



## WHAT'S NEW IN NATIVE TITLE SEPTEMBER 2016

1. Case Summaries _____	1
2. Legislation _____	5
3. Native Title Determinations _____	5
4. Registered Native Title Bodies Corporate & Prescribed Bodies Corporate ____	6
5. Indigenous Land Use Agreements _____	7
6. Future Acts Determinations _____	8
7. Publications _____	10
8. Training and Professional Development Opportunities _____	10
9. Events _____	11

### 1. Case Summaries

#### [Bropho v City of Perth \[2016\] FCA 1098](#)

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##### **8 September 2016, Application for Declaration, Federal Court of Australia, Western Australia, McKerracher J**

In this case, McKerracher J dismissed an application for a declaration that the [Local Government Property Local Law 2005 \(WA\)](#) (Local Law) had no effect against persons with native title rights on Heirisson Island in Perth. The application was brought by Swan River Nyungah elder, Ms Bropho. Ms Bropho is an applicant in the Swan River #2 Claim (WAD 24/2011) seeking a determination of native title over Heirisson Island. The Local Law prohibits activities such as camping; however, Ms Bropho argues that she is protected from the application of this law as she will be entitled to hold native title over Heirisson Island in due course. McKerracher J held that the application be summarily dismissed on the basis that it had no reasonable prospects of success. The respondents to the proceeding were the City of Perth and the State of Western Australia.

McKerracher J found that the application should be dismissed on the basis that the area had been validly vested twice under s 33(2) of the [Land Act 1933 \(WA\)](#) (Land Act) in its then current form. Following [Western Australia v Ward \[2002\] HCA 28](#), his Honour found that vestings under s 33 of the *Land Act* wholly extinguish native title,

including vestings made after the commencement of the [Racial Discrimination Act 1975 \(Cth\)](#). His Honour also noted that Ms Bropho would have difficulties in relying upon s 211 of the [Native Title Act 1933 \(Cth\)](#) (NTA) as camping is unlikely to fall within the native title rights and interests listed in s 211(3). Furthermore, his Honour held that Ms Bropho is seeking a declaration on the assumption that native title exists, however her application can only succeed if and when there is a determination of the Court that native title exists over Heirisson Island. McKerracher J therefore concluded that this application had no reasonable prospects of success as native title has been wholly extinguished over the area, and found that it was therefore not apparent that Ms Bropho has standing to bring this application.

### **[Bropho v City of Perth \(No 2\) \[2016\] FCA 1168](#)**

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#### **27 September 2016, Costs Application, Federal Court of Australia, Western Australia, McKerracher J**

In this matter, McKerracher J ordered that the applicant, Ms Bropho, pay the costs of the first respondent, the City of Perth, for the application dismissed in [Bropho v City of Perth \[2016\] FCA 1098](#), by which Ms Bropho had sought a declaration that the *Local Government Property Local Law 2005 (WA)* did not apply to native title claimants. The respondents were the City of Perth and the State of Western Australia.

Ms Bropho argued that following [The Lardil Peoples v State of Queensland \[2001\] FCA 414 \(Lardil\)](#), the ‘spirit’ of s 85A of the NTA may be taken into account in the court’s discretion to vary a costs order. She argued that there should be no order as to costs as the argument raised in the originating application was novel, potentially important and she stood to gain nothing personal from the outcome. Following the reasoning of Barker J in [Corunna v South West Aboriginal Land and Sea Council \(No 2\) \[2015\] FCA 630](#), McKerracher J held that under *Lardil*, the originating application does not fall within the exclusive jurisdiction of the Federal Court conferred by s 81 of the NTA. As s 85A only applies to applications within the exclusive jurisdiction of the court, s 85A is also inapplicable.

Even if s 85A were applicable, his Honour was not persuaded that there were good reasons to take into account the ‘spirit’ of s 85A to vary the ordinary costs order. His Honour reasoned that the ordinary costs should stand as the originating application related to the application of the NTA and not to its interpretation; the originating application was not brought in the public interest; and Ms Bropho’s case had no reasonable prospects of success due to the prior extinguishment over the area, and did not fail simply on a technicality.

**[TR \(Deceased\) on behalf of the Kariyarra – Pipingarra People v State of Western Australia \[2016\] FCA 1158](#)**

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**23 September 2016, Application to Remove Respondents, Federal Court of Australia, Western Australia, North ACJ**

In this matter, North ACJ dismissed an application under s 84(8) of the NTA seeking the removal of Mary Attwood, George Dann, Robert Dann, Shirley Lockyer, Patricia Mason and Eugenia Smith (the Indigenous respondents) as respondents to the Kariyarra-Pipingarra application for native title as they were also members of the claim group. The Kariyarra-Pipingarra application was filed in December 2009 over areas east and south of Port Hedland in Western Australia, and the application for removal was filed in February 2016. The respondents in this matter were the State of Western Australia, the Commonwealth, the Indigenous respondents, and various mining companies.

