

# FEDERAL COURT OF AUSTRALIA

## Ross on behalf of the Cape York United #1 Claim Group v State of Queensland (No 1) [2021] FCA 1463

File number(s): QUD 673 of 2014

Judgment of: **MORTIMER J**

Date of judgment: 23 November 2021

Date of publication of judgment: 24 November 2021

Catchwords: **NATIVE TITLE** – interlocutory applications for joinder – applications made only days before scheduled consent determinations – where joinder applicants are claim group members and an existing RNTBC – failure to prove that interests are affected in a way justifying joinder – applications refused – direction for minor amendments to wording in two schedules of proposed consent determinations notwithstanding refusal of interlocutory applications

Legislation: *Native Title Act 1993* (Cth) s 84(5), s 87A

Cases cited: *Lawson on behalf of Badimaya Barna Guda People v Western Australia* [2020] FCA 104  
*Sturt on Behalf of the Jaru Native Title Claim v Western Australia* [2018] FCA 1923

Division: General Division

Registry: Queensland

National Practice Area: Native Title

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Date of hearing: 22 November 2021

Counsel for the Applicants: Mr D O’Gorman SC with Mr D Yarrow

Solicitor for the Applicants: Cape York Land Council Aboriginal Corporation

Counsel for the First Respondent: Ms N Kidson QC with Ms C Klease

Solicitor for the First  
Respondent:

Crown Law Queensland

Solicitor for the Second  
Respondent:

Australian Government Solicitor

Solicitor for the Eleventh  
Respondent:

Holding Redlich

# ORDERS

QUD 673 of 2021

**BETWEEN:**            **MICHAEL ROSS AND OTHERS ON BEHALF OF THE CAPE YORK UNITED #1 CLAIM GROUP** (others named in the Schedule)  
Applicant

**AND:**                 **STATE OF QUEENSLAND**  
First Respondent

**COMMONWEALTH OF AUSTRALIA** (and others named in the Schedule)  
Second Respondent

**ORDER MADE BY:**   **MORTIMER J**

**DATE OF ORDER:**   **23 NOVEMBER 2021**

## THE COURT ORDERS THAT:

1. The applicant and the State confer on, and file, appropriate amendments to the proposed orders in the Uutaalnganu determination to address the description of the apical Lizzie.
2. The applicant and the State confer on, and file, appropriate amendments to the proposed orders in the Kuuku Ya’u determination to address the inclusion of the interest of the Kuuku Ya’u Aboriginal Corporation RNTBC (ICN 7193) in the Iron Range National Park in “other interests” in Schedule 2 of the determination.
3. The proposed amendments be sent by email to the Court at the email addresses [Associate.MortmierJ@fedcourt.gov.au](mailto:Associate.MortmierJ@fedcourt.gov.au) and [Stephanie.McCann-Hoey@fedcourt.gov.au](mailto:Stephanie.McCann-Hoey@fedcourt.gov.au), copied to all active parties, on or before 10am AEST on Wednesday 24 November 2021.
4. The application for joinder by the Kuuku Ya’u Aboriginal Corporation RNTBC (ICN 7193), Anthony Pascoe and Lucy Hobson be dismissed.
5. The consent determinations listed in this proceeding relating to the native title held by the Kuuku Ya’u and Uutaalnganu (Night Island) groups proceed as listed at 10.15am AEST on Thursday 25 November 2021 in Cairns.
6. The Cape York Land Council make these orders and the Court’s reasons for judgment, once revised and published, available on its website and Facebook account.

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

## REASONS FOR JUDGMENT

(Delivered *ex tempore* and revised)

### MORTIMER J:

1 The first two determinations of native title under the Cape York United #1 claim are listed for a consent determination hearing this Thursday, 25 November 2021, in Cairns. That date was set back in December 2020 almost a year ago.

2 Last Thursday – on 18 November 2021 – two interlocutory applications were filed. They are applications to join the proceedings made under s 84(5) of the *Native Title Act 1993* (Cth).

3 One application is made by Mrs Norma Hobson on behalf of the Kuuku Ya’u Aboriginal Corporation RNTBC (ICN 7193). Mrs Norma Hobson is the current chairperson of that corporation. The Kuuku Ya’u Aboriginal Corporation as trustee holds the native title of the Kuuku Ya’u People in land and waters recognised as Kuuku Ya’u country by a determination of this Court in 2009. The Kuuku Ya’u Aboriginal Corporation is not the prescribed body corporate (PBC) nominated to hold the native title of the Kuuku Ya’u People on trust for the determination scheduled for this Thursday. Instead, a new PBC has been created and nominated. Mrs Hobson contends the Kuuku Ya’u Aboriginal Corporation should be a party to these proceedings, that its board has not been properly consulted about apical ancestors and boundaries on the proposed determinations and that arrangements for the s 87A authorisation meeting being changed to Cairns were made at such short notice that some Kuuku Ya’u people could not attend.

4 The other interlocutory application is made by Mrs Lucy Hobson and Mr Anthony Pascoe. Mrs Lucy Hobson identifies herself in her application as an Uutaalnganu person through Douglas Ropeyarn. Her complaint relates to the way she understands her ancestors have been identified on the Uutaalnganu determination. She states that she has been told by Cape York Land Council that she is recognised as an Uutaalnganu person through Lizzie King, but she does not consider her genealogy through her grandfather Douglas Ropeyarn has been correctly identified. She appears to be concerned that her family is not being correctly identified, even if she is included in the native title holding group, which she did not appear certain about.

