IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY OF THE REGISTRY

No. B58 of 2012

On appeal from the Full Court of the Federal Court of Australia

B E T W E E N:

LEO AKIBA ON BEHALF OF THE TORRES STRAIT REGIONAL SEAS CLAIM GROUP
Appellant

and

COMMONWEALTH OF AUSTRALIA
First Respondent

STATE OF QUEENSLAND
Second Respondent

NEIL WADE
Third Respondent

MARKIM HOLDINGS T/A BARRIER REEF LIVECRAY
Fourth Respondent

ROBERT JOHN STEFANSTANDEN
Fifth Respondent

BARRY WILSON
Sixth Respondent

MARK WILLIS
Seventh Respondent

TASMANIAN SEAFOODS PTY LTD
Eighth Respondent

KAREN SKUDDER
Ninth Respondent

BRUCE ROSE
Tenth Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

Filed on behalf of:	State Solicitor for Western Australia Solicitor for the State of WA	Date	7 December 2012
Prepared by:	Griff Ranson		
Law firm:	State Solicitor's Office		
Telephone:	(08) 9264 1188	Email:	g.ranson@sso.wa.gov.au
SSO Ref:	4258/12		
Address for service	Level 16, Westralia Square 141 St Georges Terrace Perth WA 6000		

QUEENSLAND ROCK LOBSTER ASSOCIATION
Eleventh Respondent

THEOPHANIS PETROU
Twelfth Respondent

ELFREDA PETROU
Thirteenth Respondent

PETER J PAHLKE
Fourteenth Respondent

ALISON NEWBOLD
Fifteenth Respondent

RAYMOND MOORE
Sixteenth Respondent

MABEL MOORE
Seventeenth Respondent

MARK MILLWARD
Eighteenth Respondent

KENNETH JAMES MCKENZIE
Nineteenth Respondent

JOHN STEW ART MCKENZIE
Twentieth Respondent

STEVEN MACDONALD
Twenty First Respondent

M G KAILIS PTY LTD
Twenty Second Respondent

ROBERT BRUCE LOWDEN
Twenty Third Respondent

NOEL LOLLBACK
Twenty Fourth Respondent

BOB LAMACCHIA
Twenty Fifth Respondent

RICHARD LAURENCE JONES
Twenty Sixth Respondent

PHILLIP JOHN HUGHES
Twenty Seventh Respondent

ROBERT GEORGE GIDDINS
Twenty Eighth Respondent

LARRY HUDSON
Twenty Ninth Respondent

PAMELA HUDSON
Thirtieth Respondent

DIANNE MAREE HUGHES
Thirty First Respondent

AUSTRALIAN MARITIME SAFETY AUTHORITY
Thirty Second Respondent

BARRY EHRKE
Thirty Third Respondent

DENNIS FRITZ
Thirty Fourth Respondent

JENNY TITASEY
Thirty Fifth Respondent

AUGUSTINUS TITASEY
Thirty Sixth Respondent

GEOFFREY DONALD MCKENZIE
Thirty Seventh Respondent

ZIPPORAH GEAGEA
Thirty Eighth Respondent

PETER GEAGEA
Thirty Ninth Respondent

ROBERT GARNER
Fortieth Respondent

TROPICAL SEAFOOD OPERATION PTY LTD
Forty First Respondent

DIAKEN PTY LTD
Forty Second Respondent

CARL DAGUIAR
Forty Third Respondent

JIMMY ALISON
Forty Fourth Respondent

DANNY BROWNLOW
Forty Fifth Respondent

BEVERLEY JOAN BRUCE
Forty Sixth Respondent

GUY STEWART BRUCE
Forty Seventh Respondent

KIWATLUI
Forty Eighth Respondent

TORRES STRAIT REGIONAL AUTHORITY
Forty Ninth Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: CERTIFICATION AS TO FORM

1. These submissions are in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. Western Australia seeks leave to intervene in support of the First and Second Respondents in respect of the "reciprocal rights issue".

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Western Australia is a party to numerous native title determinations and a respondent in many native title claims. There have been 34 determinations of native title made in respect of land and waters in Western Australia. There 108 undetermined native title determination applications before the Federal Court which relate to land or waters in Western Australia. The reciprocal rights issue is central to the operation of the *Native Title Act 1993*.

