ensure the integrity of the records of the Land Tribunal, which, previously, had not been properly catalogued, stored or archived. Attached to this report is a

memorandum from the Principal Registrar, dated 17 May 2018. It explains the background to the project, the issues encountered and the outcome. I thank the Principal Registrar, Darren Campbell, and the staff who undertook the painstaking work to reconstitute files, which were in an unsatisfactory state of disarray. I am satisfied the Land Court has done all it can reasonably do to restore the integrity of the files and to arrange for them to be archived.

**Application for access to restricted records:**

In 2017-18, I dealt with one application to access restricted records of the Simpson Desert Claim. The Wangkamahdla Nation applied for records to support its native title claim in the Federal Court. Although all relevant documents were not located, I made orders allowing access, on conditions, for those that were. My decision and reasons are attached to this report.

**The future:** The Land Tribunal is now functus officio. There are no outstanding claims and no new claims can be brought. My appointment expires mid the next reporting year. I recommend you consider options for: Disestablishing the Land Tribunal; Custody and control of its records; and A clear process for interested persons to apply to access them.



**PRESIDENT FY KINGHAM**

#4315964

**DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL  
DEPUTY DIRECTOR-GENERAL MEMORANDUM**

**TO:** Jennifer Lang, Deputy Director-General, Justice Services  
**FROM:** Darren Campbell, Principal Registrar, Land Court and Tribunal  
**THROUGH:** Julie Steel, Executive Director, Supreme District & Land Courts Service  
**SUBJECT:** **Aboriginal Land Tribunal – Volume of Records**  
**DATE:** 17 May 2018

**PURPOSE**

That you note the contents of this memo.

**BACKGROUND**

In April 2017 the Land Court of Queensland's Court File and Data Integrity Project commenced. During this project it was identified that there were significant issues with the management and record keeping practices associated with the Aboriginal Land Tribunal records.

In early February 2018, the Aboriginal Land Tribunal Project was established for the purpose of organising and restoring the integrity of records relating to land claims under the *Aboriginal Land Act 1991* and to ensure that the records are in compliance with the Courts' Retention and Disposal Schedule as prescribed in the Queensland Disposal Authority Number 705 (QDAN).

The project to restore the integrity of records relating to the Aboriginal Land Tribunal took eight weeks to complete. The project was overseen by Ms Corinna McCallum A/Project Officer, Land Court with the expertise of Ms Andrea Knight from the Supreme and District Courts' Records unit supported by Ms Andrea Lamb, Law student, University of Queensland.

**ISSUES**

It was identified that there are 830 references to individual exhibits of which 398 were located. The project exhausted all reasonable attempts to locate the remaining 432 exhibits. Those exhibits that could not be located were presumed to have been returned to parties, destroyed or lost.

In regards to volume, there are 110 folders of which 76 folders do not contain exhibits. The folders that do not contain exhibits have records that refer to correspondence, filed documents and transcripts. Thirty four folders contain exhibits and 18 of those folders contain restricted exhibits.

Briefing Officer	Darren Campbell Principal Registrar, Land Court	To	Jennifer Lang Deputy Director-General
Telephone	3247 5180	Date	18 April 2018

#4315964

The Land Court is now working with Queensland State Archives to transfer the records to be retained permanently and awaiting advice on a value for the Restriction to Access Period (RAP).

As a result of this work, President Kingham of the Land Court was able to consider the application and make a decision relating to accessing records to the Simpson Desert Claim so that the Queensland South Native Title Services (QSNTS) on behalf of its clients, the Wangkamahdla Nation could pursue its Native Title Claim in the Federal Court. Something that the QSNTS advised the Court they started five years ago but gave up because it seemed too hard to get the documents they needed.

## RECOMMENDATION

That you note the contents of this memo.