5 Mr Anthony Pascoe identifies in his application as a Kuuku Ya’u person descended from Barney Claudie, who is one of the proposed apical ancestors in the Kuuku Ya’u determination

scheduled for Thursday. Mr Pascoe says that he does not agree with the apical ancestor list or the southern boundary proposed for the Kuuku Ya'u native title group. At the hearing he identified a number of other complaints he has. In particular he alleged that the Cape York Land Council has "handpicked" the people who were nominated to be directors of the new Kuuku Ya'u PBC. He also alleged that the Cape York Land Council handpicked who could attend authorisation meetings and failed to make appropriate arrangements for him and, it would seem, others to travel to meetings such as the s 87A authorisation meeting. He also alleged that the subgroup Kanthanampu was "a joke made up in the 1980s" and was not a real subgroup of Kuuku Ya'u. Finally, Mr Pascoe expressed concern about Father Brian Claudie being a proposed director of the new PBC and disputed whether Father Claudie was senior to him.

6 All three individuals also made general complaints about the Cape York Land Council not arranging enough in-person meetings and not sitting down and talking to people.

7 At the hearing I asked each of the interlocutory applicants what they sought to achieve by being joined to the proceeding. There were common themes. They believed they had not been listened to. They believed there had not been proper arrangements made for the community to sit down and discuss matters in person, both as a community and with anthropologists working on the claim. They felt historical records and family trees within the Kuuku Ya'u group had not been distributed so they could be checked and discussed.

8 Both interlocutory applications are opposed by the Cape York applicant and by the State. No other active respondent sought to be heard on the applications.

9 The three interlocutory applicants appeared by telephone. This proved difficult through the course of the hearing, which lasted several hours, as their phone cut out several times. I am not critical of them for that. They informed the Court that the internet connection at Lockhart River was too poor for a video call. I have accepted that position at face value for the purposes of this application. I gave the interlocutory applicants time during the hearing yesterday to explain their positions and they each did so carefully.

10 As the State and the Cape York applicant submitted, the two main matters the Court must be satisfied about in order to join a person to a proceeding are, first, that a person's interest may be affected by a determination in the proceeding and, second, that it is in the interests of justice for the court to grant the application.

11 The outcome of these two applications mostly rests on the facts rather than the law.

## CONTEXT

12 The context of these interlocutory applications is important. There are matters which all go to the question of whether it is in the interests of justice to grant the joinder. Not only are these applications brought very close to the listed consent determinations with the intention of having the consent determinations postponed for an indefinite period, but they are brought after a long and resource intensive process which the Court has been closely supervising.

13 These matters have been the subject of close case management since 2014, and since around April 2020, when there was a change in direction of how the native title claims would be resolved, there has been a highly intensive case management process. Since early 2020 in particular, there has been a tremendous expenditure of resources on behalf of the Cape York applicant, through the Cape York Land Council, and on behalf of the State. Other respondents have also played an important role.

14 Most of the funds of the Cape York applicant, the State, and, indeed, the Court are public funds. The costs of this claim to date would run into the many, many millions. Let me explain why that matters.

15 First, public monies are not limitless and they must be spent responsibly and carefully.

16 Second, when public funds are used it is important that everyone makes the most of the opportunities that are given to them *at the time they are given to them*, because public funds have to be spread around a lot of different people and groups, for a lot of different purposes. When your turn comes to do something with those public funds, it is important that you use that opportunity and do not put things off. The funds might not be around later. That is just the nature of using public money. It is no different to how the courts must approach their own work or how land councils and representative bodies must approach their work.

17 Third, in proceedings like native title claims, which take a long time, there are many points at which large sums of public funds are spent on particular events like authorisation meetings and there simply may not be any further public funds available to re-do those processes.

18 There is another aspect of the costs of a proceeding like this and the way it uses public funds which must be remembered. When the Court case manages a proceeding, what it does is work out with the parties how to set timetables by which steps must be undertaken. These timetables

are not just wishful thinking. They are not optional. They are court orders and they are the way the Court makes sure claims like this move along and do not sit with nothing happening for years.

19 In the Cape York United #1 claim, the timetables have been very detailed. Different parties have had different responsibilities. Many parties, like the Cape York applicant and the State, have had multiple responsibilities. The timetables set dates and the point at which certain events have to happen.

20 In this case, as Ms Malyon from the Cape York Land Council explains in her affidavits, the timetables have focused on steps that are important to all claim group members. Working out boundaries between different groups, working out a correct list of apical ancestors, working out which people have connection to which country. The timetables have also focused on steps to keep claim group members informed: engagement by phone, text, email, and in person before meetings, information sessions, using social media to make notices available, group meetings to talk to anthropologists and other Land Council staff and authorisation meetings.

21 These steps have had to be taken not just for the Kuuku Ya'u group or the Uutaalnganu group but for several dozen other groups in the Cape York United #1 claim. This is a complicated process with such a big claim, and so many groups.

22 When the timetables provide for these steps to happen that is when they must happen unless the Court gives permission to change the dates. Once they have happened, then those steps have finished. They are completed. This kind of complicated timetable does not easily allow for steps to be undertaken again later on. Sometimes steps get postponed for good reasons, like meetings postponed for sorry business. The Court understands that and agrees to those kinds of changes. But eventually the steps must be undertaken and the jobs must be completed. Otherwise no group would ever get their native title.

