Native Title Newsletter

March/April, No. 2/2012

Last chance to register for the Native Title Conference 2012

Visit the conference website at:

http://www.aiatsis.gov.au/ntru/NTC12.html

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AIATSIS
Australian Institute of Aboriginal and Torres Strait Islander Studies

Native Title Research Unit, AIATSIS

Native Title Conference 2012

By Jennifer Jones, Native Title Conference Manager, NTRU, AIATSIS.

The annual National Native Title Conference is only weeks away and will be held at the Townsville Entertainment and Convention Centre from 4-6 June 2012. The conference will be co-convened by AIATSIS and the North Queensland Land Council on the lands of the traditional owners of the greater Townsville region.

Speakers that have been confirmed include:

- The Attorney General for Australia, the Hon. Nicola Roxon.
- Mr Neil Sterritt, one of the principal architects of the *Delgamuukw v Queen* Aboriginal title court case, which was decided by the Supreme Court of Canada in 1997.
- Mr Mick Gooda, Social Justice Commissioner.
- Professor Michael Dodson AM, Chairperson of AIATSIS.
- The representatives from native title representative bodies and service providers.
- Professor Marcia Langton.

The theme "Echoes of Mabo: Honour and Determination" was selected to honour and recognise the 20th anniversary of the *Mabo* decision. In line with our theme, we have chosen the artwork of Alick Tipoti for our logo. Mr Tipoti is a Torres Strait Islander artist and is well known throughout the Townsville and Torres Strait Islands region.

The Townsville community is holding the Reconciliation Festival to celebrate the 20th anniversary of the *Mabo* decision. This festival will be held on the weekend prior to the conference. Part of this festival will be 'March along the Strand' on Saturday 2 June, where traditional games, food, performances and storytelling will take place. There will also be guest speakers and trade stalls. On Sunday 3 June, the community will hold a *Mabo* decision 20th anniversary commemoration ceremony at the Mabo monument, Victoria Bridge, Townsville. A program detailing the festivities can be found on our website. AIATSIS is proud to be part of these festival celebrations.

The conference will conclude with a dinner to be held at the Townsville Entertainment and Convention Centre. There will be entertainment from local Indigenous bands and great food. Don't forget to include the dinner when you register.

A reminder as well that Townsville will be very busy before and during the conference. It is strongly recommended you register for the conference as soon as possible. When you do register, please also book your accommodation. Our accommodation provider, In House Event Solutions has negotiated good prices for rooms throughout the city and you don't want to miss out!

For more information visit the conference website at: http://www.aiatsis.gov.au/ntru/NTC12.html

Forthcoming publication by the Native Title Research Unit

The NTRU has been preparing a special book for the 20th anniversary of the *Mabo* decision. *The Limits of Change: Mabo and Native Title 20 Years On,* edited by Toni Bauman and Lydia Glick, will be launched at the AIATSIS Native Title Conference in Townsville in June.

Introduced by Mick Dodson, the volume consists of 34 chapters by those who were close to the *Mabo* case, or the negotiations leading up to the enactment of the *Native Title Act*, or who for the past two decades have helped shape native title outcomes. The volume includes perspectives from native title claimants and holders, community, political and corporate leaders, legal practitioners, researchers and government administrators. To purchase this book please email lydia.glick@aiatsis.gov.au. All early orders for the book (before 31 May) will be sold at a discounted price of $20.00.

Joint management workshop: Towards a community of practice

Desert Park, Alice Springs, 3-4 April 2012

Gabrielle Lauder and Toni Bauman, AIATSIS

Joint management broadly refers to an agreement between native title holders and the relevant government regarding the management of national parks and other conservation or protected areas.

The NTRU has been researching joint management agreements through a series of workshops and has been investigating the concept of a 'community of practice', a national community of effective joint management practice.

Participants of the 'Towards a Community of Practice' workshop

The most recent workshop, 'Joint Management of Protected Areas in Australia Workshop: Native Title and Other Pathways towards a Community of Practice', brought together government staff working in joint management to share information about each jurisdiction's approach to joint management outcomes and to identify practical issues that should be addressed in developing a community of practice. It is intended that this workshop will inform a series of workshops later in 2012 which will involve native title holders and traditional owners, representatives of NTRBs and other joint management stakeholders.

Day 1 of this workshop was devoted to each jurisdiction giving an overview of their joint or co-management arrangements, including their respective challenges and successes. Access to country and the right to care for country was identified as an increasingly common outcome sought by traditional owners through joint management arrangements. However, a challenge in achieving this is matching the aspirations of joint management partners with their capacities.

Day 2 involved a discussion on a range of issues impacting on joint management, including potential in the dedication of Indigenous Protected Areas ('IPAs') over multi-tenures, including National Parks; and the manner in which IPAs can be used as a whole of country planning tool and an alternative pathway to joint management. Each jurisdiction outlined their current approaches to marine areas and the emerging potential for joint management over marine areas. Although there has been limited progress in joint management over marine areas to date, there is a growing awareness of the need to address Indigenous interest in sea country management.

Participants showed a strong commitment to sharing information about their joint management models and successful case studies. This information will now be used to inform the development of a community of practice or learning portal, with the aim of providing cross-jurisdictional support for joint management practices. Some suggestions for the content included digital information sharing, a range of toolkits, web-based forums for discussion, research to benefit stakeholders, and email networks.

The workshop also looked to what is possible beyond the current restraints. It was apparent from feedback discussion and evaluation forms that the participants highly valued the workshop and that a range of further workshops would be constructive to facilitating a strong dialogue with traditional owners and other joint management stakeholders.

The NTRU will be publishing a report to provide a more detailed account of the workshop, which will be made available through the NTRU Joint Management webpage:
http://www.aiatsis.gov.au/ntru/jointmanagement.html

Yawuru joint management in the Kimberley

By Sharon Ferguson, Department of Environment and Conservation (WA)

Situated in Western Australia's Kimberley region is Yawuru *buru* (country). The Yawuru people are the traditional owners of the lands and waters in and around Broome. Part of the resolution of the Yawuru native title determination in 2010 was the identification of a new conservation estate under two Indigenous land use agreements ('ILUAs') signed by Yawuru and the Western Australian ('WA') Government.

The new Yawuru conservation estate comprises around 100,000 hectares of lands and waters to be jointly managed by Yawuru, the WA Government and the Shire of Broome. These lands and waters comprise significant cultural, recreational and conservation values including law grounds, meeting places, hunting areas, the internationally recognised Ramsar Wetlands of Roebuck Bay and popular terrestrial and marine recreation areas. The Yawuru people live by six seasons and have cultural rules and responsibilities for looking after country by these seasons.

Luke Puertollano with the Governor-General

The management of the Yawuru conservation estate is overseen by the Yawuru Park Council, a body comprising equal representatives from Yawuru, the Department of Environment and Conservation ('DEC') and the Shire of Broome. Each party has voting rights on those parcels of land for which they have a vested interest.

The Yawuru Park Council operates under the joint management agreement outlined in one of the ILUA's, and its primary function is the development and implementation of management plans for the estate. The estate management plans that are currently being developed are guided by the Yawuru cultural management plan, which was produced as an outcome of the ILUAs. The cultural management plan was prepared by Yawuru people to explain the importance of Yawuru *buru* and culture, and how they will be protected, nurtured and passed on to future generations.

Yawuru Rangers at Mangalagun

Employment and training opportunities for Yawuru people managing Yawuru *buru* were identified as a focus of the joint management agreements and an employment and training strategy has been set up within DEC. The Mentored Aboriginal Training and Employment Scheme ('MATES') is an initiative of DEC which aims to recruit, train and employ Aboriginal staff to manage country.

Four trainee Yawuru rangers were selected by a panel consisting of Yawuru and DEC representatives to undertake the MATES program. The four trainees undertake their Certificate II, III and IV in Conservation and Land Management through a mixture of on the job training, short courses and guided workbooks while being employed full time with DEC on the management of the Yawuru conservation estate.

The officers within the joint management team supervise, mentor and work with the trainee rangers. These officers include a Yawuru operations officer and Yawuru trainee supervisor, who have themselves been through the MATES program as Aboriginal trainees. Of the nine staff working within the joint management team, seven are Yawuru men.

In September 2011, the WA Government passed the *Conservation Legislation Amendment Act 2011* (WA), which amended the *Conservation and Land Management Act 1984* (WA) and the *Wildlife Conservation Act 1950* (WA). This enabled joint management between DEC and other landowners, including Aboriginal people, over lands and waters including private land, *Conservation and Land Management Act1984* (WA) reserve land, pastoral leases and other Crown land.