PART IV: LEGISLATIVE MATERIALS

4. See [17] of the Commonwealth Submissions.

PART V: ARGUMENT

5. Western Australia submits that the reasoning of the primary judge (in *Akiba FC*) and of the Full Court[1] (in *Akiba FFC*) in respect of the reciprocal rights issue is correct and that Ground of Appeal 5 should be dismissed.

6. The reciprocal rights issue is to be understood by reference to the claimant's "Customary Marine Tenure Model" as articulated by the primary judge[2], and the

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[1] In respect of this issue, Mansfield J agreed with Keane CJ and Dowsett J; see *Commonwealth of Australia v Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group* (2012) 204 FCR 260; [2012] FCAFC 25 (*Akiba FFC*) at 309 [148].

contrasting of "ancestral occupation based rights"[3] with "reciprocity based rights"[4]. Critical to this appeal is the aspect of the latter that appears at (b) at [70] of *Akiba FC*, where his Honour states that such rights:

> "(b) can be called rights or interests because they are enforceable and sanctioned by appeal to the law or custom that associates the reciprocal obligation with the relationship and the law or custom that sanctions consequences for denial of the reciprocal obligation."

7. This was supplemented at [493] of *Akiba FC*[5]:

> "(e) the content of the rights is reciprocal shared access and use which permits the same activities as may be done by the person or group upon whom the right depends but does not include territorial control or livelihood and the exercise of the right is subject ultimately to control by ancestral occupation based rights holders."

8. The primary judge was keen to make plain that these efforts at articulation were not his[6]. More telling than imprecision, is the failure in this formulation to identify the components of the bundle of rights contended by the claimants to be such reciprocal rights. Paragraph (e) of [493] of *Akiba FC* suggests that the bundle is the same as that possessed by the "ancestral occupation based rights holders", but that such rights can only be exercised by those in the reciprocal relationship with the consent of the "ancestral occupation based rights holders".

9. The relevant findings made by the primary judge are summarised in *Akiba FC* at [503]-[508][7]. A number of matters emerge from these findings, the reasoning of the primary judge and that of the majority in *Akiba FFC* based on these findings[8].

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2 *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* (2010) 270 ALR 564; [2010] FCA 643 (*Akiba FC*) at 587-588 [68]-[70], accepted in *Akiba FFC* at 301-302 [115]-[118].

3 Also called "emplacement based rights".

4 Also called "reciprocal relationship based rights".

5 See *Akiba FFC* at 302 [118] (Keane CJ, Dowsett J).

6 *Akiba FC* at 588-589 [72]-[76].

7 This summary of findings and statement of conclusions ought not to be read to the exclusion of the primary judges detailed reasoning as to and identification of the particular rights of the native title holders. This reasoning is at *Akiba FC* at 683-690 [511]-[540] and is reflected in the determination. Western Australia does not (yet) have access to the Appeal Book. It is assumed that the Determination will be there. It is summarised relevantly in *Akiba FFC* at 264-265 [8]-[11].

8 See *Akiba FFC* at 305-306 [127]-[133].

10. *First,* the consideration of such findings within the construct of "rights and interests", and "rights and interests ... in relation to land or waters" is required by s.223(1) and 225 of the *Native Title Act 1993.* Although native title rights are not to be conceptualised within a rubric of non-indigenous property concepts[9], the *Native Title Act 1993* requires that the phenomenon must (*inter alia*) be a right or interest, it must be in relation to land or waters and it must be "possessed under the traditional laws acknowledged and the traditional customs observed"[10] by the claimants.

11. *Second,* such "right" must be akin to the non-indigenous notion of a legal right, as opposed to (say) a moral right or any form of right short of a legal right.

12. *Third,* in the characterisation of the phenomenon as a right or interest, the characterisation of whether it is in relation to land or waters and the determination of whether it is possessed under traditional laws acknowledged and observed by the claimants it matters not whether the claimants consider, in accordance with their own law and custom, that the phenomenon is (say) a right or interest in relation to land or waters. In this sense, the phenomenon does not require, what Professor Hart would call, an internal aspect of a rule[11].