Noted	Approved	Not Approved
Signed: .....		
Date:     /     /		

## LAND TRIBUNAL, QUEENSLAND

CITATION: *Re: Wangkamahdla Nation* [2018] QLT 1

PARTIES: **Allan Sailor, Isabel Tarrago, Christine Doyle, Trevor Dempsey, Lorna Bogdanek, Trevina Rogers, David Rogers, Joe (Gubby) Rogers on behalf of the Wangkamahdla Nation (as per proceeding QUD52/2016) (applicant)**

FILE NO: AB92-012

PROCEEDING: Application for access to filed documents and exhibits, including restricted material

DELIVERED ON: 23 March 2018

DELIVERED AT: Brisbane

HEARD ON: Heard on the Papers

ACTING CHAIRPERSON: FY Kingham

ORDERS:

- 1. The applicant may inspect and copy all documents identified in Appendix A.**
- 2. The applicant may inspect and copy all documents identified in Appendix B, to the extent that they relate to the Wangkamahdla people. The documents will be redacted:**
  - a. to the extent that they contain information about the Wongkungurru people; and**
  - b. with the assistance of Mr Blackwood, or another anthropologist nominated by the applicant; and**
  - c. upon Mr Blackwood or the applicant's nominated anthropologist providing an undertaking to maintain the confidentiality of any information about the Wongkungurru people.**
- 3. The applicant may only use the documents for the following purposes:**
  - a. as a source of information to amend its current native title determination**

- application and to complete or amend any future native title claim in the Federal Court;
  - b. to inform the research and support of its current or any future native title claim; and
  - c. for use in mediation or hearing of the current or any future native title claim.
4. The applicant must bear the costs of:
- a. this application;
  - b. the redaction of any documents; and
  - c. photocopying or providing the documents in electronic form.
5. Mr Blackwood, or the applicant's nominated anthropologist, has liberty to apply for direction about the redaction process, if necessary.

CATCHWORDS: LAND TRIBUNAL – APPLICATION FOR ACCESS TO FILED DOCUMENTS AND EXHIBITS INCLUDING RESTRICTED DOCUMENTS – where a claimant group for a registered native title application in the Federal Court seeks access to materials filed in an Aboriginal land claim under state legislation – where some of the materials are restricted – where it was found the claimant group is represented in both proceedings – where there is no objection to the request – where the application is allowed, subject to certain conditions.

*Aboriginal Land Act 1991* s 225(1) and s 225 (3)  
*Native Title Act 1993* s 82

*Ward v Western Australia* (1998) 159 ALR 483

REPRESENTATION: Queensland South Native Title Services Limited, on behalf of the Wangkamahdla Nation

## Background

- [1] The Wangkamahdla Nation is the claimant group for a registered native title determination application filed in the Federal Court. It seeks access to the transcript and 38 exhibits admitted during the hearing of an aboriginal land claim made under the *Aboriginal Land Act 1991* to an area simply described as the Simpson Desert National Park.<sup>1</sup>

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<sup>1</sup> The request was made by email by QSNTS prior to my appointment as Acting Chairperson of the Tribunal. Consistent with the informality of the Tribunal's procedures, I have accepted the email request as an application to the Tribunal.



- [2] A group that included representatives of the Wangkamahdla Nation, was the claimant in those proceedings. Although there is not a complete correlation between the Wangkamadla Nation native title claim group as described in the Federal Court proceedings and the claimants in the Land Tribunal who identified as Wangkamadla descendants, there is sufficient commonality for me to be satisfied that the same group is represented in both proceedings. I am satisfied, on the information attested to by Mr Wishart a lawyer with QSNTS in his affidavit, that the current spokespeople for descendants of the Wangkamadla people have authorised this application.<sup>2</sup>
- [3] Some of the material requested by the applicant is subject to a restriction order made by the then Chairperson of the Tribunal, Mr Graeme Neate.
- [4] The applicant's representative, Queensland South Native Title Services Limited, is also representing the Wangkamadla Nation in the Federal Court application. The applicant seeks access to the material for the following purposes:
- (a) as a source of information to amend its current native title determination application and to complete or amend any future native title claim in the Federal Court;
  - (b) to inform the research and support of its current or any future native title claim; and
  - (c) for use in mediation or hearing of the current or any future native title claim.
- [5] To illustrate how the documents might be used, Mr Wishart deposed that the applicant's anthropologist, Mr Peter Blackwood, may use them to revise his connection report for the Wangkamahdla Nation's native title claim. QSNTS will provide his report to the State of Queensland for use in without prejudice and confidential negotiations and may, subsequently, file it in the Federal Court.
- [6] Further, QSNTS may rely on the documents to amend the current claim or to file a future native title claim for the Wangkamahdla Nation. Mr Wishart anticipates lawyers and experts engaged to prepare expert evidence may quote, rely upon, refer to, or otherwise reproduce the documents.