23 The point of explaining this is to make very clear that in a native title case, there are times to speak up and there are times where it may be too late to speak up. There are times to object and there are times where it may be too late to object. People in this region know by now the Court is open to listening to what claim group members have to say where they speak up about significant issues and where they speak up early so problems can be addressed. The joinder of Ms Symonds and Mr Miller to this claim back in August 2019 is an example of that. But as I have said in other cases in Western Australia (see *Lawson on behalf of Badimaya Barna Guda*

*People v Western Australia* [2020] FCA 104 at [99], *Sturt on Behalf of the Jaru Native Title Claim v Western Australia* [2018] FCA 1923 at [57]), people cannot delay; they cannot wait until just before a big and expensive event like a consent determination and put forward a complaint that they could have made a lot earlier and could have made at a more appropriate stage in the proceeding. There is just too much disadvantage to other parties, and to the way the Court must conduct its judicial business, to allow that to occur.

24 The State has cited a number of cases in its written submissions at [12]-[14] and I accept those cases stand for the propositions there set out. I accept it may be rare for members of the claim group like Mr Pascoe and Mrs Lucy Hobson to be joined as respondents. However, it has already happened in this proceeding with Ms Symonds and Mr Miller. The fact that Mr Pascoe and Mrs Lucy Hobson are claim group members would not have stopped the joinder if it was otherwise appropriate. What will be a sufficient interest for the purposes of the law about joinder is not confined by categories or rules. It is a matter for the Court to decide in each individual case. It is important to recall that joinder of individuals is an important way, whether in a claimant application or a non-claimant application, that Aboriginal and Torres Strait Islander people can, as individuals, participate in proceedings which they say affect the native title they claim to hold. For my own part, I consider it inappropriate to take any narrow or prescriptive approach to these questions.

25 However, these two particular interlocutory applications could and should have been brought some time ago. Bringing them up late causes great disruption and can involve a waste of much of the public funds and resources already spent, and a waste of a lot of the human effort already put in by a lot of people.

26 The Court cannot allow that to occur unless there is a compelling justification. The interlocutory applicants have not explained in any satisfactory way what should happen if they are joined, aside from insisting that some of the steps that have already been undertaken should be undertaken again. Where that leads anyone was completely unclear at the hearing. The interlocutory applicants have not established any compelling justification to stop the consent determinations by being joined to the proceeding.

### **THE KUUKU YA'U ABORIGINAL CORPORATION APPLICATION**

27 I now turn to explain in a little more detail why I have rejected each of the applications. And I start with the Kuuku Ya'u Aboriginal Corporation application. The Cape York applicant submits there is not enough evidence that Mrs Norma Hobson, in fact, has the agreement of the

board to bring this application. Mrs Hobson says in her affidavit that she does. She says the interlocutory application is brought, “with the consent of my board of directors”. But there is no evidence from any other board member or evidence of a board resolution.

28 At the hearing, Mrs Norma Hobson confirmed that she had several Kuuku Ya’u Aboriginal Corporation board members sitting with her. She confirmed that she did speak on behalf of the board and I am prepared to accept that position for the purposes of the Corporation’s interlocutory application.

29 One reason for the joinder application by the corporation appears to be dissatisfaction with the fact that a new and different PBC is being nominated for the upcoming consent determination on Thursday.

30 As the Cape York applicant and the State have explained in their evidence and submissions, the initial reason for the nomination of a different PBC was because the rule book for the Kuuku Ya’u Aboriginal Corporation did not permit membership for all the people who were to be determined in this third Kuuku Ya’u determination as members of the native title holding group. The rule book needed to be amended to widen the membership criteria to include descent from some new apical ancestors. The Kuuku Ya’u Aboriginal Corporation refused to do that when asked, and then, at the s 87A authorisation meeting in Cairns, those members of the claim group itself who were present and voting decided to authorise a new PBC. In other words, their deliberate choice was a new PBC.

31 The evidence shows that, around August 2021, Ms Malyon asked the Kuuku Ya’u Aboriginal Corporation board of directors to confirm whether it agreed to calling a general meeting, to be held prior to the authorisation meeting for the s 87A agreement, in the week of 13 September 2021, for the purpose of deciding whether to amend the rule book. Ms Malyon offered the assistance of the Cape York Land Council. Ms Malyon made it clear that if the rule book was not amended, the other option would be for the native title group to nominate a new corporation. She asked for confirmation by 19 August 2021 whether the board agreed to convene a special general meeting to amend the rule book. Mrs Norma Hobson was chairperson of the Kuuku Ya’u Aboriginal Corporation at this time.

32 Let me pause here. The Kuuku Ya’u Aboriginal Corporation is an independent corporation which is able to, and expected to, govern itself concerning matters to do with its membership and its role as trustee for the Kuuku Ya’u native title holders under the 2009 determination.

Ms Malyon was quite correct to make this approach, but the responsibility to take it up and act on it lay with the board of the Kuuku Ya'u Aboriginal Corporation and not with the Cape York Land Council.

33 Ms Malyon's invitation was rejected by Mrs Norma Hobson on behalf of the corporation only a few days later on 13 August 2021. Mrs Norma Hobson said in the rejection email that it was premature to advise the Kuuku Ya'u Aboriginal Corporation of any amendments to its constitution with no discussion with its current members and said "thank you for offering your help to put together a meeting of our members. It is not necessary at this stage."