The Indigenous respondents are Kariyarra people, but were not included in the original native title claim group description as their apical ancestor, Tommy Anderson was not listed. In September 2010, the Indigenous respondents filed a notice of intention to become respondents to the application, and orders to that effect were made by the District Registrar on the basis of an anthropological report supporting their assertions. In December 2013, following a further expert anthropologist report, the applicant filed an application to amend the description of the native title claim group to include additional apical ancestors, including Tommy Anderson. The application was opposed by the Indigenous respondents on grounds disputing that the apicals were Kariyarra people, and the application was not authorised by the people entitled to native title over the country in question as a result. The Court allowed the amendment in [TR \(Deceased\) on behalf of the Kariyarra People v State of Western Australia \[2014\] FCA 734](#), and the Indigenous respondents became members of the native title group, while remaining as respondents to the application.

The applicants sought to remove the Indigenous respondents as respondents following their inclusion in the native title claim group, submitting that their interests as holders of communal rights with others are protected their inclusion as members of the native title claim group. The Indigenous respondents opposed this application as they disagreed with the criteria for being a Kariyarra person and considered that they hold ‘an interest in preventing the making of a determination in favour of some people who are not entitled under traditional law and custom to hold rights and interests in the land’ at [22].

His Honour distinguished this case from [Starkey v State of South Australia \[2011\] FCA 456](#), holding that contesting the membership of the group itself is not an intramural matter. His Honour held that it was not appropriate to decide the issues at this stage of the proceeding and the matter must be determined at trial.

North ACJ considered further discretionary considerations. The Indigenous respondents have not made a competing claim for determination of native title, nor have they given any reasons for not lodging a claim. Furthermore, by remaining as respondents, the finalisation of the proceeding will be delayed and greater expenses incurred by the parties. These factors weighed against the Indigenous respondents. Following [\*Byron Environment Centre Incorporated v The Arakwal People\* \[1997\] FCA 797](#), however, his Honour held at [49] that the interest the Indigenous respondents claimed ‘would be “affected in a demonstrable way” by a determination of native title’ and the court should therefore not exercise its discretion under s 84(8) of the NTA to remove the Indigenous respondents from the proceeding. His Honour also held that the Indigenous respondents have raised an arguable case in support of competing native title, have asserted their claimed rights and interests from the beginning of the proceeding and have not been responsible for any delay. Given these considerations the Indigenous respondents were entitled to remain as respondents and the application was dismissed.

### ***Gomeri People v Attorney-General of New South Wales (No 2)* [2016] FCAFC 116**

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#### **1 September 2016, Application to Vary Costs Order, Federal Court of Australia – Full Court, New South Wales, Reeves, Barker and Bromberg JJ**

In this case, Reeves, Barker and Bromberg JJ dismissed an application filed on behalf of the Gomeri people seeking to vary a costs order. The application followed leave granted to the parties by the Court in [\*Gomeri People v Attorney-General of New South Wales\* \[2016\] FCAFC 75](#) to apply to vary the no costs order made - see [\*What’s New in Native Title - May 2016\*](#) for a summary of that case. The Gomeri people applied to vary the order to have NTSCORP Limited pay their costs in the proceedings. The respondents were the Attorney General of New South Wales and NTSCORP Limited.

In 2011 the Gomeri people made a native title determination application and engaged NTSCORP Limited as the Native Title Representative Body and its solicitor to conduct the proceeding. A claim group meeting in 2013 created the expectation that NTSCORP Limited would remain acting on behalf of the Gomeri people in their native title determination application. The applicant then engaged another solicitor and NTSCORP filed an application in February 2015 to be reinstated. On 13 May 2015, the primary judge dismissed the application and made further orders not sought by NTSCORP Limited relating to the conduct of the claim group meeting in choosing a legal representative. The Gomeri people appealed in relation to the further orders, and sought orders that NTSCORP Limited pay their additional costs.