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<sup>2</sup> Affidavit of Mr Timothy John Wishart sworn 14 December 2017.

## The original claim proceedings

- [7] The Aboriginal Land Claim commenced in this Tribunal in September 1992 when the Land Claims Registrar referred a land claim application for all the land within National Park 1 (NP1 Aboukir, or the Simpson Desert National Park).
- [8] Under the *ALA*, a group of aboriginal people could make a claim for an area of claimable land. The Simpson Desert National Park was, at the time, claimable land.
- [9] The description of the claimant group changed during the Land Tribunal proceedings. Ultimately, it was described as follows:
- “The customary land owners of the claim area are people of either Wangkunguru and Wangkamadla descent, who identify as such, and are accepted as such by the senior custodians of custom in the region, and who regard the relevant lands as theirs by Aboriginal law”.<sup>3</sup>
- [10] This was a unified claim by two groups, not a claim brought by two or more sets of people severally. According to the claimant’s final submission, “the unity of this claimant action group reflects the unity of the basic category into which people are recruited as customary land owners for the land under claim (and to a definable extend beyond the claim area)”.<sup>4</sup>
- [11] That has implications for this application. Some of the exhibits involve information relating to both groups. I will return to that issue later in the reasons.
- [12] The claimant made the claim on two of three statutory grounds, traditional affiliation and historical association.
- [13] On 15 December 1994, the Land Tribunal recommended the Minister for Lands grant the claimed land in fee simple to the claimant group, because it had established historical association, but not traditional affiliation.
- [14] The Land Tribunal advised the Minister as follows:
- “The fact that so many of the claimants live so far from the land and from each other has had profound effect on their knowledge of their ancestors’ traditional land and the Aboriginal traditions relating to that land. Much of the knowledge has been lost.

...

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<sup>3</sup> Neate, Graham J, Robert V Anderson and Warren W McLachlan, ‘Report of the Land Tribunal on the Aboriginal Land Claim to Simpson Desert National Park’ (1994) 2 *Aboriginal Land Claim Reports*, 20.

<sup>4</sup> Ex 36, page 8.

Having considered the evidence in submissions in light of our understanding of the legislative requirements, we are not satisfied that the claim has been established on the ground of traditional affiliation”.<sup>5</sup>

### **The restriction order**

- [15] The restriction order appears in the Land Tribunal’s report at Appendix D. It applies to the transcript of the claimant’s evidence and some of the exhibits. Those exhibits that are not subject to the order are listed in Appendix A to this decision.
- [16] The restriction order was made pursuant to the following provision of the *ALA*:
- “If the tribunal is satisfied that it is desirable to do so because of the confidential nature of any evidence or matter or for any other reasons, the tribunal may by order:<sup>6</sup>
- (a) direct that a hearing or part of a hearing is to take place in private and give directions as to the persons who may be present; or
- (b) give directions prohibiting or restricting the publication of evidence given before the tribunal, whether in public or in private, or of matters contained in documents and lodged with the tribunal or received in evidence by the tribunal”.
- [17] The *ALA* provided further guidance on how the Land Tribunal was to exercise that power. The Land Tribunal was required to start with the principle of open justice: that it is desirable for the hearing to be in public, and for evidence and documents lodged or received in evidence to be publicly available.<sup>7</sup> However, it was required to pay due regard to any reasons given to restrict access, particularly if based on any applicable Aboriginal traditions.<sup>8</sup>
- [18] The submissions made in support of the restriction order raised two grounds. Firstly, the oral evidence relates to places of significance to Aboriginal people. The Land Tribunal was persuaded such information was of a secret or sensitive nature and should not be published beyond the parties to the proceedings.
- [19] Secondly, the evidence related to family relationships recorded in detail in the genealogies. The Land Tribunal accepted this could raise matters of family sensitivity which people would not want published beyond the parties to the proceedings. The

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<sup>5</sup> Neate, Graham J, Robert V Anderson and Warren W McLachlan, ‘Report of the Land Tribunal on the Aboriginal Land Claim to Simpson Desert National Park’ (1994) 2 *Aboriginal Land Claim Reports*, 172.

<sup>6</sup> *Aboriginal Land Act 1991* s 8.22(2), as it was then numbered.