Joint management was defined by the *Conservation Legislation Amendment Act 2011* (WA) as a cooperative legal arrangement between the WA Government, represented by DEC, and one or more other parties to manage land or waters in the State. Areas of the Yawuru conservation estate classified as 'out of town' reserves, which will be jointly managed by Yawuru and DEC, will be primarily vested freehold to Yawuru with a leaseback arrangement to DEC for joint management.

Case note: *Commonwealth of Australia v Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group*

15 March 2012
Federal Court of Australia - Brisbane
Keane CJ, Mansfield, Dowsett JJ

Dr Lisa Strelein and Gabrielle Lauder, AIATSIS

In this appeal, the Full Court of the Federal Court varied the original native title determination, which covered a significant area of the waters of the Torres Strait. The original determination contained a right to take resources 'for any purpose', but on appeal this right was restricted such that there is no right to take fish or other aquatic life for sale or trade. The cross-appeal by the Seas Claim Group – concerning the geographic extent of their claim, the recognition of reciprocity-based rights, and the relationship of native title rights to public rights – was dismissed.

Introduction

The Torres Strait sea claim decision was handed down in the Federal Court of Australia on 2 July 2010. Justice Finn, the primary judge, found that the claim group had established their claim to approximately 37,800 square kilometres of sea between the Cape York Peninsula and Papua New Guinea.

The primary judge found that the claimants' native title interests include the non-exclusive right to 'access resources and take for any purpose resources in the native title area', subject to the laws of the State of Queensland and the Commonwealth of Australia. This determination did not affect the validity of other interests in relation to the native title areas, including the rights and interests of holders of licenses, permits, authorities, resource allocations and endorsements issued under State and Commonwealth fisheries legislation. To the extent of any inconsistency, native title rights and interests were to yield to common law public rights and customary rights.

Many of the issues that were contested at trial, including questions about the proper scope and definition of the relevant 'society', were no longer controversial on appeal. The issues to be decided in the appeal were:

1. whether Commonwealth and State licensing regimes for commercial fishing extinguished native title rights to take fish and marine life for commercial or trading purposes;
2. the geographic boundaries of the native title claim area; and
3. the nature and extent of subsisting native title rights and interests.

Appeal by Commonwealth – extinguishment issue

The important point of the decision at first instance was that once a determination had been made that law and custom supported the right to take resources, the use made of those resources was irrelevant (unless restricted by law and custom, which is matter internal to the group). The primary judge had held that although statutory licensing regimes had regulated the native title right to take fish or other marine resources for commercial purposes, they had not extinguished that native title right. This was based on the reasoning in *Yanner v Eaton* that native title rights will not be extinguished by legislation unless the legislation demonstrates a clear and plain intention to do so. In this case, as in *Yanner*, the judge held that the primary purpose of the legislation was to regulate the use of scarce resources, and the extinguishment of native title rights was not necessary to this purpose.

On appeal, the Commonwealth argued that previous regulatory regimes have extinguished native title rights to commercial fisheries and

although the current *Torres Strait Fisheries Act 1984* (Cth) and the *Fisheries Act 1994* (Qld) protect Islanders' traditional fishing rights, they do not have the effect of reviving or reinstating native title rights previously extinguished by legislative regimes. Queensland first legislated to prohibit the taking of fish without a statutory license in 1887 and the *Fisheries Act* 1952 (Cth), which the Commonwealth argued had introduced a 'new species of statutory entitlement', placing prohibitions on the unlicensed taking of fish for commercial purposes in proclaimed waters.

The claim group relied on *Yanner v Eaton* and the trial judge's decision that the mere regulation of a right does not necessarily amount to extinguishment. The joint judgment of Chief Justice Keane and Justice Dowsett emphasised that the orthodox approach to the extinguishment of native title is to assess whether the native title rights under question are consistent with legislation regulating that activity. The majority held that although the licensing regimes do not explicitly extinguish native title, they manifest a clear intention to extinguish all common law rights. Extinguishment leaves no room for revival, unless expressly provided for by statute. The prohibition is directed at all commercial fishing. They held that there is no authority for the view that an explicit reference to native title is necessary to include native title holders within a general prohibition.

The claim group also relied on s211 of the *Native Title Act 1993*. Section 211 provides that, under certain circumstances, native title holders can carry on certain activities without a licence or permit, in spite of laws that would otherwise require a licence or permit. The joint judgment held that s211 did not assist the claim group's argument on two bases. Firstly, although s211 can alter the effect of existing legislation, it cannot deny the effect of past legislation. Accordingly, once the right to take native title fish for commercial purposes was extinguished, it could not be revived by invoking s211 of the NT Act. Secondly, s211(2) states that the law does not restrict native title holders from carrying on an activity where they do so for the purpose of satisfying their personal, domestic or non-commercial communal needs. It has no relation to an activity undertaken for commercial purposes.

Their Honours concluded that the right to take fish and other aquatic life for commercial purposes without a licence could not survive the enactment of laws that prohibit that activity. Accordingly, they ordered that the native title determination be amended to exclude commercial hunting and fishing.

Justice Mansfield, dissenting on this point, came to a different conclusion on the question of extinguishment. His Honour was of the view that the legislative regimes of Queensland since 1877 and of the Commonwealth since 1952 did not take away the native title right to fish for commercial purposes, but rather constituted measures for the management of fisheries. His Honour did not dispute the fact that the claim group were required to comply with the restrictions and requirements of the licensing regime in force. But he was satisfied that the legislation created a regime of control consistent with the continued enjoyment of the native title right to take fish or other marine resources for commercial purposes.

Cross-appeal by claim group

At the same time as the Commonwealth's appeal against the primary judge's decision on commercial fishing and hunting rights, the claim group filed their own appeal against the original judgment (known as a cross-appeal) on the grounds that the primary judge:

1. failed to recognise the full geographical extent of their claim with respect to waters in the north-eastern extremities of the claimed area;
2. failed to accept reciprocity-based rights as native title rights under s223(1) of the *Native Title Act 1993* (Cth); and
3. proceeded on the footing that native title rights must yield to common law public rights and customary rights to fish and navigate to the extent of any inconsistency.

<u>Sea claim area</u>

The primary judge had held that the claim group had established their connection by traditional law and custom to the main area of the claim, satisfying the requirements of s223(1)(b) of the *Native Title Act 1993*. His Honour found, however, that the evidence was not sufficient to establish the claimants' connection to the outer extremities of the claim area.

On appeal, the claim group relied on the primary judge's finding that the Torres Strait Islanders are a maritime people who 'have long been exceptional navigators' and on the evidence showing use of, and visitation to, areas a long way outside of the nearest community islands. They also argued that the evidence demonstrated fishing in deep waters far away from reefs.

All of the judges on appeal, including Mansfield J, rejected the claim group's argument on this point. Their Honours considered that the primary judge's approach to the evidence had been correct. Where the evidence indicated journeys to specific geographic features, those features had been included in the determination area, but the waters

surrounding those features were not included unless the evidence showed some use of the waters. While particular areas might have been crossed by Islanders travelling between certain islands, the evidence did not positively establish that this was the case, and in any case their Honours doubted whether evidence of travel by an individual would be sufficient to establish the necessary connection at the community level. In all, the Full Court judges considered that the evidence of 'use' of the four excluded areas was not sufficient or specific enough to demonstrate that the primary judge's findings were mistaken.

Reciprocity-based rights

There are two types of rights identified in what the claim group call the 'customary marine tenure model': (i) occupation-based rights; and (ii) reciprocal rights. Occupation-based rights are held by descendants of the socially recognised prior occupying ancestors and the wives of members of the group. Reciprocal rights are held by each person or each group who has a relevant reciprocal relationship with an ancestral occupation-based rights holder. Such rights cover the same area and content as the ancestral occupation based rights holder. Put simply, they are rights that give access to the land and waters of another. Reciprocal rights do not include territorial rights and are ultimately subject to the control of the occupation-based rights holder.

The primary judge had held that reciprocal relationships are situational in the sense that they will be enjoyed and discharged as the situation requires. His Honour had concluded that reciprocity-based rights are not rights in relation to land or waters, but rights in relation to persons which invoke social and personal obligations. Accordingly, reciprocity based rights are not native title rights for the purposes of s223(1) of the *Native Title Act 1993* (Cth). This was not to deny, however, that such rights exist under the Islanders' traditional laws and customs.

On appeal, the claim group argued that the basis of a right should not be a barrier to recognising native title rights. They further argued that the primary judge erred in contrasting rights in relation to land or waters and rights in relation to persons.