Reeves, Barker and Bromberg JJ found that each party to the proceeding must bear their own costs as per s 85 of the NTA, and that s 85(2) did not apply as there was

no unreasonable conduct by NTSCORP. In relation to the appeal costs, the Court found that as the appeal concerned orders made by the primary judge that NTSCORP had not applied for, there should be no order as to costs. Furthermore, the question raised in the appeal related to the entitlement of a claim group to limit the authorisation of an applicant under the NTA, and was therefore of some significance to the administration of the NTA beyond the interests of the parties. These considerations led to no order as to costs on appeal, and this decision was upheld by the Full Court.

## 2. Legislation

### Victoria

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#### [Victorian Fisheries Authority Bill 2016](#)

**Status:** This Bill was introduced into the Legislative Assembly on 13 September 2016 and was read for a second time on 15 September 2016.

**Stated purpose:** This Bill establishes the Victorian Fisheries Authority (VFA) and amends the [Fisheries Act 1995 \(Vic\)](#) to allow the VFA and its Chief Executive Officer to exercise functions under that Act. This Bill also makes minor amendments to other Acts.

**Native title implications:** The VFA is designed to be responsible for the majority of the functions currently undertaken by Fisheries Victoria. It has been established to improve regulatory outcomes in the recreational and commercial fisheries sector, including the Aboriginal fishing sector, and enforce compliance with the *Fisheries Act 1995* and other regulations that relate to fishing activities. The Bill also amends the definition of ‘decision maker’ in the [Traditional Owner Settlement Act 2010 \(Vic\)](#) by replacing references to the Secretary regarding decisions under the *Fisheries Act 1995* with references to the Authority.

For further information please see the [Second Reading Speech](#) from the Legislative Assembly.

## 3. Native Title Determinations

In September 2016, the NNTT website listed 0 native title determinations.

## 4. Registered Native Title Bodies Corporate & Prescribed Bodies Corporate

[The Native Title Research Unit](#) within AIATSIS maintains a [RNTBC summary document](#) which provides details about RNTBCs and PBCs in each state/territory including the RNTBC name, RNTBC type (agent or trustee) and relevant native title determination information. The statistics for RNTBCs as of 20 September 2016 can be found in the table below.

Information on RNTBCs and PBCs including training and support, news and events, research and publications and external links can be found at [nativetitle.org.au](http://nativetitle.org.au). For a detailed summary of individual RNTBCs and PBCs see [PBC Profiles](#).

Additional information about RNTBCs and PBCs can be accessed through hyperlinks to corporation information on the [Office of the Registrar of Indigenous Corporations \(ORIC\) website](#); case law on the [Austlii website](#); and native title determination information on the [NNTT](#) and [ATNS](#) websites.

State/Territory	RNTBCs	No. of successful (& conditional) claimant determinations for which RNTBC to be advised
Australian Capital Territory	0	0
New South Wales	6	0
Northern Territory	22	0
Queensland	77	3
South Australia	15	1
Tasmania	0	0
Victoria	4	0
Western Australia	36	2
<b>NATIONAL TOTAL</b>	<b>160</b>	<b>15</b>

**Note** some RNTBCs relate to more than one native title determination and some determinations result in more than one RNTBC. Where a RNTBC operates for more than one determination it is only counted once, as it is one organisation.

**Source:** <http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx> and Registered Determinations of Native Title and RNTBCs as at 20 September 2016.

## 5. Indigenous Land Use Agreements

In September 2016, 7 ILUAs were registered with the National Native Title Tribunal.

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
27/09/2016	<a href="#"><u>Birriah People/Spurdle Family ILUA</u></a>	QI2016/028	Body Corporate	QLD	Access, Pastoral
27/09/2016	<a href="#"><u>Birriah People and Betteridge ILUA</u></a>	QI2016/033	Body Corporate	QLD	Extinguishment
27/09/2016	<a href="#"><u>Birriah People Protected Areas ILUA</u></a>	QI2016/034	Body Corporate	QLD	Government, Co-management
27/09/2016	<a href="#"><u>Birriah People Tenure Resolution ILUA</u></a>	QI2016/035	Body Corporate	QLD	Tenure resolution, Government
27/09/2016	<a href="#"><u>Birriah People and S Wilkie ILUA</u></a>	QI2016/041	Body Corporate	QLD	Extinguishment
23/09/2016	<a href="#"><u>Sandstone East Land Transfer ILUA</u></a>	QI2016/017	Area Agreement	QLD	Government, Co-management, Infrastructure, Tenure resolution
23/09/2016	<a href="#"><u>Lockhart River Defence Facilities ILUA</u></a>	QI2016/018	Area Agreement	QLD	Government, Access

For more information about ILUAs, see the [NNTT website](#) and the [ATNS Database](#).