<sup>7</sup> *Aboriginal Land Act 1991* s 225(1), then numbered 8.22(1).

<sup>8</sup> *Aboriginal Land Act 1991* s 225(3), the numbered 8.22(3)

Land Tribunal noted some material might prove to be embarrassing for claimants and other Aboriginal people, some of whom may not have been aware of the claim or have been present for the hearing. Some claimants only agreed to cooperate on the basis the evidence would not be publicly available.

- [20] The order restricted access to the parties to the proceedings for use in those proceedings only. Access by any other person, or for any other purpose, required either an order by the Land Tribunal or consent by the claimants.<sup>9</sup>
- [21] Because the applicant is only part of the claimant group in the Land Tribunal proceedings, and it does not have the consent of the Wongkungurru people, an order of the Land Tribunal is necessary.

### **The attitude of the Wongkungurru people**

- [22] The Wongkungurru people have since secured a native title determination. The Wongkungurru Yarluyandi Aboriginal Corporation RNTBC holds native title on their behalf. The applicant gave the RNTBC notice of its request for access to these documents. At my direction, QSNTS served Mr Wishart's affidavit on the RNTBC in January this year, under cover of a letter that informed the RNTBC it could make submissions to the Land Tribunal about the application, if it wished to do so.<sup>10</sup> The Land Tribunal has not been contacted by the RNTBC or by any person purporting to be a member of or represent the Wongkungurru people.
- [23] QSNTS has also brought this to the attention of the parties in the Federal Court proceedings. No submission has been received from any person other than the applicant.
- [24] I am satisfied, then, that there is no active objection to the request. Regardless, in deciding whether to allow access, the Land Tribunal must take into account the interests of the Wongkungurru people.

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<sup>9</sup> Neate, Graham J, Robert V Anderson and Warren W McLachlan, 'Report of the Land Tribunal on the Aboriginal Land Claim to Simpson Desert National Park' (1994) 2 *Aboriginal Land Claim Reports*, Appendix D.

<sup>10</sup> Affidavit of Ms Jessica Marie Ling sworn 10 January 2018.

### **Should access be allowed?**

- [25] The principle of open justice is the starting point under the *ALA*. The same principle applies in the Federal Court in native title proceedings.<sup>11</sup> Many of the exhibits are not subject to the restriction order and should be available to the applicant.
- [26] As for the restricted material, the applicant seeks to use it to further its own native title claim. The Wangkamahdla Nation made an earlier application while Mr Neate was Chairperson, for the same scope of access that it now seeks. Mr Neate expressed some caution and provided access for a more limited purpose. He explained:
- “Because the law is developing in relation to access to documents (including confidential material) used in native title proceedings, I have taken a cautious approach concluding that it is in the interest of your clients and the Land Tribunal to make decisions from time to time as required in accordance with an understanding of the law at the time when each decisions made.”<sup>12</sup>
- [27] Since then, the Federal Court has expounded the principles governing access to documents in native title proceedings.<sup>13</sup>
- [28] The evident purpose of the Land Tribunal’s restriction order was to show respect for the claimants’ legitimate cultural interests. The Federal Court, in the native title proceedings, can confer the same protection.<sup>14</sup>
- [29] A relevant consideration is the public interest in advancing rather than detracting from the purposes of relevant legislation.<sup>15</sup> If the Wangkamahdla Nation does not secure access to records about their connection to this area of land, that may hinder their native title claim. Or it might put them to further trouble and expense in re-documenting what has already been received in evidence in the Land Tribunal. Given the passage of time, it is likely some Wangkamahdla people involved in the Land Tribunal claim have passed away. To maintain the restriction may well detract from the purpose of the *Native Title Act 1993*, which provides a process for native title claimants to secure recognition of their interest in land.

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<sup>11</sup> *Native Title Act 1993* s 82.

<sup>12</sup> Letter from Mr Graeme Neate Chairperson of the Land Tribunal to Miss Pam Ditton dated 13 December 1999.

<sup>13</sup> *Ward v Western Australia* (1998) 159 ALR 483.

<sup>14</sup> *Native Title Act 1993* s 82.

<sup>15</sup> *Ward v Western Australia* (1998) 159 ALR 483 at 509 to 510.