The joint judgment concluded that s223(1) of the *Native Title Act 1993* (Cth) does not contemplate rights that are dependent on the permission of other native title holders for their enjoyment. Their Honours said that such rights would not be held by reason of a person's own connection with the land and waters under their laws and customs, but would instead be held 'mediately' through a personal relationship with another person who did have the necessary connection. Practical inconsistencies would arise if native title was held not only by the members of a community but unidentified individuals on the basis of their relationship with native title holders. Accordingly, the claim group could not succeed in their attempt to have reciprocity-based rights recognised in the native title determination.

Relationship with Public Rights

The primary judge held that the common law's public right to navigate and to fish within the claim areas co-exists with native title rights, and that the Islanders have those public rights in addition to native title rights in those areas.

On appeal, the claim group sought to amend the determination so that it would specify that the public rights do not prevail over the native title rights – in effect, that they are on equal footing. They also argued that the two sets of rights should be described in the determination as being required to be 'exercised reasonably'.

The joint judgment rejected this argument as it would leave open the possibility of a practical collision between two sets of rights. The law establishes priorities between two types of rights. The purpose of s225(d) of the *Native Title Act 1993* (Cth) is to resolve such inconsistencies.

The majority held that native title rights in this circumstance must yield, reinforcing the superiority of non-native title rights.

Leave to appeal

The claim group have applied for special leave to appeal to the High Court of Australia in relation to the extinguishment question, the reciprocal rights question and the public rights question.

NTRB Legal Precedents Database

Nick Duff, AIATSIS

A reminder for all lawyers, negotiators and agreement implementers at participating Native Title Representative Bodies ('NTRB'): The NTRB Legal Precedents Database is a resource produced by NTRBs for NTRBs. It is jointly funded by FaHCSIA and NTRBs themselves. It is here to make your work faster and easier, and to improve outcomes for your clients.

Please take the time to log on and familiarise yourself with the content.

If there is content that you think the database should have but does not, let the project manager Nick Duff know.

What's on the database?

- Agreement-making resources for infrastructure, heritage, mining, exploration, etc.
- NTRB agreement-making resources – consultancy contracts, costs agreements, etc.
- Court documents – including pleadings, affidavits, consent determination materials, etc.
- Tribunal documents – including expedited procedure objections, submissions, etc.
- Trust, corporation, Prescribed Bodies Corporate documents – including selected rulebooks with notes, trust deeds, etc.
- Useful links and resources for agreement-making.
- Online forum and comment function for particular clauses or documents.

Please speak to your Principal Legal Officer or other Database contact person about the contributions you can make to the Database. **Its quality and usefulness depends on your contributions of content.**

If you need the login information, or have any other questions, please contact the project manager Nick Duff: nick.duff@aiatsis.gov.au, 02 6246 1160.

The NTRB Legal Precedents Database can be found at: **www.ntrbprecedents.org.au**

What's new?

Recent cases

***WF (Deceased) & Ors on behalf of the Wiluna Native Title Claimants/ Western Australia/ Emergent Resources Ltd* [2012] NNTTA 1**
23 February 2012
Expedited procedure objection
National Native Title Tribunal of Australia-Perth
Daniel O'Dea JM

In this case the Tribunal decided that the proposed grant of an exploration licence was a future act attracting the expedited procedure under s237 of the *Native Title Act 1993* (Cth) ('NTA'), meaning that the native title party did not have the statutory right to negotiate.

The State of Western Australia (the State') had given notice of its intention to grant an exploration license to Emergent Resources Ltd over an area of 30 square kilometres, situated entirely within the Wiluna native title claim area. The State indicated that it considered that the grant would attract the expedited procedure. WF (deceased) and others, on behalf of the Wiluna native title claimants, lodged an expedited procedure objection.

The Tribunal had to consider in this case whether the proposed license satisfied s237(b) of the NTA. This section states that the expedited procedure cannot apply unless the relevant future act is not likely to interfere with sites of particular significance to native title holders. The native title party sought confidentiality orders pursuant to s155 of the NTA to restrict the publication of three of their four affidavits on the basis that they contained culturally sensitive material. The Tribunal was not prepared to make such orders, but did modify Tribunal practice by not setting out the affidavits in full in the Tribunal's written judgment.

The Tribunal accepted that three of the deponents – initiated men and senior members of the Wiluna claimants – had the authority to speak on behalf of the native title party. The Tribunal accepted the evidence of the fourth deponent on the basis that he was a qualified anthropologist who had conducted research for the Central Desert Native Title Services ('CDNTS'). The State challenged the reliability of the evidence provided by the Wiluna deponents on the basis that was not detailed enough and did not contain sufficient material to establish that granting the exploration licence would interfere with significant sites.

There were no registered Aboriginal Sites or Heritage Places under the *Aboriginal Heritage Act 1972* (WA) within the proposed license area, though two sites within the area were registered as 'Other

Heritage Places'. The Tribunal noted that the Register of Aboriginal Sites does not purport to be a record of all Aboriginal sites in Western Australia, and so the Tribunal will consider any evidence to support the existence of other sites of particular significance. Further, the question of whether the *Aboriginal Heritage Act 1972* (WA) is sufficient to ensure that interference with particular sites is unlikely, will turn on the facts of each case.

The three Wiluna affidavits stated that there are sites of particular significance within the proposed license area, including: four dreaming tracks; two hills associated with a particular dreaming; places that are closed for women; and important artefacts. The native title party also contended that the two registered sites were of significance to the Martu people.

The Tribunal looked to the evidence contained in the affidavit of the CDNTS anthropologist to confirm the significance of the dreaming tracks and associated sites to Martu people. But as this evidence was based on the affidavits of the Wiluna deponents it could not be relied on to support information that did not appear in the primary evidence. Moreover, the direct evidence of members of the native title party with reference to sites of particular significance is preferred over the evidence of anthropologists.

The Tribunal held that the evidence of the native title party did not provide sufficient detail and specificity with regard to the nature of the significance of sites and their exact location. The Tribunal accordingly determined that the grant of the exploration license attracted the expedited procedure, and so could proceed without engaging the statutory right to negotiate.

***Karajarri Traditional Lands Association (Aboriginal Corporation)/Western Australia/ASJ Resources Pty Ltd* [2012] NNTTA 1**

24 February 2012

Expedited procedure objection

National Native Title Tribunal of Australia - Perth

Helen Shurven JM

In this case the Karajarri Traditional Lands Association (Aboriginal Corporation) unsuccessfully objected the expedited procedure being applied to a proposed exploration licence.

The State of Western Australia ('the State') gave notice of its intention to grant an exploration license to ASJ Resources Pty Ltd over 290 square kilometres of land within the claim area of the Karajarri People. The notice indicated that the State considered that the grant attracted the expedited procedure pursuant to s237 of the *Native Title Act 1993* (Cth) ('NTA') – that is, that the grant could be made without the negotiations required by s31 of the NTA. The Karajarri Traditional Lands Association lodged an objection to the proposed grant being dealt with under the expedited procedure.

The State sought to have the Karajarri objection application dismissed on the basis that the Tribunal had already decided in a previous decision over the same parcel of land that the expedited procedure was applicable. This argument was based on the doctrine of *res judicata*, which provides that a Court's decision on a dispute between parties must be final and conclusive, so that neither party is allowed to re-litigate the dispute. The State also argued that Karajarri's objection was barred by *issue estoppel,* a rule which holds that where an issue of fact of law has been decided between two parties, that issue cannot be re-argued in subsequent proceedings between the same parties. The Tribunal, however, doubted whether *res judicata* and *issue estoppel* applied to administrative decision making by Tribunals (as opposed to judicial decisions by Courts). Even if these doctrines were applicable, the Tribunal took the approach outlined in *Matusko* which allows a Tribunal to use flexible procedures where fresh evidence is provided. In this case, new affidavit evidence had been provided by both the native title party and ASJ Resources Pty Ltd. For this reason the Tribunal decided not to dismiss the objection as suggested by the State.

On the substantive question raised by the objection, the Tribunal noted that s237 of the NTA stipulates that a future act will attract the expedited procedure if:

a) the act is not likely to interfere with community or social activities of native title holders and;

b) the act is not likely to interfere with areas or sites of significance and;

c) the act is not likely to involve major disturbances to land or waters.

To object to the expedited procedure on the basis of the first ground, the objector must demonstrate a direct interference with community or social activities of a tangible and not wholly spiritual nature. The Tribunal clarified that it was open to them to determine whether the protective regime under the *Aboriginal Heritage Act 1972* (WA) is sufficient to make it unlikely there would be interference with sites of particular significance. Therefore sites identified by the native title party that are not registered under the *Aboriginal Heritage Act 1972* (WA) may be taken into consideration by the Tribunal. The task of the Tribunal is to undertake a predictive assessment of the likelihood, as opposed to possibility, of potential interference or disturbance.