34 In her recent affidavit, Ms Malyon then describes what steps she took next. The Cape York Land Council contacted all members of the Kuuku Ya'u Aboriginal Corporation about the upcoming s 87A authorisation meeting. They explained the need to change the existing rule book if the Kuuku Ya'u Aboriginal Corporation was to be used as the PBC. They explained they had contacted Mrs Norma Hobson as chairperson about this and had been told the board did not wish to organise a meeting. They explained the tight timeframes and the need to establish a new corporation if the existing one could not be used because of the state of its rule book. Ms Malyon and the Cape York Land Council did all they could reasonably be expected to do in the circumstances.

35 Ms Malyon describes a phone call organised by Ms Polglase on 13 September to discuss this matter again. Ms Malyon was told the board was present, but a little like the hearing yesterday, she could not see them. Ms Malyon explained the situation again, offered the Land Council's assistance, including drafting alternative and appropriate resolutions to amend the rule book. Again, I am satisfied Ms Malyon and the Land Council did all they reasonably could do to assist and encourage the rule book amendments. They were rebuffed.

36 Critically, however, the proposal to use the Kuuku Ya'u Aboriginal Corporation as the PBC for this forthcoming Kuuku Ya'u determination was nevertheless still put to a vote at the s 87A authorisation meeting. That there was going to be a discussion and choice about PBC was a clear part of the notices sent out ahead of the s 87A authorisation meeting. The claim group was presented with two options: direct the Kuuku Ya'u Aboriginal Corporation to amend its rule book to widen the group description, or create a new PBC. The claim group itself chose the second option unanimously. The interlocutory applicants did not appear to appreciate this during the hearing.

37 Contrary to Mr Pascoe's assertions, nobody handpicked the proposed directors for the new corporation. Instead, the claim group voted them in unanimously and, as Ms Jasmine Accoom told the Court in her evidence, the claim group did not want to choose the Kuuku Ya'u Aboriginal Corporation. That was a choice for the claim group to make and it did so properly at the s 87A authorisation meeting. That is an end to the matter as far as the Court is concerned.

38 The Corporation, through Mrs Norma Hobson, also appears to complain about how the list of apical ancestors for the forthcoming Kuuku Ya'u determination was arrived at, how the genealogies were constructed. In her most recent affidavit, as well as in that part of her affidavit before the Court in support of the consent determination application, Ms Malyon explains at length a number of interactions with Kuuku Ya'u people, and in her recent affidavit she explains her interactions with Mrs Norma Hobson and, in particular, about apical ancestors. The interactions with Mrs Norma Hobson occurred this year in May 2021 and June 2021 on quite a few occasions by telephone and email and included the Cape York Land Council providing a PowerPoint presentation to the Kuuku Ya'u Aboriginal Corporation board. Then there was another quite long and detailed series of exchanges in August 2021, mostly by email.

39 The Court accepts that Mrs Norma Hobson, and perhaps other board members, might not agree with or be happy about some of the answers received. They may not agree with some of the decisions made along the way towards the Kuuku Ya'u determination, whether in terms of apical ancestors or boundaries. However, neither Mrs Norma Hobson, nor any other board member, has taken the opportunities available to them in the steps ordered by the Court in this proceeding to voice their objection. Mrs Norma Hobson did not attend an information meeting about the reauthorisation process which occurred on 19 May 2021, even though she spoke separately to Ms Malyon that very same day. Mrs Norma Hobson seems largely to have operated through her role as chairperson of the Kuuku Ya'u Aboriginal Corporation, rather than taking up chances she had to engage at meetings as a claim group member.

40 The problem – or a problem – as the State pointed out in its submissions, is that the Kuuku Ya'u Aboriginal Corporation has no formal or informal role in the native title process over the land and waters of the Kuuku Ya'u People within the Cape York United #1 claim. It is the Cape York applicant which represents the Kuuku Ya'u People and other groups on this claim. The Kuuku Ya'u Aboriginal Corporation has a role as trustee for the native title holders in relation to the land and waters determined in 2009. That is all. The Corporation does not act

as some general representative of the Kuuku Ya'u People in this claim, especially when in this proceeding there is an authorised applicant.

41 On the issue about apical ancestors, as senior counsel for the State submitted, it would appear the only apical ancestor issues raised by Mrs Norma Hobson were about the inclusion of two apicals who were already included. There was also a request about Annie Butcher, who was also an existing apical, and information about her should be held by the Kuuku Ya'u Aboriginal Corporation because she is an apical on the 2009 determination. As Ms Kidson submitted, the real issue seems to be debates not about the identification of the apicals, but rather about more recent generations of descendants from them. However, this is a matter for the native title holding group to decide in accordance with the 2009 determination, and its rule book. It has nothing to do with interests being affected by the terms of the proposed Kuuku Ya'u consent determination.

42 Mrs Norma Hobson has also complained, as did Mr Pascoe, about the moving of the s 87A authorisation meeting to Cairns, because of sorry business. Ms Malyon explains in her affidavit why this occurred and the lengths to which the Cape York Land Council went to accommodate Mrs Hobson, in particular. Ms Malyon explains how she and the Cape York Land Council followed their usual practice of consulting the family of the person who had passed away about whether the meeting should be held in Lockhart River or not, and they were told it should not be. Again, no more could reasonably be expected. The Cape York Land Council may well have been subject to justified criticism had they chosen to go ahead with the meeting in Lockhart River against the wishes of that family.

43 I accept Ms Malyon's evidence that Mr Davis from the Cape York Land Council made inquiries with senior people within the Kuuku Ya'u native title group and they agreed the meeting should go ahead on 16 November 2021 and that it should go ahead in Cairns, and therefore that was the course the Land Council undertook.