- [30] Although the applicant does not seek access to information about the Wongkungurru people, there is a practical difficulty in redacting some of the restricted exhibits. Some exhibits clearly identify certain parts as relating to one or other of the Wangkamahdla or the Wongkungurru people. However some exhibits do not. To redact them to exclude information relating to the Wongkungurru people requires an understanding of the genealogies of the two groups and how the information about places and practices, for example, relates to one or other of them. Without the assistance of an anthropologist, it is not appropriate that I undertake that exercise.
- [31] Mr Blackwood, the applicant's consultant anthropologist, could undertake that exercise, subject to providing his undertaking to maintain the confidentiality of any material which relates to the Wongkungurru people.
- [32] Unfortunately, the Land Tribunal files have not been well maintained and stored. There are two appendices to this decision. Appendix A lists exhibits which are not restricted. Appendix B lists restricted exhibits and the transcript of evidence. Both appendices identify a number of exhibits that the Land Tribunal has not been able to locate. Since my appointment as Acting Chairperson, staff of the Land Court have undertaken an extensive and sustained investigation of the Land Tribunal's records and, to the extent they can be identified, they are now in proper order.
- [33] That effort will continue. If any further exhibits are located, they will be released under these orders, upon fulfilment of the same conditions, without the necessity for further application by the Wangkamahdla Nation.
- [34] In accordance with the terms of the request, the applicant must bear the costs, if any, of Mr Blackwood's time in assisting the tribunal in the redaction process and of copying and providing to the applicant the requested material.

## **Orders**

- 1. The applicant may inspect and copy all documents identified in Appendix A.**
- 2. The applicant may inspect and copy all documents identified in Appendix B, to the extent that they relate to the Wangkamahdla people. The documents will be redacted:**
  - a. to the extent that they contain information about the Wongkungurru people; and**
  - b. with the assistance of Mr Blackwood, or another anthropologist nominated by the applicant; and**
  - c. upon Mr Blackwood or the applicant's nominated anthropologist providing an undertaking to maintain the confidentiality of any information about the Wongkungurru people.**
- 3. The applicant may only use the documents for the following purposes:**
  - a. as a source of information to amend its current native title determination application and to complete or amend any future native title claim in the Federal Court;**
  - b. to inform the research and support of its current or any future native title claim; and**
  - c. for use in mediation or hearing of the current or any future native title claim.**
- 4. The applicant must bear the costs of:**
  - a. this application;**
  - b. the redaction of any documents; and**
  - c. photocopying or providing the documents in electronic form.**
- 5. Mr Blackwood, or the applicant's nominated anthropologist, has liberty to apply for direction about the redaction process, if necessary.**

**FY KINGHAM  
PRESIDENT OF THE LAND COURT**

**Appendix A** (not restricted)

Located:

Exhibit 1  
Exhibit 2  
Exhibit 5  
Exhibit 6  
Exhibit 7  
Exhibit 8  
Exhibit 18  
Exhibit 19  
Exhibit 21  
Exhibit 23  
Exhibit 25  
Exhibit 32  
Exhibit 33  
Exhibit 34  
Exhibit 35  
Exhibit 36  
Exhibit 37

Not Located:

Exhibit 3  
Exhibit 4  
Exhibit 17  
Exhibit 20  
Exhibit 24  
Exhibit 26  
Exhibit 27  
Exhibit 28  
Exhibit 31  
Exhibit 31A-31H  
Exhibit 31I  
Exhibit 31J  
Exhibit 31K  
Exhibit 31 L  
Exhibit 38



**Appendix B (restricted)**

Located:

Transcripts

Exhibit 10

Exhibit 10A

Exhibit 10B

Exhibit 11

Exhibit 12

Exhibit 14

Exhibit 15

Exhibit 16

Exhibit 22

Exhibit 30

Not Located:

Exhibit 9

Exhibit 13

Exhibit 29

Exhibit 29A

## LAND TRIBUNAL ANNUAL REPORT 2017-18

### Location & contact details

**Address:** Level 8, Brisbane Magistrates Court Building, 363 George Street, Brisbane Qld 4000

**Registry business hours:** 8.30 am to 4.30 pm, Monday to Friday (*excluding public holidays and other designated court holidays*)

**Postal address:** Aboriginal Land Tribunal, GPO Box 5266, Brisbane Qld 4001

**Phone:** (07) 3406 7777 (business hours)