The Department of Indigenous Affairs documentation showed no registered Aboriginal sites or heritage places under the *Aboriginal Heritage Act 1972* (WA) within the area of the proposed license. The nearest Aboriginal communities are approximately 35-40km north west of the proposed license. Affidavit evidence provided by the native title party details the range of activities Karajarri people perform within the license area – hunting, gathering bush tucker and medicines, camping – and how the grantee party 'could damage the land or interfere with our hunting and foraging rights'. The Karajarri witness also gave evidence about sites of significance, including an initiation site, paintings, and waterholes. The State argued that affidavit evidence provided for by the native title party had not claimed that all areas referred to were actually in the proposed license area and some sites were described in very general terms.

The Tribunal decided that the proposed grant of the exploration licence did attract the expedited procedure, on the following grounds:

a) The Karajarri affidavit evidence lacked specificity in relation to the number of members of the native title party who use the area for community and social activities and the precise locations that are regularly used for such activities.

b) The Tribunal was confident that ASJ Resources Pty Ltd would take steps to eliminate the likelihood of sites of particular significance being interfered with.

c) The evidence did not sufficiently demonstrate that the proposed activities would cause major disturbances to land or waters.

***Worimi Local Aboriginal Land Council v Attorney-General of New South Wales* [2012] FCA 147**

28 February 2012
Unopposed native title determination
Federal Court of Australia - Sydney
Cowdroy J

In this unopposed application the Federal Court determined that no native title rights and interests exist over land located at Anna Bay. This application was heard simultaneously with another application involving Worimi Local Aboriginal Land Council, as it concerned the same evidence.

***Bonner on behalf of the Jagera People #2 v Queensland (No 3)* [2012] FCA 214**

9 March 2012
Interlocutory application
Federal Court of Australia - Brisbane
Collier J

This case concerns an urgent interlocutory application to restrain the holding of a meeting authorising amendments to the Jagera People #2 native title claim. The application was dismissed by Justice Collier.

The claim area subject to the Jagera People #2 native title application encompasses land and waters in south-east Queensland, between Brisbane and Toowoomba. The notice advertising the meeting stated that the purpose of the meeting was to consider changes to the claim group description and to make decisions on other matters relating to the native title claim.

Three Indigenous respondents applied for an injunction to stop the meeting from going ahead. That application was supported by three affidavits. The first deponent objected to the claim being amended on the grounds that the amended claim area would divide certain peoples; the amended claim would exclude certain apical ancestors; and a number of elders did not support the authorisation meeting. The second affidavit deposed that the connection report was not based on comprehensive consultation with the claim group and was not prepared by an unbiased and independent contractor. The third deponent objected to the proposed amendment based on the composition of the amended claim group and the amended claim boundary. The third deponent also contended that the connection report was not thorough or accurate.

In circumstances where a plaintiff seeks an injunction, they must demonstrate that:

- There is a serious question to be tried; and
- The plaintiff is likely to suffer injury that damages cannot remedy; and
- The 'balance of convenience' (a comparison of factors for and against the granting of the injunction) favours granting an interlocutory injunction.

Justice Collier was not satisfied that the general concerns and allegations put forward by the applicants advanced a serious case for preventing the authorisation meeting from proceeding. Secondly, her Honour did not consider that the applicants would suffer any injury at all if the meeting was to proceed. Instead, her Honour regarded the meeting as a forum where the concerns raised by the applicants could be aired. Finally, her Honour considered several factors – the thousands of dollars spent advertising the meeting,

the organisation of a venue and catering, the lateness of the application to restrain the meeting – that tilted the balance of convenience against the applicants. Her Honour also noted that earlier the same day, orders had been made to refer the issues in dispute to mediation, for which each respondent was to serve an expert anthropologist's report. Justice Collier was satisfied that this would give the applicants further opportunities to address their concerns. Accordingly, her Honour dismissed the application.

***Baker on behalf of the Muluridji People v Queensland* [2011] FCA 1432**

16 March 2012
Consent determination
Federal Court of Australia - Mareeba
Logan J

This case comprises two consent determinations of native title on behalf of the Muluridji people over 12,030 hectares of land and waters to the north-west of Mareeba, about 30km west of Cairns in North Queensland. The Federal Court recognised exclusive native title rights in relation to about 745 hectares of land (Part 1) and non-exclusive native title rights over about 11,285 hectares of land and waters (Part 2). The non-exclusive rights include the right to access and camp on the area; to light fires (though not for clearing vegetation); to hunt, fish and gather, to take natural resources for non-commercial purposes; and to conduct ceremonies, maintain and protect significant sites, and teach the physical and spiritual attributes of the area.

Native title was recognised by an agreement reached between the parties pursuant to s87 of the *Native Title Act 1993* (Cth) ('NTA'). As such the court was not required to make its own inquiry on the merits of the applicant's claim. Justice Logan referred positively to Justice Mansfield's treatment of s87 of the NTA in *King v Northern Territory of Australia [2011]*. Given that the parties were legally represented and all interests in the land which affect native title within the proposed determination area were identified, it was appropriate for the Court to make orders. His Honour acknowledged the linguistic identity of the Muluridji people and their connection to the land in accordance with traditional laws and customs. Extensive material, including anthropological reports, supported the connection of the claim group to the land and waters within the determination area. Justice Logan further determined that the Muluridji Aboriginal Corporation is to be the prescribed body corporate for the purpose of s57 of the NTA.

***Banjo Wurrunmurra and Others on behalf of Bunuba/Western Australia/Francis Robert Salmon and Jamie Dean Duffield* [2012] NNTTA 27**

19 March 2012
Expedited procedure objection
National Native Title Tribunal of Australia - Perth
Member Helen Shurven

In this case the Tribunal decided that the proposed grant of an exploration licence is not a future act attracting the expedited procedure under s237 of the *Native Title Act 1993* (Cth) ('NTA'), and so the native title party did have a statutory right to negotiate.

The State of Western Australia ('the State') gave notice of its intention to grant an exploration license over 9.8 square kilometres of land within a registered native title claim of the Bunuba People. The proposed license area is 77 kilometres north of Fitzroy Crossing in the Shire of Derby, West Kimberley. The Bunuba people lodged an expedited procedure objection. Section 237(a) of the NTA provides that a future act will not attract the expedited procedures unless the act is not likely to interfere with community or social activities of native title holders in relation to the land and waters concerned. Issues arising under s237(b) and s237(c) were not raised in any detail given the evidence relating to s237(a) supported a determination that the expedited procedure was not attracted.

The evidence provided by the native title party comprised the affidavit of a senior Bunuba person, also a named applicant in the Bunuba native title claim and a resident of Biridu Aboriginal Community (one of the five communities within a 45 kilometre radius of the tenement). The deponent gave evidence regarding the community and social activities performed on the tenement area. These activities included: visiting country and sharing stories; camping along creeks to get water or digging soaks; collecting wood and building fires; hunting and fishing using traditional techniques to transfer knowledge to the young people; collecting bush tucker and bush medicine. The deponent also indicated that there are two important songlines that run through the tenement area and important rock formations. The deponent expressed concern that exploration companies may exhaust the water supply on the tenement area.

The State made the following contentions:

- The affidavit evidence is unhelpful as the camping sites indicated fall outside the tenement.
- The existence of songlines is not enough to support a decision that the expedited

procedure does not apply, as this would affect the vast majority of Australia.

- The proposed license is not likely to directly interfere with community or social activities as the grantee party intended to offer a Regional Standard Heritage Agreement ('RSHA')
- The proposed license would have no greater effect on community or social activities than the previous tenements and the pastoral lease that overlap the proposed license.
- There are no Aboriginal communities situated on the proposed license and the native title party rarely visit the proposed license.
- The grantee has a right to take and divert water under s66 of the *Mining Act 1978* (WA).

The Tribunal accepted the deponent's assertions that community and social activities, such as camping, occurred in or near the license area. The Tribunal cited Moses Silver and Ors/Ashton Exploration Australia Pty Ltd/Northern Territory, which says that spiritual activities are within the scope of s237(a) of the NTA if they are rooted in physical activities. The Tribunal accepted that the community actively follows and sings the songlines as part of a physical community or social activity. The Tribunal stated that the RSHA went more to preventing the likelihood of major disturbances to land and water than interference with community or social activities.

The Tribunal found that the previous tenements and the pastoral lease had not placed considerable restraints on the exercise of community or social activities. The Tribunal did not accept the State's contention that the native title party rarely visit the proposed license given the affidavit evidence to the contrary and the number of Aboriginal communities within a 25-45 kilometre radius of the tenement. Finally, the Tribunal determined that none of the endorsements or conditions that the State intended to place on the proposed tenement specifically dealt with the interference with community or social activities using water on the proposed license.