## 6. Future Acts Determinations

In September 2016, 5 Future Acts Determinations were handed down.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
20/09/2016	<u>Raymond William Ashwin (dec) &amp; Others on behalf of Wutha v Western Australia and Evanton Ross Harris</u>	WO2016/0237	WA	Objection - Dismissed	Member Shurven did not receive any contentions from the Wutha claim group as to why the objection to the expedited procedure application should not be dismissed, nor was a request for extension of time made in order to comply with directions. Ms Shurven considered the group had been given sufficient opportunity to comply with directions set by the Tribunal, and it would be unfair to prejudice the other parties with further delays.
20/09/2016	<u>Raymond William Ashwin (dec) &amp; Others on behalf of Wutha v Western Australia and Evolution Mining (Mungari) Pty Ltd (formerly La Mancha Resources Australia Pty Ltd)</u>	WO2015/0682	WA	Objection - Dismissed	Member Shurven did not receive any contentions from the Wutha claim group as to why the objection to the expedited procedure application should not be dismissed, nor was a request for extension of time made in order to comply with directions. Ms Shurven considered the group had been given sufficient opportunity to comply with directions set by the Tribunal, and it would be unfair to prejudice the other parties with further delays.
09/09/2016	<u>Raymond William Ashwin (dec) &amp; Others on behalf of Wutha v Western Australia and Downunder Exploration Pty Ltd</u>	WO2015/0993	WA	Objection - Dismissed	Member Shurven did not receive any contentions from the Wutha claim group as to why the objection to the expedited procedure application should not be dismissed, nor was a request for extension of time made in order to comply with directions. Ms Shurven considered the group had been given sufficient opportunity to comply with directions set by the Tribunal, and it would be unfair to prejudice the other parties with further delays.



Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
05/09/2016	<u>George Brooking &amp; Others on behalf of Bunuba #2 and Bunuba Dawangarri Aboriginal Corporation v Marten Hendrick Ynema and Western Australia</u>	WO2016/0013; WO2016/0014	WA	Objection - Expedited Procedure Does Not Apply	Member Shurven found that the proposed activities under the licence were not likely to interfere with any social or community activity in a substantial manner, as required under s 237(a). However Member Shurven found that there were two sites of particular significance to the Bunuba native title parties, and one of them, the massacre site, would likely be disturbed by the licence activities and therefore under s 237(b) the parties should negotiate the necessary precautions to take.
01/09/2016	<u>Raymond Ashwin (dec) &amp; Others on behalf of Wutha v Western Australian and Venus Metals Corporation/Bruce Robert Legendre and Another</u>	WO2015/0329; WO2015/0333; WO2015/0463; WO2015/0626; WO2015/0627	WA	Objection - Dismissed	Member Shurven did not receive any contentions from the Wutha claim group as to why the objection to the expedited procedure application should not be dismissed, nor was a request for extension of time made in order to comply with directions. Ms Shurven considered the group had been given sufficient opportunity to comply with directions set by the Tribunal, and it would be unfair to prejudice the other parties with further delays.

## 7. Publications

### **Kimberley Land Council**

The September 2016 edition of the KLC newsletter is available for [download](#)

### **South West Aboriginal Land and Sea Council**

#### ***Boorna-Wangkiny Newsletter***

The October 2016 edition of the *Boorna-Wangkiny Newsletter* is available for [download](#).

## 8. Training and Professional Development Opportunities

### **AIATSIS**

#### **Aboriginal Studies Press**

Entries for the 2017 Stanner Award close at 5pm (EST) Tuesday 31 January 2017.

Sponsored by AIATSIS, the biennial award is open to all aspiring Indigenous authors of academic works. The author of the winning submission will receive \$5000 in prize money, mentoring and editorial support to turn their manuscript into a publication, and publication by the award-winning publishing arm of AIATSIS, Aboriginal Studies Press.

For more information, [visit the AIATSIS website](#).

#### ***Australian Aboriginal Studies Journal***

Australian Aboriginal Studies (AAS) is inviting papers for coming issues. AAS is a quality multidisciplinary journal that exemplifies the vision where the world's Indigenous knowledge and cultures are recognised, respected and valued. Send your manuscript to the Editor by emailing [aasjournal@aiatsis.gov.au](mailto:aasjournal@aiatsis.gov.au).

For more information, [visit the journal page of the AIATSIS website](#).

#### ***Senior Project Manager/Research Fellow (Law), Native Title Research Unit***

The AIATSIS Native Title Research Unit is recruiting for the position of Senior Project Manager/Research Fellow (Law).

