What's New - April 2011

1. Cases

Roberts v State of Western Australia [2011] FCA 257

21 February 2011
Federal Court of Australia: Perth Registry
Justice North

The Court is supervising the resolution of a dispute between families currently comprising the Kariyarra native title claim, regarding which families are to be included in the claim group description as they approach consent determinations. Previously (9 December 2010), North J had made orders that the Court would use its discretion under Order 34 of the Federal Court Rules to appoint an independent anthropological expert to report on Kariyarra law, custom and genealogies. The applicant, state and respondent party BHP had all argued that the matter was of high enough importance to justify the Court retaining an expert at its own expense. By the time the parties came before North J on this occasion (21 February 2011), they had reached agreement on their preferred expert. The Court will now seek to engage that expert. Although North J heard that the expert's report may not necessarily resolve all the relevant disputes, he accepted that it was likely to assist towards resolution and, at least, produce evidence for any future trial. The reported decision contains the proposed terms of reference on which the expert will report.

Dale v State of Western Australia [2011] FCAFC 46

31 March 2011
Full Federal Court of Australia: Perth Registry
Justices Moore, North & Mansfield JJ

The Federal Court had previously dismissed part of the appellants' (the Wong-goo-tt-oo (WGTO) native title claimants) native title claim, which had been consolidated with overlapping claims. The Court had found that there was no continuous connection of the WGTO group to the claimed area since sovereignty, but that the members of the group might be native title holders within the groups whose claim areas overlapped (*Daniel v State of Western Australia* [2003] FCA 666).

In the present claim, the WGTO claimants asserted native title over three areas that were not part of the consolidated claim. The State of WA asked the court to dismiss this application without a hearing, on the basis that the applicants were bringing arguments on which that the court had previously ruled. The doctrine of *res judicata* (or issue estoppel) in the common law prevents parties from raising an issue that the court has already decided between those parties. The Court agreed with the State and dismissed the claim.

The WGTO appealed. In its decision, the Full Federal Court considered the law regarding abuse of process. At [111] of this appeal, the Court decided: 'It is our view that, in substance, the WGTO essentially seek to have the same issue as determined in *Daniel* determined differently in the present WGTO claim. Its attempts to do so constituted, in our opinion, an abuse of process.' The appeal was dismissed.

***Cheedy v State of Western Australia (No 2)* [2011] FCA 305 on appeal from *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2010] FCA 690**
1 April 2011
Federal Court of Australia: Perth Registry
Justice Gilmour

This was a decision on costs. The Court ordered that the Yindjibarndi people pay FMG Pilbara's costs of the two motions brought by the Yindjibarndi and dismissed by Gilmour J on 25 November 2010. The motions had sought to stay both the judgment of the Court and the determination of the Tribunal in the same matter until the Full Court decided the appeal: *Cheedy v State of Western Australia* [2010] FCA 1305. The Yindjibarndi were seeking judicial review, on administrative and constitutional grounds, of a Tribunal decision allowing mining tenure to be granted.

On the question of costs, Gilmour J followed the decision of the Full Court in *Murray v Registrar of the National Native Title Tribunal* (2003) 132 FCR 402. The approach from *Murray* is that costs in native title matters may be dealt with 'in the spirit of' s. 85A of the *Native Title Act 1993* (Cth) which provides that native title parties normally pay their own costs. However, the Court held in *Murray* that costs on appeal 'follow the event' according to normal appeal costs principles, and can be awarded against the unsuccessful party. Gilmour J noted that, although the dismissed motions were not appeals, they were made in appellate proceedings.

***Smith v Marapikurrinya Pty Ltd* [2011] FCA 330**
6 April 2011
Federal Court of Australia: Perth Registry
Justice Gilmour

This was a claim brought under the misleading and deceptive conduct provisions of s. 52 of the *Trade Practices Act 1974* (TPA) (as it then was). The claim was brought by six persons listed on the Kariyarra people's native title claim (but not on behalf of the entire claim group), against a corporation (and its two Kariyarra directors who are also on the Kariyarra claim) which has provided consultant services to BHP Billiton Iron Ore and FMG Ltd in the Port Hedland area. The parties filed draft consent orders, but Gilmour J declined to endorse them, noting that he considered the main proposed order to be declaratory in nature.

He raised concerns over the standing of the applicants (i.e., their entitlement to litigate an issue based on a direct relationship to it). Gilmour J considered case law on the question of whether the native title determination applicants have exclusive standing to bring a claim like this one, as the TPA claim relies on the existence of the Kariyarra People's native title claim. His Honour particularly noted the similarity between the issues at hand and his judgment in *Roe v Kimberley Land Council Aboriginal Corporation* [2010] FCA 809. The Court ordered that documents in this matter be provided to the solicitors for the Kariyarra people's native title claim, inviting their submissions, on the question of standing particularly, and scheduled a further directions hearing for 3 May 2011.