In the absence of evidence as to the nature and extent of exploration activities, the Tribunal found that the granting of the proposed license was likely to interfere with the community or social activities of the Bunuba people.

***Roberts on behalf of the Najig and the Guyanggan Nganawirdbird Groups v Northern Territory* (No 2) [2012] FCA 254**

20 March 2012,
Notice of motion to separate proceedings
Federal Court of Australia - Darwin
Finn J

In this short judgment, Justice Finn made orders that the native title determinations for Mataranka and the Town of Mataranka be heard separately. This order was considered appropriate as the parties sought a determination that native title exists with respect to the Town of Mataranka application (see below, *Roberts* determination), but that no native title exists with respect to the Mataranka determination (see below, *Roberts (No 3)* determination).

***Roberts on behalf of the Najig and the Guyanggan Nganawirdbird Groups v Northern Territory* (No 3) [2012] FCA 255**

20 March 2012
Consent determination
Federal Court of Australia - Darwin
Finn J

The applicant lodged a native title determination application over land and waters subject to a former Crown Lease in the Mataranka Locality. This was subsequently amended by the parties. Pursuant to ss87 and 94A of the *Native Title Act* (Cth) the parties reached an agreement that no native title exists in relation to the determination area. The parties agreed to this on the basis that the conversion of the former Crown Lease to a Crown Lease Perpetual was a pre-existing rights based act that wholly extinguished any existing native title rights and interests in the determination area.

Justice Finn considered that it would be appropriate to make the orders sought for the following reasons: all parties were legally represented; tenure searches had been conducted to identify other interests in the claim area; respondent parties provided lists of their interests to the other parties; the parties agreed on the nature and extent of different interests in the claim area; there were no other native title proceedings on foot that covered any of the claim area; and the State had played an active role in negotiating the consent determination.

***Roberts on behalf of the Najig and the Guyanggan Nganawirdbird Groups v Northern Territory* [2012] FCA 223**

21 March 2012
Consent determination
Federal Court of Australia - Mataranka
Finn J

In this decision Finn J made a determination by consent that native title exists in lands and waters within and surrounding the town of Mataranka.

The Court was satisfied that the parties had reached an agreement as to the terms of the determination pursuant to s87 of the *Native Title Act* (Cth) ('NTA'). The determination area comprises two estates, held respectively by the Najig group and the Guyanggan Nganawirdbird group.

In part of the claim area, the court determined that the claimants have rights to possession, occupation, use and enjoyment of the area to the exclusion of all other. In the remainder of the claim area, the claimants had a range of non-exclusive rights including access, camping, hunting, fishing, gathering and using natural resources, taking and using natural water, conducting ceremonies, maintaining and protecting important sites, and lighting fires (but not to clear vegetation). The court also recognised the non-exclusive right to live on the area and to erect shelters for that purpose.

In relation to the connection requirement under s223 of the NTA, Finn J noted that the connection material was prepared by anthropologists employed by the Northern Land Council. The Northern Territory Government ('the Territory') had raised various contentions about the connection material, which resulted in amendments to the application concerning revised genealogies and the parts of the determination area where native title has been extinguished based upon the grant of tenure and public works.

Having established that all parties had agreed to the nature and extent of other interests within the determination area, pursuant to s225 of the NTA, Justice Finn regarded it as appropriate to make orders. His Honour noted that the Territory as first respondent had played an active role in negotiating the consent determination. His Honour commended procedures implemented by the Territory 'which facilitate the speedy resolution of, and recognition of, native title claims.' Justice Finn noted that, although the agreement avoided the need for a protracted court hearing, 'It is almost a decade since the application was filed. That it has taken this long to be finalised is, in some measure, a matter for regret.'

Drake Coal Pty Ltd, Byerwen Coal Pty Ltd/Grave Smallwood & Ors (Birri People)/State of Queensland [2012] NNTTA 31 (26 March 2012)

26 March 2012
Future act determination
National Native Title Tribunal of Australia - Brisbane
Sosso DP

In this matter, the tribunal made a determination to grant mining leases (ML 10349,10350 and 10351) to Drake Coal Pty Ltd, and to grant mining leases (ML 10355, 10356, and 10357) to Byerwen Coal Pty Ltd, in the absence of submissions and evidence from the relevant native title party.

The native title party was given notice by the State of Queensland ('the government party') of its intention to grant mining leases to Drake Coal Pty Ltd and Byerwen Coal Pty Ltd ('the grantee parties'). Subsequently, the native title holders indicated to the tribunal that it wished to fully contest the matter and intended to provide the tribunal and parties with detailed evidence relevant to the factors that the tribunal must take into account in considering a future act determination per s39 of the *Native Title Act 1993* (Cth) ('NTA').

However, soon before the listings hearing, the legal representatives of the native title party wrote to the tribunal indicating that they were instructed to oppose the determination, but did not intend to file any evidence or attend any further court dates. The representatives also indicated that they had no instructions to appear at the listing hearing. No further information was provided to the tribunal regarding the native title party's position.

The listing hearing proceeded in the absence of the native title party. After hearing from the government party and the grantee parties, the tribunal found that it had accorded the native title party a fair opportunity to contest the matter. The tribunal considered that it now had a mandatory obligation to take all reasonable steps to make a determination as soon as possible per ss36(1) of the NTA, and proceeded to make a determination.

While the tribunal was unable to consider the interests, proposals, opinions and wishes of the native title party, the tribunal considered the other requirements in s39 of the NTA based on the grantee and government parties' submissions only, and granted the mining leases per s38 of the NTA.

Chippendale on behalf of the Wuthathi People #2 v State of Queensland & Ors [2012] FCA 310 (27 March 2012)

27 March 2012
Application for joinder
Federal Court of Australia - Brisbane
Greenwood J

In this matter, the Court ordered that three individuals ('the individuals') from the Gudang Yadheykenu people be joined as respondents to the Wuthathi peoples' application for a native title determination under the *Native Title Act 1993* (Cth) ('NTA'), but rejected the individuals' application to be joined as representatives of the Gudang Yadheykenu people.

The individuals sought to be joined as respondents in their individual capacity and as representatives for the Gudang Yadheykenu people on the basis that the Wuthanthi peoples' application claimed

native title rights over some traditional country of the Gudang Yadheykenu people. In support of their application for joinder, the individuals tendered evidence regarding the Gudang Yadheykenu peoples' traditional interests in areas of the land included in the Wuthathi peoples' application, including an extensive anthropological report.

The existing respondents (the State of Queensland, the Cook Shire Council and parties representing fishing interests) did not actively oppose or consent to the application for joinder, but noted that the matter had been on foot since 1997, and no assertion regarding the Wuthathi peoples' application had been made by or on behalf of the Gudang Yadheykenu people until then. The existing respondents also indicated that they had recently reached a point of consent with the Wuthathi peoples in relation to their application for a native title determination.

The Court considered s84(5) of the NTA, which provides that the Court may join any person as a party to the proceedings at any time if the Court is satisfied that the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so. The Court also considered s68 of the NTA, which states that there can only be one approved determination of native tile in relation to a particular area.

In finding for the individuals, the Court noted that it is well accepted that a person who claims to hold a native title right or interest in relation to land or waters the subject of a determination application has a sufficient interest for the purpose of ss84(5) of the NTA. On this basis, and with particular reference to the extensive anthropological report tendered, the Court was satisfied that the individuals had sufficiently demonstrated interests which may be affected by a determination of native title, and ordered that they be joined.

However, the Court rejected the individuals' application to be joined as representatives of the Gudang Yadheykenu people on the basis that the individuals had not sufficiently demonstrated that the Gudang Yadheykenu people had approved the individuals as their representatives per ss251B(a) or (b) of the NTA. The Court also noted that the individuals were joined as respondents only to resist a determination in favour of the Wuthathi people, not to make a native title application.

This matter is ongoing.

QGC Pty Ltd v Bygrave [2012] FCA 309 (27 March 2012)

3 April 2012
Applications for costs
Federal Court of Australia - Brisbane
Reeves J

In this matter, due to a disagreement between four parties regarding the registration of an Indigenous land use agreement ('ILUA'), NTSCORP Ltd ('NTSCORP'), the New South Wales ('NSW') Aboriginal representative body, was ordered to pay the costs of QGC Pty Ltd ('QGC') and the registered native title claimant for the Bigambul People, Russell Doctor & Ors ('the claimant), in relation to appeal proceedings.

This matter concerned an administrative appeal by QGC under s5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s39B of the *Judiciary Act 1903* (Cth) against the Native Title Registrar's ('the Registrar') decision not to register an ILUA between the QGC and the claimant under the *Native Title Act 1993* (Cth) ('NTA').