44 Ms Malyon also describes in her affidavit the arrangements and assistance for travel to that meeting in Cairns and how those arrangements extended to the three individuals involved in these interlocutory applications and all board members of the Kuuku Ya'u Aboriginal Corporation.

45 Mrs Norma Hobson's main complaint was that she had only three days' notice of the change of venue, and I understood her to say that in her role as chairperson she was trying to organise

flights for elders and transport for elders at short notice, or organise to drive, noting it was a 10 hour drive. I have read Mrs Norma Hobson's emails to Ms Malyon and I agree they do make all those points. Those emails were sent the day before the s 87A authorisation meeting. Ms Malyon's evidence is that other claim group members made their arrangements somewhat earlier, and the inference is that Mrs Hobson may have left things a little late, and I agree that appears to be the case.

46 However, the more important fact is that both Norma Hobson and Lucy Hobson *did* travel to Cairns and *did* attend the start of the s 87A authorisation meeting. They were not prevented from attending and they did attend. They chose not to stay for the resolutions part of the meeting; that was their choice.

47 Subject to one matter, I do not consider there is any justifiable basis for any of the complaints made by Norma Hobson on behalf of the Kuuku Ya'u Aboriginal Corporation board, but also would appear, to some extent, on her own behalf. The board has had ample opportunity to amend its rule book, with Cape York Land Council assistance offered; the board chose not to do so. The claim group members were given a choice and deliberately chose a new corporation and a new board of directors; they were free to make that choice. The remainder of Mrs Hobson's allegations have an insufficient probative basis and I do not accept them as a reason for the joinder of the corporation.

48 The one matter I put in a different category is Mrs Norma Hobson's question at the start of the hearing yesterday, quite properly, in her capacity as chairperson of the Corporation, about the Iron Range National Park. The State confirmed the Iron Range National Park is held by the Corporation as Aboriginal freehold land under the *Aboriginal Land Act 1991* (Qld). Both the State and the Cape York applicant confirmed there would be no effect on the arrangements about the Iron Range National Park from the proposed Kuuku Ya'u consent determination; there is an ILUA supporting those arrangements. But in a constructive and proactive step, the Cape York applicant, supported by the State, proposed that the Aboriginal freehold held by the Corporation within the proposed Kuuku Ya'u determination area should be identified as an "other interest" in schedule 2 of the proposed determination.

49 I accept that would be appropriate and that is one of the two amendments the Court will direct be agreed upon ahead of the proposed consent determination.

## **MRS LUCY HOBSON'S APPLICATION**

50 I turn now to Mrs Lucy Hobson's application. The Cape York Land Council put on a considerable amount of evidence about Mrs Lucy Hobson's complaints.

51 I am satisfied there appears to have been a misunderstanding by Mrs Lucy Hobson. I am satisfied she is not excluded from the claim group and I am satisfied her grandmother is correctly described. But as she explained it to the court herself, Mrs Lucy Hobson's main concern is that her grandfather, Douglas Ropeyarn, be recognised. It is Douglas' grandmother, Lizzie, who is currently listed as an apical ancestor on the Uutaalnganu determination. She is currently described as "Lizzie, wife of Charlie King". Again, constructively and proactively, the State proposed and the Cape York applicant agreed that a more expansive description could be given by adding the words "mother's mother of Douglas Ropeyarn" to the description of Lizzie as an apical ancestor. Later in the hearing, when I discussed this with Mrs Lucy Hobson, she confirmed she would be satisfied with that change.

52 I consider it is appropriate to order the Cape York applicant and the State to confer and draw up a form of words to add into the description of the native title holders to give effect to this proposal.

53 That is a practical and pragmatic solution, but it should not be taken as the Court agreeing that there has been anything flawed or wrong with the process adopted by the Cape York applicant and the State in the preparation of group descriptions and the identification of apical ancestors.

54 I am satisfied that there have been many chances for Mrs Lucy Hobson to clarify this part of her family history, and that explanations have been given to her, and she has also had other chances to explore these matters, which she has not taken up.

55 The evidence went into great detail, for example, about a meeting on 31 May 2021 with Ms Waters. That meeting was with the board of the Kuuku Ya'u Aboriginal Corporation and Mrs Lucy Hobson attended that meeting. Ms Waters explained how the genealogy of Lucy Hobson had been recorded. The meeting was arranged and facilitated by Ms Lana Polglase, an administration officer employed by the Kuuku Ya'u Aboriginal Corporation. It is Ms Polglase who appears on the bottom of all the interlocutory application documents as the person who filed all the material for the interlocutory applications. I find she has been assisting Norma Hobson, Lucy Hobson and Anthony Pascoe in making these applications.

56 That meeting with Ms Waters was held by video conference and the evidence is that the internet connection was not strong enough to support a video link to the cameras were turned off.

57 Nevertheless, that meeting went for almost two hours and Ms Waters spent some time presenting a list of apical ancestors to the board, explaining the differences between that list and the list in previous determinations, and answering questions. There was a discussion about who the Cape York Land Council and Ms Waters could share genealogical information with and an explanation was given about why it could only be shared with the individual concerned and not a wider group of people. There was an offer by Ms Waters and Dr Kevin Murphy, the manager of anthropology at the Cape York Land Council, to meet with any individual who wanted to discuss their own genealogies. Some people asked to meet Ms Waters in person at Lockhart River. Ms Waters lives in New South Wales and COVID border restrictions meant she could not travel to an in-person meeting. She offered to have telephone or video conferences. Mrs Lucy Hobson did not contact Ms Waters. Ms Cioffi from the Cape York Land Council followed up the offers made during this meeting with an offer by email to Ms Polglase. No request from any individual members of the board of the Kuuku Ya'u Aboriginal Corporation in relation to their genealogical information were made to the Cape York Land Council anthropology unit to Ms Cioffi or to Ms Waters.