***Bonner on behalf of the Jagera People #2 v Queensland* [2011] FCA 321**
6 April 2011
Federal Court of Australia: Brisbane Registry
Justice Reeves

Two separate applications (one lodged by Kenneth Markwell and another by Ruth James and Myfanwy Locke – 'the joinder applicants') were lodged under s 84(5) of the *Native Title Act 1993* (Cth) to be joined as respondents to the Jagera #2 claim covering an area to the south east of Queensland. The joinder applicants claim that parts of the country in the Jagera #2 claim fall within their traditional country. However, the Jagera #2 applicants claim that a) allowing the joinder applicants to proceed would be inconsistent with the decision in *Commonwealth of Australia v Clifton* (2007) 164 FCR 355 and that the applicants do not have a 'sufficient interest'. After considering the affidavits outlining the interests of the joinder applicants in the contested area the Court noted hat they did 'have rights and interests in various parts of the land or waters covered by the Jagera #2 claim that may be affected by a determination of that claim, sufficient to allow them to be joined as respondents'.

The Court also considered the decision of *Clifton* and noted that the decision prevents the applicants from joining a claim in order to have a determination made in their favour. However this was differentiated from the situation where the applicants are 'seeking to protect the native title rights and interests they claim to

hold from erosion, dilution, or discount by the process of the Court determining the claims of the Jagera #2 claimants', that is, defensively asserting their native title rights and interests.

***Blackwater Accommodation Village Pty Ltd v State of Queensland* [2011] FCA 355**
12 April 2011
Federal Court of Australia: Brisbane Registry
Collier J

This was a non-claimant application under s 61(1) of the *Native Title Act 1993* (Cth) (NTA), in relation to a parcel of land in the centre of the township of Blackwater in the Central Highlands region of Queensland. The applicant had a lease over the land and had developed it. Here, it sought replacement tenure, and the State of Queensland had indicated that native title issues needed to be resolved before any grant of tenure. The applicant notified the relevant parties and advertised its intentions to seek this declaration as required by the NTA. The Court was satisfied that there was no native title held or asserted over this parcel of land.

***Thomas v State of Western Australia* [2011] FCA 346**
12 April 2011
Federal Court of Australia: Perth Registry
Justice McKerracher

The case considers the Court's discretionary power to dismiss an application under s. 190F (6) of the *Native Title Act 1993* (Cth). One of the elements that require consideration includes whether or not the application has been amended and whether it is likely to lead to a different outcome. Upon considering the evidence, Justice McKerracher did not dismiss the application and noted that: 'Much of the previous delay seems to have been, at least in some measure beyond the control of the applicant and there is a positive plan and strategy in train. It appears that there is a real chance that the shortcomings…are capable of being overcome and thus leading to registration.'

***Champion v State of Western Australia (No 2)* [2011] FCA 345**
12 April 2011
Federal Court of Australia: Perth Registry
Justice McKerracher

The case considers the Court's discretionary power to dismiss an application under s. 190F(6) of the *Native Title Act 1993* (Cth) and considered *George v Queensland* [2008] FCA 1518 (which requires the Court to consider 'whether there is a real chance not a mere possibility that an application will be amended in a way that would lead to a different outcome once considered by the registrar'). The Court found that there was evidence that the application was amended and that work was progressing towards a claim. However it was further argued that the Court should be satisfied that there isn't 'any other reason' that the claim should be dismissed. The Court rejected this argument and noted that given the case is in mediation it is unlikely that s 86 B(referral to mediation) was intended to conflict with s 190F(6) since the act was designed to promote mediated outcomes.

***Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* [2011] FCA 370**
14 April 2011
Federal Court of Australia: Sydney Registry
Justice Flick

The Dunghutti Elders Council (the Council) sought an injunction preventing the Registrar of Indigenous Corporations ('the Registrar') from making a determination under s 487-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act). In February 2011, the Council had received a notice requiring the Council to show cause as to why it should not be put under special administration which would lead to the removal of the director and secretary of the organisation. The Council made an application based on 'procedural points' including:

- a denial of procedural fairness
- a failure to afford a 'reasonable opportunity' to respond; and
- an apprehension of bias.

All these points were rejected and the injunction was refused. In considering whether procedural fairness applied Flick J noted that the real issue was there was a requirement for procedural fairness as opposed to whether that requirement had been met. In particular it was argued by the Council that the requirements of

disclosure had not been met but Flick J found that 'there is no requirement that the documents or other material relied upon need necessarily also be disclosed' [34]. Further Flick J found that there was contrary evidence indicating that examination reports were made available to the Council and that a failure to provide such documents 'did not occasion any procedural unfairness' [40]. Further the onus of establishing procedural unfairness fell on the Council but it failed to identify the specific documents required to be disclosed.