The Registrar's decision not to register the ILUA was due to an objection raised by the Chairman of the Kamilaroi Land Trust, Mr Weatherall, and NTSCORP on the basis that the ILUA covered lands and waters over which the Kamilaroi/Gomeroi People claimed native title. The subject lands and waters were entirely in Queensland and were included in the claimant's native title claim filed in 2009.

When the appeal was filed, the Registrar indicated that it did not wish to actively participate in the appeal proceedings. This meant that there was no opposing party to QGC's appeal, as QGC and the claimant shared the same position in relation to having the ILUA registered. As such, the Court joined NTSCORP and Mr Weatherall, in part, as contradictors to QGC's and the claimant's cases. After being joined, NTSCORP maintained an active role the proceedings.

Ultimately, the Court set aside the Registrar's decision, and ordered that the subject ILUA be registered. QGC and the claimant then sought cost orders against NTSCORP contending that it was NTSCORP's intervention that led to the Registrar's decision not to register the ILUA and resulted in QGC and the claimant incurring substantial legal costs. QGC and the claimant also contended that as NTSCORP is a NSW body, it had no authority or obligation to intervene in the ILUA registration process because the relevant land was entirely in Queensland.

The claimant also noted that NTSCORP did not object to being joined and could have simply submitted to any orders of the Court, but it instead chose to have a full and active role in opposing

QGC's appeal. Therefore, the claimant contended that NTSCORP did not act purely as a contradictor in this matter, and as such, the 'spirit' of s85A, which provides that each party should bear its own costs, should not be applied.

NTSCORP opposed the cost application on the basis that it was joined by the Court to assist as a contradictor, and its involvement in the initial objection was pursuant to its statutory responsibilities under the NTA. NTSCORP also asked the Court to take into account the "spirit" of s85A of the NTA, even though it appeared to accept that s85A did not strictly apply in the matter given it was not a 'proceeding' under s81 of the NTA.

In finding for QGC and the claimant, the Court rejected the claim that NTSCORP acted purely as a contradictor in the proceedings, particularly given that NTSCORP indicated that it wished to participate in the proceedings to fulfil, what it considered, its statutory responsibilities under NTA. The Court also agreed with QGC's submission that NTSCORP was not obliged to discharge any statutory function under the NTA as the relevant land was entirely in Queensland, and under the responsibility of the Queensland South Native Title Services.

The Court declined to apply s85A of the NTA, or the 'spirit' of s85A of the NTA on the basis that this matter was an administrative appeal and not a s81 of the NTA 'proceeding', and because NTSCORP's involvement in the matter was not purely as a contradictor or to fulfil a statutory obligation. For these reasons, and on the basis that that NTSCORP's objection to the registration of the ILUA was the original and direct cause of QGC and the claimant incurring legal costs in the proceedings, the Court ordered that NTSCORP pay the costs of QGC and the claimant in relation to the appeal.

Anderson on behalf of the Wulli Wulli People v State of Queensland (No.2) [2012] FCA 339 (3 April 2012)

3 April 2012
Application for costs
Federal Court of Australia - Brisbane
Collier J

In this matter, the Court rejected the application of 12 of the 15 individual applicants to the Wulli Wulli peoples' native title determination proceedings ('the 12 individuals') for an order that the Queensland South Native Title Services ('QSNTS'), the representative of the remaining 3 of the 15 individual applicants to the Wulli Wulli peoples native title determination proceedings ('the 3 individuals'), pay the their costs to a notice of motion.

This matter concerns a dispute amongst the 15 individuals who collectively made up the applicant to the native title determination for the Wulli Wulli peoples ('the applicant'). The dispute concerned whether the QSNTS or Just Us Lawyers were authorised to represent the applicant in relation to the applicant's native title determination proceedings. QSNTS had previously acted for the applicant in those proceedings; however, Just Us Lawyers had since been briefed and added as the applicant's legal representative on the Court's file.

The 3 individuals, represented by QSNTS, filed a notice of motion seeking that Just Us Lawyers be removed from the Court's file as the applicant's representative on the basis that there was an absence of understanding and informed consent of a number of the persons comprising the applicant to the native title determination. The 3 individuals filed evidence supporting this claim. The 12 individuals incurred substantial costs in responding to this evidence, which due to a change in the 3 individuals' case, was never relied upon by the 3 individuals.

Ultimately, the 3 individuals' motion was dismissed. The 12 individuals then sought costs against QSNTS on the basis that it was not fair or reasonable that the 3 individuals be required to pay the costs sought because any cost order made against the 3 individuals would, in effect, be made against the applicant and would be paid using funds which would otherwise be used for the applicant's native title determination proceedings. The 12 individuals also claimed that the conduct of QSNTS in changing the 3 individuals case caused wasted costs to be incurred by the 12 individuals, and referred the Court to s37N of the *Federal Court of Australia Act 1976* (Cth), which provides that a party must conduct the proceeding in a way that facilitates a just resolution of disputes in accordance with law, and as quickly, inexpensively and efficiently as possible.

The Court noted that this matter was complicated given that the 12 individuals do not seek costs against the 3 individuals, but rather their legal representative. The Court considered its jurisdiction to make an order against a legal representative; and s85A of the NTA which provides that if the Court is satisfied that a party has unreasonably caused another party to incur costs, the Court may order that party to pay some or all of those costs, but otherwise the parties are to bear their own costs.

In finding against the 3 individuals, the Court made three points. Firstly, the material before the Court suggested that nothing more than usual steps were taken by QSNTS in accordance with the 3 individuals' instructions, including briefing counsel

and filing evidence. Secondly, there was no evidence that QSNTS abused or used the Court's process for an improper or ulterior purpose to warrant an order for costs, or that QSNTS failed in its duty to give proper consideration to relevant questions in the preparation or presentation of the case to deem it derelict in its duty. Thirdly, the Court was not persuaded that s85A of the NTA was relevant in this matter, particularly as the 12 individuals specifically did not seek costs against the opposing party to the motion, which is what that section is directed to. As such, the Court dismissed the 12 individuals' application, and made no orders as to costs.

***Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* (No 4) [2012] FCAFC 50 (5 April 2012)**

5 April 2012

Applications for costs

Federal Court of Australia – Sydney

Keane CJ, Lander and Foster JJ

In this matter, the Court rejected the application of the Registrar of Aboriginal and Torres Strait Islander Corporations ('The Registrar') for a costs order against the individual directors of the Dunghutti Elders Council (Aboriginal Corporation) RNTBC ('the directors'), and ordered that there be no orders as to cost in relation to the appeal and various applications made throughout the proceedings.

This matter concerns an appeal brought by the Dunghutti Elders Council (Aboriginal Corporation) RNTBC ('the Corporation') against the Court's decision to dismiss the Corporation's application for a ruling that a notice given by the Registrar requesting the Corporation to show cause why a special administrator should not be appointed under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) ('the CATSI Act') was invalid, and restraining the Registrar from making a determination that the appellant be put under special administration under the CATSI Act.

When the appeal was dismissed, the Registrar sought a cost order against the Corporation's directors contending that they had failed in their duties under the Corporation's constitution and under the CATSI Act by pursuing the appeal. The Registrar claimed that the directors pursued the appeal to protect their own interests by preventing the appointment of a special administrator and to ensure the ongoing receipt of substantial amounts in remuneration. The Registrar also sought the cost order against the directors themselves as it considered the preservation of the Corporation's assets as a function and aim of its office.

The Court considered evidence that in the financial year ending 30 June 2010, the directors received 25% of the Corporation's expenses in remuneration, travel, and gifts; and in financial year ending 30 June 2011, the directors received 37% of the Corporation's expenses also in remuneration, travel, and gifts. The Court also considered correspondence from the Corporation's accountant and auditor confirming that the Corporation had been advised in relation to its finances; and minutes from a directors' meeting where legal advice was discussed in relation to proceeding with the appeal.

The Court considered the Corporation's constitution, and in particular the clauses relating to directors remuneration, which provided that only employees can receive remuneration and that a majority of directors must not be employees. The Court also considered the CATSI Act and in particular the Registrar's functions and aims under ss658-1 and 658-5, the directors' duties in Division 265, and consequences for breaching those duties in Chapter 8.

Ultimately, the Court held that the merits of the financial and legal advice received by the Corporation need not be tested, as the Court had no reason to consider that the Corporation acted otherwise than in accordance that advice. In addition, while the Court found that it did have the jurisdiction to make a costs order against the directors, the Court was not satisfied on the balance of probabilities that the directors acted in pursuit of their own interests, and dismissed the Registrar's application.

The Court noted that the more appropriate course would have been for an order to be made against the Corporation, which is now under special administration, and for the Corporation to properly investigate and take necessary action against the directors for the loss and damage, as well as the cost of pursuing the appeal.