58 Two anthropologists organised by the Cape York Land Council, Rebecca Ralfe and Mark Winters, did travel in person to Lockhart River in August 2021. The Kuuku Ya'u Aboriginal Corporation board were told they were coming to Lockhart River and would be available for people to speak to. Those anthropologists spoke to Kuuku Ya'u families about the authorisation meetings, including boundaries and group description issues. Mrs Lucy Hobson could have used that chance to speak to people, as could Mr Pascoe and Mrs Norma Hobson. Indeed, those anthropologists spoke to Mr Pascoe's mother, Beverley Pascoe. This was all happening in the week of 23 August 2021.

59 The evidence also is that Mrs Lucy Hobson had email exchanges with Ms Malyon; I have seen those emails. There are careful explanations given to Mrs Lucy Hobson about the matters she has raised. Those emails were in early August 2021.

60 Let me pause here to emphasise a couple of matters. *Firstly*, in person meetings might be preferred but we have all learned during the last two years of the COVID pandemic that they are not always safe or possible. Decisions of governments about border restrictions have affected the way everyone can work. I do not consider the interlocutory applicants have been

realistic about what has been possible in the last 18 months. That said, as I have explained, the evidence is that there *were* in person meetings in August 2021. People were, to use Mr Pascoe’s description, “sitting down” with Kuuku Ya’u people.

61 *Second*, the remotely held meeting with Ms Waters was at the end of May 2021. That is six months ago. The in person meetings were in August, three months ago. Yet, not until last week were these interlocutory applications filed.

62 *Third*, in person meetings in August 2021 were just ahead of the authorisation meeting of the s 87A agreement. That was the right time for people to speak up. Indeed, they could have made these applications even earlier before all these matters were finalised and the s 87A agreement was made.

63 The suggestion from the State and the Cape York applicant about adding a reference to Mr Ropeyarn in the description of the apical ancestor Lizzie will go some way to addressing Mrs Lucy Hobson’s real concern. Having heard her describe what she was worried about, I consider her concern about her grandfather was genuine. Although there were opportunities to clarify it before this, for whatever reason they have not been taken. It can be addressed for the consent determination and it should be. But there is no basis for the Court to find Mrs Lucy Hobson has a sufficient interest to be joined as a respondent.

#### **MR ANTHONY PASCOE’S APPLICATION**

64 I turn now to Mr Pascoe’s application. One difficulty with Mr Pascoe’s complaints about the “southern boundary” as he put it, as the State and Cape York applicants submitted, is that the complaint is so vague and general it is difficult to understand what the issue is. Mr Pascoe did not expand on this at the hearing yesterday although he was given a chance to do so.

65 Mr Pascoe deposes that he has traditional authority to speak for the area of Lockhart River Township. I will refer later to what Mrs Beatrice Hobson, a senior woman, has to say about that statement. Father Brian Claudie himself also communicated his views to Ms Malyon and it is fair to say that he did not agree with Mr Pascoe.

66 In contrast, Mr Pascoe was quite adamant about his position. However, in my opinion, the way that Mr Pascoe presented his opinion did not appear very respectful. And the evidence of Father Claudie and Beatrice Hobson persuades me that Mr Pascoe may not have quite as much authority as he is claiming.

67 Ms Malyon also deposes to the series of meetings and discussions about boundaries and apicals for the Kuuku Ya'u claim area. These were all part of the Court's orders and timetables that I described earlier. These meetings started in September 2020 with information meetings at Lockhart River. Members of Mr Pascoe's family, including his mother, attended these meetings. Some members of his family also attended a decision making meeting in October 2020 about group descriptions. Mr Pascoe himself attended a similar meeting in January 2021. There was another meeting in April 2021 to resolve some issues with another apical ancestor and some of Mr Pascoe's family were at that meeting. Like all other claim group members, Mr Pascoe has been invited to all these meetings.

68 Ms Malyon describes how in the January 2021 meeting there was a discussion about the boundary between Kuuku Ya'u and Uutaalnganu and that it is the descendants of Annie Butcher who speak for that boundary area. That is the southern boundary of the Kuuku Ya'u area. This is also what Beatrice Hobson told the Court. Those descendants spoke at this meeting. Ms Kidson took the Court to the notice for that meeting. It could not have been clearer about when and where the meeting was. It was an in person meeting at Lockhart River. It was about boundaries and the notice plainly said the Cape York Land Council will confirm instructions from native title holders by way of resolution. It was clear that this was a decision making meeting.

69 Now, Mr Pascoe explained why he could not get to some meetings. There may be many reasons why people find it hard to get to meetings. They may send other family members if they cannot get there. But as I have tried to explain, if people feel strongly and they want to make a contribution or they want to make an objection or ask a question then it is their responsibility to do so at the right time and in the right place. In a complicated process like the Cape York United #1 claim, the Cape York Land Council has gone to great lengths to explain to people when meetings will be held, what will be discussed, and when decisions will be made at meetings. Claim group members need to take responsibility for attending or making sure other family attends if they want to contribute and make their voices heard.