The EL 1 Senior Project Manager/Research Fellow (Law) is responsible for conducting high-quality research and designing and undertaking research projects, including the management of staff. Staff management includes developing and monitoring of work plans and flows, the delivery of outputs, mentoring and guiding project team members. The Senior Project Manager/Research Fellow (Law) will manage project resources, develop research strategies, identify and solve problems and evaluate project outcomes in producing project reports, conference papers and other research outputs.

Applications close 4 November 2016. For more information and information on how to apply, [visit the AIATSIS website](#).

## Victorian Department of Premier and Cabinet

### *Traditional Owner Agreement Making Support*

The Right People for Country program is currently calling for Expressions of Interest from Traditional Owner groups interested in accessing agreement making support. Support is tailored to the needs of Traditional Owner groups and is available to prepare for and to make agreements within and between Traditional Owner groups.

Expressions of interest close on 21 November 2016.

For more information, [visit the website](#).

## ORIC

ORIC provides a range of training for Aboriginal and Torres Strait Islander corporations about the [Corporations \(Aboriginal and Torres Strait Islander\) Act 2006 \(CATSI Act\)](#), the corporation's rule book and other aspects of good corporate governance. More information on upcoming training is outlined below.

### *Upcoming training courses*

Course	Location	Dates	Applications Close	Details
Introduction to Corporate Governance workshop	Melbourne	8-10 November	Applications close: 17 October	<a href="#">Apply online   Download the application form</a>
Two-day governance workshop	Broken Hill	15-16 November	Applications close: when full	Email <a href="mailto:training@oric.gov.au">training@oric.gov.au</a> to apply
Two-day governance workshop	Kalgoorlie	29-30 November	Applications close: when full	Email <a href="mailto:training@oric.gov.au">training@oric.gov.au</a> to apply

For further information on training courses and dates, [visit the ORIC website](#).

## 9. Events

### Australian Anthropological Society

#### *Australian Anthropological Society Conference 2016: Anthropocene Transitions*

The 2016 conference of the Australian Anthropological Society (AAS) will be hosted by the Department of Anthropology at the University of Sydney in partnership with the AAS.

**Date:** 12-15 December 2016

**Location:** University of Sydney, New South Wales

For further information, including the conference program, [visit the conference website](#).

## **Ngā Pae o te Māramatanga**

### ***International Indigenous Research Conference 2016***

The 7th biennial Indigenous Research Conference will be hosted by Ngā Pae o te Māramatanga (NPM). The conference will be structured around NPM's key research themes:

- Whai Rawa – Prosperous Indigenous Economies
- Te Tai Ao – Healthy Natural Environments
- Mauri Ora – Indigenous Human Flourishing
- Mahi Auaha – Creative Indigenous Innovation
- Te Reo me Ngā Tikanga Māori – Thriving Indigenous Languages and Cultures

**Date:** 15-18 November 2016

**Location:** University of Auckland, New Zealand

Registrations close 31 October. For more information, [visit the conference website](#).

### ***International Indigenous Research Conference 2016 – Pre-conference workshops and events***

NPM is hosting three pre-conference workshops:

- Indigenous Data - Indigenous Sovereignty Workshop
- Kai mārika ("Absolutely Food"): Indigenous Food Sovereignty Workshop
- Indigenous Early Career & Post-Graduate Workshop

**Date:** 14 November 2016

**Location:** University of Auckland, New Zealand

For more information, [visit the conference website](#).

## **University of Western Australia**

### ***Expert Panel: Social License – a 'must have' in negotiating with Aboriginal communities?***

The University of Western Australia is holding an expert panel discussion on the need for a social license to operate within Aboriginal Communities. Following the panel discussion there will be a cocktail hour. This event is a CPD event – 1 point in Ethics and 0.5 points in Professional Skills.

**Date:** 26 October 2016

**Location:** University of Western Australia, Western Australia

For more information, [visit the event webpage](#).

***Indigenous Business, Enterprise and Corporations Conference (IBECC)***

The IBECC will be held at the University of Western Australia Business School and will cover a broad range of areas including business, community, enterprise, innovation, health, corporations, native title, the arts, education, research and Indigenous knowledge. The Conference will provide an exciting forum for dialogue and exchange on how to best foster the growth of Indigenous businesses, enterprises and corporations.

**Date:** 1-2 December 2016

**Location:** University of Western Australia, Western Australia

For more information, [visit the conference website](#).

The Native Title Research Unit produces monthly publications to keep you informed on the latest developments in native title throughout Australia. You can [subscribe to NTRU publications online](#), [follow @AIATSIS on Twitter](#) or [‘Like’ AIATSIS on Facebook](#).