Native title publications

- J K Weir (ed.), *Country, Native Title and Ecology*, ANU E-Press and Aboriginal History Inc., Canberra, 2012.
- P Burke, *Law's Anthropology: From ethnography to expert testimony in native title*, ANU E-Press, Canberra, 2011
- 'Responses to David Trigger's Article Anthropology Pure and Profane: The Politics of Applied Research in Aboriginal Australia', *Anthropological Forum: A journal of social anthropology and comparative sociology*, vol. 22, no. 1, March 2012, pp. 62–93
- Kristin Hauslet, 'Indigenous Perspectives in the Courtroom', *The International Journal of Human Rights*, vol. 16, no. 1, January 2012, pp. 51-72
- National Native Title Tribunal, *National Native Title Tribunal Strategic Plan 2012–2014*, 2012.
- M Langton & J Longbottom (eds.), *Community Futures, Legal Architecture: Foundations for Indigenous Peoples in the Global Mining Boom*, Routledge, 2012.
- Saliha Belmessous (ed.), *Native Claims Indigenous Law against Empire, 1500-1920*, Oxford University Press, 2012.

Legislation

Commonwealth

***Native Title (Prescribed Bodies Corporate) Amendment Regulation 2012 (No. 1)* (Cth)**
The Regulation amends the definition of 'native title decision' in sub-regulation 3(1) of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) by omitting the word 'do' from after the words 'agree to' in paragraph (b) of the definition. This correction recognises that acts of governments may affect native title rights and interests, as well as acts done by the common law holders. Further information is available at:
http://www.comlaw.gov.au/Details/F2012L00578

***Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth)**
Regulations as amended to take into account amendments to the *Native Title (Prescribed Bodies Corporate) Amendment Regulation 2012 (No. 1)* (Cth). Further information is available at:
http://www.comlaw.gov.au/Details/F2012C00151

Western Australia

***Aboriginal Heritage Act 1972* (WA)**
The State Government of Western Australia intends to make amendments to the *Aboriginal Heritage Act 1972* (WA), which is the State's principal legislation enabling the protection of Aboriginal cultural heritage. These amendments are intended to improve the protection, certainty and compliance in relation to Aboriginal cultural heritage. Comments and feedback is now sought from stakeholders in relation to these proposed amendments. The closing date for comments and feedback is Tuesday, 5 June 2012 at 5pm.

- Download the discussion paper, 'Seven proposals to regulate and amend the *Aboriginal Heritage Act 1972* for improved clarity, compliance, effectiveness, efficiency and certainty' by visiting http://www.dia.wa.gov.au/PageFiles/1836/Discussion%20paper%20APRIL%202012v1.pdf
- To provide feedback on the discussion paper, or to make a comment, email aha@dia.wa.gov.au
- To view the media statement issued by the Minister for Indigenous Affairs, visit http://www.mediastatements.wa.gov.au/Pages/default.aspx?ItemId=149863&

Native title in the news

New South Wales

02/03/2012
Dunghutti Elders Council
Directors of the Dunghutti Elders Council may be liable to pay massive legal fees for a court case against the Office of the Registrar of Indigenous Corporations ('ORIC'). ORIC placed the Council in special administration in September 2011 alleging that directors had been paid $786 137 in travel and wage payments between 2009 and 2011 in contravention of *The Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). After six months under special administration, seven new board members have been appointed, all Dunghutti descendants and members of the Council. *Australian* (Australia, 2 March 2012), 34. *Macleay Argus* (Kempsey NSW, 2 March 2012), 2. *Macleay Argus* (Kempsey NSW, 6 March 2012), 5.

20/04/2012
Murray and Darling rivers
A group of 21 Aboriginal nations has called for water licenses on the Murray Darling to be revoked. The Northern Murray Darling Basin Aboriginal Nations has said that Indigenous people should hold the ultimate title over the rivers' water. *ABC Western Plains* (20 April 2012), accessed online 2 May 2012.

Northern Territory

01/03/2012
Northern Territory seabed mining moratorium
On 6 March, the Northern Territory Resources Minister, Kon Vatskalis, announced a 3 year moratorium on exploration and seabed mining in the coastal waters of the Northern Territory to allow the Environment Protection Authority to assess the potential impacts of exploration and mining. The Northern Land Council Chief Executive, Kim Hill, said, 'The traditional owners have told us they oppose seabed mining and we know if a large deposit of minerals are located during the exploration phase, the pressure to allow mining will increase.' *Koori Mail* (Lismore NSW, 21 March 2012), 40.

22/03/2012
Native title bar too high
Justice Paul Finn has said the bar on proving native title claims was too high during a special outdoor hearing which determined that the Najig and Guyanggan Nganawirdbird groups had native title over parts of the town of Mataranka. A number of people such as the Northern Land Council Chief Executive, Kim Hill, and the Northern Territory's Minister for natural resources, environment and heritage, Karl Hampton, have agreed with Justice Finn on the difficulty of proving claims. *Northern Territory News* (Darwin NT, 22 March 2012), 11.

28/03/2012
Muckaty Station
The Commonwealth Government will use evidence from anthropologists to fight claims that the traditional owners of a site at Muckaty Station in the Northern Territory have not been consulted about a planned nuclear waste dump. *The Australian* (28 March 2012), accessed online 30 March 2012.

28/03/2012
Mataranka determination
Mataranka traditional owners, the Najig and Guyanggan Nganawirdbird people, have had their native title rights and interests recognised in the Northern Territory. The Federal Court of Australia announced that the determination was the third successful native title claim over a township in the Northern Territory. *Australian* (Australia, 2 March 2012), 34. *Katherine Times* (Katherine NT, 28 March 2012), 3.*National Indigenous Times* (Malua Bay NSW, 28 March 2012), 12.

05/04/2012
Muckaty protest
An impromptu protest was staged on 2 April by Muckaty traditional owners. The protesters rallied outside the Northern Land Council office to reiterate their stand against the nomination of their land as a site for the Commonwealth government's national radioactive waste dump. Lawyers representing traditional owners who have challenged the nomination of Muckaty faced the Commonwealth government and Northern Land Council in the Federal Court in late March. After a two day hearing the matter was adjourned until May 2012.*Tennant & District Times* (Tennant NT, 5 April 2012), 3.

17/04/2012
Lhere Artepe
In 2011, traditional owners raised concerns about the financial capacity and credibility of the Lhere Artepe Aboriginal Corporation. The newly appointed Chairman of the group, Ian McAdam, has said it faces many challenges, including repairing relationships with the community and its stakeholders, but has hope for the future. *Centralian Advocate* (Alice Springs NT, 17 April 2012), 10. *ABC Indigenous* (12 April 2012), accessed online 2 May 2012.

Queensland

21/03/2012
Wild rivers
Cape York traditional owners from Hope Vale, Aurukun, Coen and Lockhart River have been stationed out the front of the Brisbane electorate of Ashgrove to raise their concerns with the public in regards to the Queensland Government's wild rivers laws. *National Indigenous Times* (Malua Bay NSW, 21 March 2012), 11.

11/04/2012
Mer Island reserve transfer
The Queensland Department of Environment and Resource Management ('DERM') is working towards the transfer of the Mer Island reserve to Mer Gedkem Le Torres Strait Islanders Corporation ('MGLTSIC') (the Prescribed Body Corporate for native title on Mer Island) in 2012. MGLTSIC convened a meeting on March 30 to discuss the management of social housing on Mer once the transfer goes through. The Queensland Government wants an agreement from the Mer people for a 40-year lease over all existing social housing and vacant land for new social housing. But no such lease can be signed until an Indigenous land use agreement ('ILUA') is in place. *Torres News* (Thursday Island QLD, 11 April 2012), 4. *Koori Mail* (Lismore NSW, 4 April 2012), 15.

11/04/2012
Hunting ban
The Mura Badugal Registered Native Title Body Corporate and the Badu community have put in place traditional hunting restrictions within an area defined under the Mura Badugal Dugong and Turtle Management Plan. The restrictions aim to protect dugong and turtle populations in the Badugal peoples' traditional area, the Badu and surrounding islands in the Torres Strait. Representative bodies throughout the Torres Strait and Far North Queensland are being urged to support a Torres Strait Regional Authority ('TSRA') initiated campaign to protect culturally appropriate management of natural resources, including fisheries. *Torres News* (Thursday Island QLD, 11 April 2012), 5. *Torres News Online* (20 April 2012), accessed online 2 May 2012.

Western Australia

13/03/2012
Agreement signed
Flinders Mines has signed a native title agreement with the Wintawari Guruma Aboriginal Corporation for a mining project 70 kilometres north of Tom Price. *Financial Review* (13 March 2012) accessed online 30 March 2012.