70 Mr Pascoe also makes a complaint about not being supplied with information from the s 87A authorisation meeting about who was present when each apical ancestor was agreed to. Ms Malyon has explained why this information cannot be disclosed on an open basis. Mr Pascoe did not attend that meeting himself. That would have been the best way to see who was there, and who spoke about each apical ancestor. It was also his chance to voice his own opinion.

As Ms Kidson submitted, it was also the right place for a discussion when other elders and senior people were present. Mr Pascoe did not take that opportunity, nor, apparently, did he send any other family member to make the points that he wished to make, if he could not be there himself.

71 Finally, there was Mr Pascoe's argument about the subgroup of the Kuuku Ya'u people known as Kanthanampu. Mr Pascoe described this name as, "a joke from the 1980s". I found his approach quite disrespectful given that this subgroup has been recognised in two previous Kuuku Ya'u determinations by this Court and is expressly recognised in the Kuuku Ya'u Aboriginal Corporation rulebook. It is not a joke. Mrs Norma Hobson also tried in response, at the hearing yesterday, to explain why she did not consider there was such a subgroup and why the Kuuku Ya'u Aboriginal Corporation rulebook was incorrect. Yet people I consider to be serious and dedicated claim group members, like Ms Jasmine Accoom, in her evidence expressly identified as Kanthanampu.

72 I reject any suggestion that references to this subgroup whether in the rulebook of the new PBC or otherwise in the forthcoming consent determination are inappropriate or wrong.

73 I am not satisfied Mr Pascoe has any sufficient interest justifying his joinder to this proceeding, nor that it would be in the interests of justice to do so.

#### **EVIDENCE FROM SENIOR MEMBERS OF THE KUUKU YA'U AND UUTAALNGANU NATIVE TITLE GROUPS**

74 On these applications, the Court was not just presented with arguments from lawyers for the Cape York Land Council. Significantly, the Court had evidence from senior members of the Kuuku Ya'u and Uutaalnganu Native Title groups which I consider undermines the position put on the interlocutory applications and supports the consent determinations going ahead on 25 November.

75 Just as I heard directly from the interlocutory applicants outside their affidavits, so I invited the two people who had given affidavits supporting the position of the Cape York Land Council and another senior man, whose views were quoted by Ms Malyon, to address the court.

76 Mrs Beatrice Hobson is an elder of the Uutaalnganu Native Title group. She is the daughter of Peter Night Island. She is 80 years old. Her evidence is very direct. In her affidavit, she says:

Anthony Pascoe has no authority to talk about the country where Kanthanampu and Uutaalnganu meet. That is Annie Butcher country. He does not have authority to

speaking for the Lockhart River township area. There are other families from that area, too. All Kanthanampu speak for the township area.

Anthony Pascoe can only talk about the Claudie River if Father Brian gives him permission and agrees with what he is saying. He needs Father Brian's consent and he needs to listen to him. Anthony's father is the same generation as Father Brian and Anthony calls Father Brian "Uncle". Some younger generations do not realise they should be sitting down with their elders. We do not disrespect our elders.

77 Now, Mr Pascoe strenuously disagreed with those views. However, I found Mrs Beatrice Hobson very persuasive. She is a very senior woman who has been closely involved in the Cape York United #1 claim all along and I accept what she says. Beatrice Hobson's evidence is that she has been coming to meetings about this claim since it started, and if she has any questions, the Cape York Land Council staff have answered them.

78 From what I have observed over the last year or two during lengthy and complex case management, that evidence is credible. I accept that, certainly in recent times, the Cape York Land Council staff have done their very best to engage with claim group members as much as possible.

79 But I add, it is a two-way street. Claim group members must take responsibility for asking questions and following up if they have doubts or are unsure. It is their native title and they must be on the front foot about these things. Most importantly, that means going to meetings, whether in person or by phone or video, and making their voices heard. That does not mean people will secure the outcomes desired, but that is the opportunity the process gives them.

80 Beatrice Hobson's affidavit makes it very clear that she and those families she speaks for all want the consent determination to go ahead and are happy with the outcome as it is. She told the Court:

I say to my people you need to stay out on your land. Black soil is our traditional land. It is like the colour of skin and we need our land. We do not want to stop this native title – we want it to go ahead next week.

I was at the authorisation meeting on 17 September 2021. I was very happy with the boundary line and the list of old people. I agreed that the way the decisions were made was fair and I agreed with what was decided.

81 When Mrs Beatrice Hobson spoke directly to the Court at the hearing yesterday, she emphasised these matters again and I accept what she says.

82 Ms Jasmine Accoom is a member of the Kuuku Ya'u native title group and she is part of the Kanthanampu group. Ms Accoom told the court she used to work for the Kuuku Ya'u

Aboriginal Corporation. She is also critical of Mr Pascoe and the position he has taken on this interlocutory application. She tells the Court in her affidavit:

All of the Kanthanampu families speak for Lockhart River township, not just one person or one family. All of the Kanthanampu families speak for all of the Kanthanampu country, but each of the families respect the views of other families.

Father Brian Claudie is a senior Kanthanampu elder. Everybody in Lockhart River, the whole town, respects Brian Claudie. All Kanthanampu families and other families in Lockhart River look up to him. We always talk to him about cultural and land things. Anthony is disrespecting his elder because he is not listening to Brian Claudie and bad things can happen if we disrespect our elders.