13. *Fourth,* at [504] and [505] of *Akiba FC*[12], the primary judge expresses the principle of reciprocity as "founding" (in the sense of premising or underlying) traditional laws and customs. This emphasises that "reciprocity" is not a right in itself, but rather, informs traditional laws and customs, pursuant to which rights in relation to land are possessed.

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9 See for instance, *Mabo v Queensland* (1992) 175 CLR 1 at 83-85 (per Deane and Gaudron JJ). As an analogy, see, *Amodu Tijani v Secretary for Southern Nigeria* [1921] 2 AC 399 at 403 (Viscount Haldane for the Privy Council). It follows that the Appellants likening of the claimants rights to a license (Appellants Submissions at [44]) is misplaced.

10 *Native Title Act 1993* s.223(1)(a).

11 To distinguish a rule from a habit; HLA Hart *The Concept of Law* (1961) p.55.

12 In particular:

> [505] ... the Islanders' society does have a body of laws and customs founded upon the principle of reciprocity and exchange and that that principle is dominant and pervasive in relationships in general. I am of the view the principle expresses in particular contexts and in varying degrees, notions of respect, generosity and sharing, social and economic obligations and the personal nature of relationships – notions, in short, which inform the Islanders' way or "ailan pasin".

14. *Fifth,* the primary judge characterised the reciprocal relationship based phenomena as a right, or rights[13]. This conclusion is not challenged in this appeal. Whether the phenomenon identified can properly be characterised as a right should not divert from identification of the content of such "rights". So, for instance, the holders of occupation based rights (call them people X) have an obligation, and the person in the reciprocal relationship (call them people Y) a correlative right, to "provide [and receive] an assured welcome, accommodation and sustenance to a visiting friend"; to "go fishing with, to share with, him or her"; to be "provided with [and receive] something you need"; to "provide [and receive] something to your friend if requested"; to "permit the friend to fish, usually in the host's company, on the family's or community's marine estate"[14]; "with permission, to allow fishing in the community waters of the host"[15]. The primary judge's characterisation of these phenomena as rights of people Y derives from the finding that the relevant traditional laws and customs contained rules to the effect that people X could not deny these rights to people Y without legitimate reason[16]. These legitimate reasons are not identified. Nor is it stated that illegitimate denial would invoke something akin to a sanction[17] (this is considered further immediately below). Even with the acceptance of all of this, the characterisation of it as conferring rights on people Y is not inevitable or (with respect) compelling. Again, the insight of Professor Hart[18] assists with the understanding that, what the primary judge has found, readily describes rules of morality and manners as much as rules giving rise to "legal rights" in any conventional sense. Further to this, many of the identified reciprocal rights, even if rights, have nothing to do with land or waters and obviously enough are not "in relation to land or waters" for the purpose of s.223(1) of the *Native Title Act 1993.*

15. *Sixth,* the nature of the right held by people Y (or person Y), and more importantly, whether it is in relation to land or waters, is assisted by having regard

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[13] *Akiba FC* at 575 [11], 588 [71], 681 [504].
[14] *Akiba FC* at 681-682 [506].
[15] *Akiba FC* at 682 [508].
[16] *Akiba FC* at 682 [507]. It would seem less important to this conclusion that such rights were transmissible through generations.
[17] The absence of sanction is not necessarily decisive; see *Commonwealth v Yarmirr* (2001) 208 CLR 1; [2001] HCA 36 at 39 [16] (per Gleeson CJ, Gaudron, Gummow and Hayne JJ).

to the consequence of denial of the putative right by people X (or person X). The evidence of the Appellant's experts at trial, Professor Scott, Professor Beckett and Mr Murphy, was that the consequence of such denial was, ultimately and terminally, the end of the "reciprocal relationship". This can be seen at *Akiba FC* [189] in the recounting by the primary judge of Professor Scott's evidence:

> "Reciprocity is a comprehensive logic for the give-and-take of social relationship. While reciprocity shapes social relationships in some avenues of life in all societies, in egalitarian hunting, fishing, gathering and horticultural societies, it is a dominant and pervasive principle informing relationships in general. Relationships are personal rather than impersonal, and equality, personal autonomy and decision-making by mutual consent are the legitimate standards of interaction. These normative ideals are not always fulfilled; and when they are breached, negative reciprocity may ensue, sometimes with destructive outcomes."[19]

16. This jargon of "negative reciprocity" is best expressed by the Appellant in his submissions; "to deny a partner in reciprocity without valid reasons was to effectively end the relationship"[20].