23/03/2012
Welcome to country signage
Kimberley Land Council's Wunggurr Rangers erected welcome to country signage at sites along the Gibb River Road to welcome tourists to Ngarinyin native title land and inform them about respecting and taking care of country. The signs have been produced in both English and Ngarinyin language. *Kimberley Echo* (Kununurra WA, 23 February 2012), 7.

23/03/2012
Yawuru develop residential site
Yawuru native title holders have made their first move as a major property holder in Broome, with a proposed residential estate on Palmer Road in Cable Beach. The Yawuru body plans to develop up to 80 residential housing lots on 14 parcels of land on the Palmer Road site. Work on the first stage of the Palmer Road residential development was expected to start by the end of February. *Broome Advertiser* (Broome WA, 23 February 2012), 9.

28/03/2012
Protests
A protest organised by the Dumbartung Corporation saw about 100 protesters arrive at parliament house demanding Aboriginal land rights, human rights and compensation for lost wages. *The West Australian* (28 March 2012), accessed online 30 March 2012.

29/03/2012
Heirisson Island protest camp
Police and council workers have again taken down the Indigenous protest camp at Heirisson Island on day 47 of the protest against the Western Australian Government's $1 billion offer to settle native title claims in Perth and the South West. *The West Australian* (29 March 2012) and *AAP Newswire* (22 March 2012), accessed 30.

27/03/2012
Browse Basin gas project
Environmental Protection Authority ('EPA') Chairman, Paul Vogel, warned of a possible delay to its environmental assessment because it was not confident legally of what is what assessing. In late 2011 the Supreme Court of Western Australia ruled that the Western Australian government's attempts to extinguish native title and secure 7000 hectares of land for the 3500 hectare development at James Price Point were unlawful. However, an EPA spokesperson has recently said that it could proceed with the environmental assessment of the project, which is due by the middle of next month. Some traditional land owners in the area, mainly members of the Jabbir Jabbir and Goolarabooloo

people, oppose the deal and do not want to see any development. *Australian Financial Review* (Australia, 27 March 2012), 16.

31/03/2012
Yawuru developments
In 2010, the Yawuru people signed a $196 million native title deal which arose from the Federal Court's determination that the Yawuru people were the native title holders of land in and around Broome. The Yawuru people have since negotiated a property portfolio worth about $140 million, making them one of the biggest commercial players in town. One of the Yawuru group's immediate priorities is to develop an affordable housing strategy, including building low-cost homes. *The Weekend West* (Perth WA, 31 March 2012), 58.

31/03/2012
Noongar heritage
It has been alleged that that some Indigenous groups are being paid to give cultural clearance for developments and maintenance work in Perth to ensure projects are not held up in the approvals process. *The West Australian* (31 March 2012), accessed online 2 May 2012.

04/04/2012
Notice of intention to compulsorily acquire land
The Western Australian Government has re-advertised notices of intention to compulsorily acquire land in the Kimberley for the $30 million Browse Basin gas project after the original notices were ruled invalid. *Koori Mail* (Lismore NSW, 4 April 2012), 32. *Mining Chronicle* (Australia, 1 April 2012), 12. *Business News* (Perth WA, 29 March 2012), 23.

11/04/2012
WA Aboriginal Heritage Act
Aboriginal Elders and advocates have voiced their fears that the Western Australian Government will attempt to water down the *Aboriginal Heritage Act 1972* (WA) to make it easier to secure assessments of Aboriginal historical and cultural sites that favour government and big business. *National Indigenous Times* (Malua Bay NSW, 11 April 2012), 25.

19/04/2012
Karajarri tenth anniversary
The Karajarri people have celebrated 10 years of native title on Bidyadanga country. The Karajarri consent determination was the second to be recognised in the Kimberley region, with native title granted across 24275sqkm of country. The native title holder is the Karajarri Traditional Lands Association (Registered Native Title Body Corporate) as trustee for the common law holders of native title, the Karajarri People. *Broome Advertiser* (Broome WA, 19 April 2012), 8.

19/04/2012
Native title restored
The Miriwung, Gidja, Malgnin and Woolah peoples and Argyle Diamonds have moved to re-establish native title on country in the remote Kimberley in what would be an unprecedented initiative. This would be the first time native title was restored to land where it had previously been extinguished. Spokesperson for Argyle said the reestablishment of native title would follow the eventual closure of the mine. *Broome Advertiser* (Broome WA, 19 April 2012), 10. *Age* (Melbourne VIC, 6 April 2012), 7. *The West Australian* (20 April 2012), accessed online 2 May 2012.

Indigenous land use agreements

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
02/03/2012	QGC Pty Limited - Jangga ILUA	QI2011/032	AA	QLD	Development Petroleum/Gas Pipeline Exploration Energy
02/03/2012	Wangkangurru/Yarluyandi Petroleum Conjunctive ILUA	SI2011/023	AA	SA	Petroleum/Gas
16/03/2012	Torres Strait Island Regional Council - IBIS Indigenous Land Use Agreement (Body Corporate Agreement)	QI2012/025	BCA	QLD	Commercial Public
16/03/2012	Muluridji People and Tablelands Regional Council ILUA	QI2011/058	AA	QLD	Access Infrastructure
23/03/2012	Hancock Alpha Coal Project (Port Area Native Title Group)	QI2011/019	AA	QLD	Mining
13/04/2012	Lake Gairdner National Park ILUA	SI2012/002	BCA	SA	Co-management
19/04/2012	Lake Gilles Conservation Park ILUA	SI2012/003	BCA	SA	Co-management

This information has been extracted from the Native Title Research Unit ILUA summary: http://www.aiatsis.gov.au/ntru/documents/IluaSummary.pdf 1 May 2012.

AA = Area Agreement BCA = Body Corporate Agreement

The information included in this table has been sourced from the NNTT.

For further information about native title determinations contact the National Native Title Tribunal on 1800 640 501 or visit http://www.nntt.gov.au

Determinations

Short Name (NNTT)	Case Name	Date (NNTT)	State	Outcome	Legal Process	Type
Muluridji People	*Baker on behalf of the Muluridji People v State of Queensland* [2011] FCA 1432	16/03/2012	QLD	Native Title Exists in Parts of the Determination Area	Consent Determination	Claimant
Muluridji People #2	*Baker on behalf of the Muluridji People v State of Queensland* [2011] FCA 1432	16/03/2012	QLD	Native Title Exists in Parts of the Determination Area	Consent Determination	Claimant
Mataranka	*Roberts on behalf of the Najig and the Guyanggan Nganawirdbird Groups v Northern Territory of Australia (No 3)* [2012] FCA 225	20/03/2012	NT	Native Title Does Not Exist	Consent Determination	Claimant
Town of Mataranka	*Roberts on behalf of the Najig and the Guyanggan Nganawirdbird Groups v Northern Territory of Australia* [2012] FCA 223	21/03/2012	NT	Native Title Exists in Parts of the Determination Area	Consent Determination	Claimant

This information has been extracted from the Native Title Research Unit Determinations summary: http://www.aiatsis.gov.au/ntru/documents/Determinationsummary_000.pdf, 1 May 2012. For further information about native title determinations contact the National Native Title Tribunal on 1800 640 501 or visitwww.nntt.gov.au.

Featured items in the AIATSIS Catalogue

The following list contains either new or recently amended catalogue records relevant to native title issues. Please check MURA, the AIATSIS on-line catalogue, for more information on each entry. You will notice some items on MURA do not have a full citation because they are preliminary catalogue records. Owing to staff constraints some older items have only been recently catalogued.

Audio-visual material of interest to native title includes:

Slides and photographs

MACKAY.L01.DF
Mackay. Library. Local History Section
Portraits by Henry King, John William Lindt, and J.W. Beattie. 1855 – 1923. (115 black and white prints)

MACKAY.L02.DF
Mackay. Library. Local History Section
Historic photographs from the Thomas Dick Collection taken at the Pt Macquarie region, NSW. 1900-1920. (12 black and white prints)

LOVE.J01.DF – LOVE.J08.DF.
6 collections of photographs by the Rev. J. R. B. Love taken from 1927-1937 of Worora rituals, making of implements and sites. (439 black and white prints)

Video

V09302_1-4
Videos of site-related songs and performances from Manyallaluk and Katherine, NT by the Katherine Diwurruwurru-jaru Aboriginal Corporation, 2003-2009.

V09293_1-38
Videos of Miriwung language and cultural activities from the Kununurra area, taken by the Mirima Council from 1990-2007.

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AIATSIS acknowledges the funding support of the NTRBs and Land Councils, Aboriginal Benefits Account of the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA).

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ISSN: 1447-722X