83 Ms Accoom describes her active involvement in the Cape York United #1 claim and how she would get information from elders and bring it back and put it on the table. She describes how she and Mr Gregory Omeenyo, a Kanthanampu person, would talk to all the Kuuku Ya'u family groups in Lockhart River about this claim. She tells the Court:

We would talk to the elders and explain things to them, including what would happen in the future. We were there to talk and bring information back from all family groups and elders.

84 In the hearing, Ms Accoom told the Court she lives in Townsville, so it is quite a trip for her to come up to Lockhart River or to Cairns to be involved in the claim. That she does is a good example of commitment to close involvement in a native title claim, to really sitting down with elders in her community and getting things done.

85 Ms Accoom describes being at the s 87A authorisation meeting on 16 September 2021. She says her elders were there and she describes everyone being really happy with what they heard and what was decided at that meeting about boundaries and the apical list. She describes how people at the meeting all decided to pass a resolution to set up a new corporation rather than nominate the existing Kuuku Ya'u Aboriginal Corporation. She explains the Kuuku Ya'u Aboriginal Corporation is not being chosen. I accept that it is not easy for people like Ms Accoom to explain such things publicly. But she did give that explanation. She said:

The Kuuku Ya'u PBC doesn't work as well as some of us would like and sometimes the chairperson and other directors create disputes between clan groups.

86 Now, people's perspectives on that opinion might differ but the point that Ms Accoom's evidence makes is the point that I have made earlier in these reasons and that is that there was a time and a place for the choice of the PBC to be made. That was at the authorisation meeting; the choice was made, and it was made for a clear and justifiable reason.

87 Father Brian Claudie also addressed the court. While he is an older man, I reject Mr Pascoe’s description of him. I found Father Claudie to be strong in his opinions and clear in what he saw as best for his community. He told the court how he supports the forthcoming consent determinations.

## CONCLUSION

88 In conclusion, there is no basis for either of the interlocutory applications to be granted. There have been methodical, resource-intensive and long-running activities by the Cape York Land Council to engage with claim group members at appropriate points in the process of settling on group descriptions, apical ancestors and boundaries, as well as the authorisation issues and the general progress of the claim.

89 Claim group members have had more than a reasonable chance to understand what is proposed and why, and have had the chance to participate, whether to agree or to object. They have had the chance to have questions answered and objections resolved. On family genealogies, they have been offered individual assistance, although many have not taken that up. On behalf of the Cape York applicant, the Cape York Land Council, its anthropologists, lawyers, officers and liaison staff in the last 18 months have done all that could reasonably have been done and they have done it, I might emphasise, under the most difficult of conditions, all through the COVID-19 pandemic.

90 As a matter of legal principle, there is no basis for the joinder applications. Even if, contrary to my conclusions, some slim basis were disclosed, as a matter of discretion, I would not grant the joinder.

91 I also accept, as Mr O’Gorman submitted, that in claimant applications of this kind, there is always a risk that some key elders may not live to see their native title recognised. This is a matter which I have addressed on many occasions and I consider it to be a matter of some weight. People have waited a very long time for their native title to be recognised and it is time for that to occur.

92 As Mrs Beatrice Hobson put it in her evidence, the consent determinations are, and I quote, “a really big thing for these two groups”. The interlocutory applications do not justify holding them up. The applications will be dismissed, and the consent determinations will proceed.

I certify that the preceding ninety-two (92) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Mortimer.

Associate:

A handwritten signature in black ink, consisting of a stylized, cursive 'A' followed by a horizontal line extending to the right.

Dated: 24 November 2021

## SCHEDULE OF PARTIES

QUD 673 of 2021

### Applicants

Second Applicant:	SILVA BLANCO
Third Applicant:	JAMES CREEK
Fourth Applicant:	JONATHAN KORKAKTAIN
Fifth Applicant:	REGINALD WILLIAMS
Sixth Applicant:	WAYNE BUTCHER
Seventh Applicant:	CLARRY FLINDERS
Eighth Applicant:	PHILIP PORT
Ninth Applicant:	HS (DECEASED)

### Respondents

Third Respondent:	ARUKUN SHIRE COUNCIL
Fourth Respondent:	CARPENTARIA SHIRE COUNCIL
Fifth Respondent:	COOK SHIRE COUNCIL
Sixth Respondent:	DOUGLAS SHIRE COUNCIL
Seventh Respondent:	KOWANYAMA ABORIGINAL SHIRE COUNCIL
Eighth Respondent:	NAPRANUM ABORIGINAL SHIRE COUNCIL
Ninth Respondent:	PORMPURAAW ABORIGINAL SHIRE COUNCIL
Tenth Respondent:	WUJAL WUJAL ABORIGINAL SHIRE COUNCIL
Eleventh Respondent:	ERGON ENERGY CORPORATION LIMITED (ACN 087 646 062)
Twelfth Respondent:	FAR NORTH QUEENSLAND PORT CORPORATION LIMITED (TRADING
Thirteenth Respondent:	TELSTRA CORPORATION LIMITED (ACN 33 051 775 556)
Fourteenth Respondent:	ALCAN SOUTH PACIFIC PTY LTD (ACN 009 726 078)

Fifteenth Respondent: LANCE JEFFRESS  
Sixteenth Respondent: BRANDT METALS PTY LTD  
Seventeenth Respondent: LESLIE CARL COLEING  
Eighteenth Respondent: MATTHEW BYRON COLEING  
Nineteenth Respondent: STEPHEN LESLIE COLEING  
Twentieth Respondent: RTA WEIPA PTY LTD (ACN 137 266 285)