In terms of the time frame for a response, Flick J noted that the Council was required to show cause in a reasonable period and found that even though only two weeks were provided, the requirements of the notice 'were within a confined compass and were manageable and could have been the subject of submissions within the period permitted' and that the Council had not sought additional time. On the point of apprehended bias, the test applied by the Court was whether a hypothetical bystander would conclude that the delegate was biased. However it found that it was not reasonable for a person to know the facts that the delegate knew at the time of issuing the relevant notices.

***Fortescue Metals Group Ltd/FMG North Pilbara Pty Ltd/Western Australia/Johnson Taylor and Others on behalf of Njamal* [2011] NNTTA 66**
15 April 2011
National Native Title Tribunal: Perth
Member Daniel O'Dea

FMG had applied for 5 mining leases in Njamal country, and the parties had not reached agreement under the right to negotiate process beyond the minimum 6 month period. FMG applied to the tribunal for a declaration that the mining leases could be granted, under s. 38 of the *Native Title Act 1993* (Cth). Njamal alleged that FMG had not negotiated in good faith. The main argument considered by Member O'Dea was that one of FMG's lawyers in this negotiation, Mr Sukhpal Singh, was acting under a conflict of duties, as he had previously been employed by the Pilbara Native Title Service as a lawyer for the Njamal People.

During the negotiations, the Njamal People had raised their objections to Mr Singh's involvement, but agreed to continue with the negotiation while reserving their rights to assert a conflict and retain confidentiality over any information Mr Singh possessed. Member O'Dea considered whether Mr Singh was ever acting as the Njamal people's lawyer, whether he had any confidential information about them, and ultimately whether any conflict of duty equates to a lack of good faith by FMG.

At [71] this decision cites *FMG Pilbara Pty Ltd v Cox* (2009) 255 ALR 229: 'It has been repeatedly recognised that the requirement for good faith is directed to the *quality of a party's conduct*. It is to be assessed by reference to *what a party has done or failed to do in the course of negotiations* and is directed to and is concerned with a party's state of mind as manifested by its conduct in the negotiations.'

Based on the evidence provided in relation to Mr Singh's previous involvement with Njamal, O'Dea concluded at [75] that FMG had not acted unreasonably by involving Mr Singh in the negotiations. Mr Singh's involvement did not amount to a failure to negotiate in good faith.

Njamal also argued that FMG failed to act in good faith by refusing to reveal the proposed joint venture party, and because they held negotiations at a preliminary stage of the project, before its scope was known. In relation to the first ground, O'Dea accepted evidence that FMG negotiators themselves did not know the identity of the joint venturer. On the second ground, O'Dea accepted FMG's arguments that the negotiations begin under the Act when the state gives notice of the proposed grant, and that the project was not in a preliminary stage. These were dealt with in much less detail than the question of conflict, and ultimately the decision was that FMG negotiated in good faith.

***Gandangara Local Aboriginal Land Council v Minister for Lands for the State of NSW* [2011] FCA 383**
15 April 2011
Federal Court of Australia: Sydney Registry
Justice Perram

The Land Council was to receive a grant of freehold of a parcel of land on the edge of Sydney under the *Aboriginal Land Rights Act 1983* (NSW) (ALRA). Under the ALRA, land grants are subject to native title rights. In order to receive the land without any possible future native title questions attached, it sought a determination that no native title exists in that land. NTSCORP and the state did not oppose the application.

Notification was carried out to allow any persons believing there was native title in the land to make their claim.

Justice Perram held: 'There is no evidence before me that there is native title and, given the notification procedure, I infer that there are no persons who believe there is native title. Not without some hesitation I conclude that there are no native title interests in Lot 200. If there were, the Court would have been informed of them.'

***Roe on behalf of the Goolarabooloo and Jabirr Jabirr Peoples v State of Western Australia* [2011] FCA 421**
29 April 2011
Federal Court of Australia: Perth Registry
Justice Siopis

Application for leave to appeal a decision which replaced Joseph Roe (the applicant in the current decision) and Cyril Shaw as named applicants on the combined Goolarabooloo and Jabirr Jabirr claims (combined GJJ claim). The Court noted that the applicant was required to demonstrate that there 'the decision of the primary judge is attended with sufficient doubt to warrant the grant of leave to appeal': [18]. The applicant claimed that the primary judge had erred on two points:

- finding that it was premature to assert that there was no common interest between the Jabirr Jabirr and Goolarabooloo people; and
- finding that there was no conflict of interest and that the new applicants could represent the combined GJJ claim.

However, it was found that the primary judge had appropriately exercised his discretion and that applicant had not demonstrated sufficient doubt to warrant the grant of leave to appeal.