17. The importance of this is to the characterisation of the rights of "reciprocal relationship based native title holder". If the consequence of denial of the right, which derives from a relationship, is that the relationship ends, such "right" is barely a legal right, and, if it can be so understood, it cannot be in relation to land or waters. With respect, the characterisation by the Full Court is apposite[21]; "... [such rights] are held mediately through a personal relationship with a native title holder".

18. *Seventh,* the native title rights of the "ancestral occupation native title holders" were determined to be[22]:

    (a) the right to access and remain in and the use the native title areas; and

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[18] In particular that in part 2 of chapter VIII of *The Concept of Law,* "Moral and Legal Obligation", pp.163-176.

[19] No doubt the primary judge would wish it to be noted in this passage at *Akiba FC* [189] his Honour is quoting Professor Scott.

[20] Appellants Submission [16].

[21] *Akiba FFC* at 305-306 [130].

[22] Order 5 of Finn J dated 23 August 2010. Order 5(b) is subject to Orders 6 and 9. The second sentence of Order 5(b) was added by the Full Court; see *Akiba FFC* at 308 [145]. Order 5 responds to the requirement of s.225(b) of the *Native Title Act 1993.*

(b) ... the right to access resources and to take for any purpose resources in the native title area. This right does not, however, extend to taking fish and other aquatic life for sale or trade.

19. On this determination of native title rights of the "ancestral occupation native title holders", the contended for rights of the "reciprocal relationship based native title holders" must be understood as follows:

(a) With the consent of an "ancestral occupation native title holder" or with the consent of "ancestral occupation native title holders"[23], the right to access and remain in and the use the native title areas; and

(b) With the consent of an "ancestral occupation native title holder" or with the consent of "ancestral occupation native title holders", the right to access resources and to take for any purpose resources in the native title area. This right does not, however, extend to taking fish and other aquatic life for sale or trade.

20. The requirement of consent makes it difficult (with respect) to conceptualise the phenomenon held by the "reciprocal relationship based group members" as any form of legal right. The equating of it to the rights of a licensee[24] can not be supported. Its closest analogy is to the hope of a person wanting to be an invitee. Even if this could be conceptualised as a legal right, the reasoning of the primary judge[25], and that of the Full Court in this respect[26] is, with respect, faultless.

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[23] This must mean the same thing as "subject ultimately to control by ancestral occupation based rights holders" as articulated by the claimants; see *Akiba FC* at point (e) of 679 [493], quoted herein at [7].

[24] Appellant's Submission [44].

[25] At *Akiba FC* 682 [508]:

> ... the parties to such status-based relationships have what properly are to be described as rights and obligations that are recognised and are expected to be honoured or discharged under Islander laws and customs. They are not privileges, interests, etc. So to describe them confuses the benefit or burden imposed with the possible forms or manner in which the rights may in a given circumstance be satisfied or the obligations discharged. ... [T]he rights in question are *not* rights in relation to land or waters. They are rights in relation to persons. The corresponding obligations are likewise social and personal and can be quite intense in character. This emerges clearly in the Islander evidence, the predominant emphases being on helping, sharing, being hospitable. To suggest that because, in a tebud relationship, the rights provide a "passport" to the host, partner's island and, with permission, will allow fishing in the community waters of the host, simply diverts attention from the personal nature and the relationship-sustaining purpose of the rights themselves. I would add that merely because rights are to be satisfied in the host's island's areas does not mean that the rights themselves are ones in relation to those areas. I do not accept "a relation to" land or waters conceptualisation of reciprocity based rights as such. Neither does it resonate in the Islanders' evidence.

[26] *Akiba FFC* at 305-306 [130]-[132].

21. The Appellant's central contention is in his submissions at [44]. There is (with respect) some vagary in the expression of the actual right asserted. What are "rights related physically to waters concerned" is difficult to fathom. Let it be assumed that it is, in fact, a right as follows: with consent of an ancestral occupation native title holder and accompanied by him/her, to go fishing in the claim area[27]. Whether this is a right in relation to land or waters (for the purpose of s.223(1)) can be tested having regard to the concession of the Appellant, in his submissions at [44]. There, it is accepted that the "right" of a "reciprocal relationship based native title holder" to be accommodated and fed while in the determination area by a member or members of the "ancestral occupation native title group" is not a right in relation to land or waters. In making the concession, the Appellant accepts that rights are not "in relation to land or waters" simply because they occur on land or water in the determination area. The Appellant does not, however, articulate the distinction between the rights asserted to be in relation to water, and the conceded rights that are not in relation to land or water. This is because none logically exists.

The "considerable difficulties" if this ground is upheld

22. The primary judge noted, but did not need to elaborate upon, the "considerable difficulties" that would flow from a conclusion that reciprocity based rights satisfied the requirements of ss.223(1) and 225 of the *Native Title Act 1993*[28].

23. The difficulties are exemplified by the new Order 4(2) sought by the Appellant in this appeal[29]. Such an order, without substantial change to Order 5, would not accord with the unchallenged findings at trial. A "reciprocal relationship based native title holder" does not possess the rights expressed in Order 5, because no such rights can be exercised without the consent of the relevant "ancestral occupation native title group". The proposed Order 4(2) does not state what the native title rights of a "reciprocal relationship based native title holder" are. For several obvious reasons a Court would not make an order in terms of Order 4(2),

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[27] This reflects the right expressed by the primary judge at *Akiba FC* 681-682 [506] and 682 [508].
[28] *Akiba FC* at 682 [510]. See also *Akiba FFC* at 306 [132].
[29] Appellant's Submission [76(4)(c)].

not least of which is that without definition of what is a "reciprocal relationship" the order would be uncertain[30].

24. These practical difficulties that would flow from a conclusion that reciprocity based rights satisfied the requirements of ss.223(1) and 225 of the *Native Title Act 1993* can be illustrated by reference to the Western Desert Cultural Bloc, an analogy to which the primary judge in this matter was alive[31]. The Western Desert Cultural Bloc is a construct considered in a number of decisions; *inter alia*, *De Rose v South Australia*[32], involving a claim over a small area in South Australia; *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No 9)[33] where the same construct was considered in an area commencing to the west of Kalgoorlie in Western Australia and extending east, and *Jango v Northern Territory of Australia*[34] involving the 104 square kilometres of the town of Yulara in the Northern Territory.

25. Without going to the detail of these claims, it might readily be assumed, having regard to the various descriptions in these decisions of the claimed native title rights, that people who associate or define as members of groups within the Western Desert Cultural Bloc would assert "reciprocal relationship based native title rights" over the entire area of the Western Desert Cultural Bloc or large parts of it[35]. So, for instance, O'Loughlin J in *De Rose v South Australia*[36] offered the following description by reference to the claimants pleading:

> "Claimants and the claimed land and water are a part of a regional network of classical and contemporary relationships shared with other Aboriginal people and land within what is known in anthropological writings as the `Western Desert bloc' of Australian Aboriginal culture."

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30 As to which, see *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 at 84 [58] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

31 *Akiba FC* at 608-609 [165]-[166].

32 *De Rose v South Australia* [2002] FCA 1342.

33 *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No 9) (2007) 238 ALR 1; [2007] FCA 31.

34 *Jango v Northern Territory of Australia* (2006) 152 FCR 150; [2006] FCA 318.

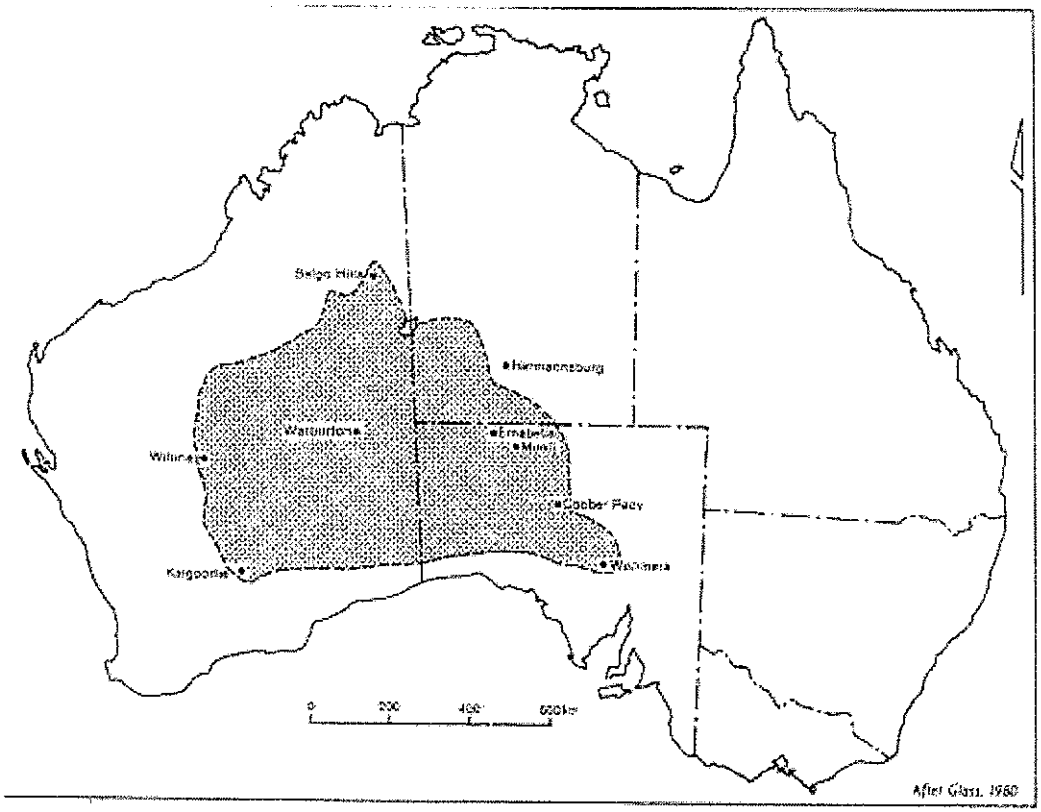
35 Of course, other than areas where they possess the equivalent of the "ancestral occupation native title rights", where their interest is direct and not reciprocally based.

36 *De Rose v South Australia* [2002] FCA 1342 at [33].

26. In *Jango v Northern Territory of Australia*[37], Sackville J did likewise:

> "(3) The people of the Western Desert are a set of overlapping networks of kin the members of which, in most cases live in the Western Desert, and most of whose antecedents lived in the Western Desert.
>
> (4) Sub-regions of the Western Desert correspond to social, cultural and linguistic variations, including variations in the way that the relationships of people to land and waters are reckoned and recognised. The eastern Western Desert is one such sub-region. The people of the sub-regions are not readily separable from the people of their neighbouring sub-regions. They interact, intermarry and share most cultural features."

27. In *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No 9)[38] among the varieties of constructions of the Western Desert Cultural Bloc, Lindgren J re-produced the following map depicting one view of its extent[39]:



[37] *Jango v Northern Territory of Australia* (2006) 152 FCR 150; [2006] FCA 318 at 191 [171].

[38] *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No 9) (2007) 238 ALR 1; [2007] FCA 31.

[39] *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No 9) (2007) 238 ALR 1; [2007] FCA 31 at [692] (these paragraphs were not reproduced in the ALR report).

28. No Western Desert based claim has been put on the basis of the claim in this matter. Were it to be, it would require, for a claim over land near Wiluna to be registered, authorisation by Western Desert people habitually resident in Woomera[40]. As in this matter, as exemplified by the opaqueness of the proposed Order 4(2) and Order 5, it is difficult to conceive of how a determination that satisfied the terms of s.225 of the *Native Title Act 1993* could be made.

PART VI: ORAL ARGUMENT

29. It is estimated that 15 minutes will be required for the presentation of Western Australia's oral argument.

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Dated:

GR Donaldson
Solicitor General for Western Australia

Telephone: (08) 9264 1806
Facsimile: (08) 9321 1385

[40] In terms of s.61 of the *Native Title Act 1993,* it would depend upon the claimed native title rights, but, having regard to s.68, it is customary to seek to encompass the claims of all native title holders in a single claim or at least have all competing claims determined at the same time.