2. Legislation

Carbon Credits (Carbon Farming Initiative) Bill 2011

This legislation is part of a package of three bills to establish the Carbon Farming Initiative. The bill provides for: the types of abatement projects eligible for Australian carbon credit units (ACCUs); requirements for recognition as an offsets entity; eligibility for offsets projects***; participation by holders of Aboriginal and Torres Strait Islander land***; characteristics of methodology determinations; permanence arrangements for sequestration projects; reporting requirements for offsets projects; a framework for auditing offset reports; the issue and exchange of ACCUs; monitoring and enforcement powers; merits review of decisions; the establishment and functions of the Domestic Offsets Integrity Committee and the Carbon Credits Administrator; and the publication of information and the treatment of confidential information.

The Bill was introduced and read a first time on 24 April 2011. On 25 March 2011 the Senate jointly referred the Australian National Registry of Emissions Units Bill 2011 and the Carbon Credits (Carbon Farming Initiative) Bill 2011 and the Carbon Credits (Consequential Amendments) Bill 2011 for inquiry and report. Submissions closed on 8 April 2011. The inquiry has received 63 public submissions. These are available for viewing here. The reporting date is 20 May 2011. Text of the Bill and the Explanatory Memorandum is available here:

- Text of Bill - First Reading
- Explanatory Memorandum

3. Indigenous Land Use Agreements

- In April 2011, **1** ILUA was registered with the National Native Title Tribunal (NNTT).
  - The Marpa National Park (Cape York Peninsula Aboriginal Land) ILUA is an Area Agreement (AA) in Queensland.
- The Native Title Research Unit maintains an ILUA Summary which provides hyperlinks to information on the NNTT and ATNS websites.
- For more information about ILUAs, see the NNTT Website: ILUAs
- Further information about specific ILUAs is available in the Agreements, Treaties and Negotiated Settlements (ATNS) Database.

4. Native Title Determinations

- In April 2011, **2** native title determinations were handed down.
  - Both determinations were unopposed and native title was deemed not to exist in either.
  - One of these determinations took place in QLD, the other in NSW.
- The Native Title Research Unit maintains a Determinations Summary which provides hyperlinks to determination information on the Austlii, NNTT and ATNS websites.
- Also see the NNTT Website: Determinations
- The Agreements, Treaties and Negotiated Settlements (ATNS) Database provides information about native title consent determinations and some litigated determinations.

5. Registered Native Title Bodies Corporate

The Native Title Research Unit maintains a Registered Native Title Bodies Corporate Summary document which provides details about RNTBCs in each state/territory including the RNTBC name, RNTBC type (agent or trustee) and relevant native title determination information. Additional information about the RNTBC 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.

6. Public Notices

The *Native Title Act 1993* (Cth) requires that native title parties and the public must be notified of:

- proposed grants of mining leases and claims;
- proposed grants of exploration tenements;
- proposed addition of excluded land in exploration permits;
- proposed grant of authority to prospect; and
- proposed mineral development licences.

The public notice must occur in both:

- a newspaper that circulates generally throughout the area to which the notification relates
- a relevant special interest publication that:
  - caters mainly or exclusively for the interests of Aboriginal peoples or Torres Strait Islanders;
  - is published at least once a month; and
  - circulates in the geographical area of the proposed activities.

To access the most recent public notices visit the NNTT website or the Koori Mail website.

7. Native Title in the News

The Native Title Research Unit publishes Native Title in the News which contains summaries of newspaper articles and media releases relevant to native title.

8. Native Title Publications

Law Council of Australia, Discussion Paper: Constitutional Recognition of Indigenous Australians
This Discussion Paper has been prepared by the Law Council of Australia, in response to the announcement by the Federal Government, with bi-partisan support, that it will hold a referendum in the current term of government, or at the next election, to amend the Australian Constitution to recognise Aboriginal and Torres Strait Islander peoples as the First Australians. The Law Council invites further comments and submissions in response to the matters outlined in this Discussion Paper by **31 August 2011.** The Discussion Paper is available for download here:

- Discussion Paper [PDF 300Kb]

Productivity Commission, Report on Government Services 2011: Indigenous Compendium
This report was released on 21 April 2011. It was produced by the Steering Committee for the Review of Government Service Provision (SCRGSP). It contains all Indigenous data reported in the Report on Government Services 2011. The Report is available for download here:

- Compendium

9. Native Title Media Releases

National Native Title Tribunal - 500th Indigenous Land Use Agreement, 31 March 2011

Australian Human Rights Commission - 500th Indigenous Land Use Agreement, 1 April 2011

Office of the Registrar of Indigenous Corporations - Federal Court dismisses proceedings brought by Dunghutti Elders Council, 18 April 2011

10. Training and Professional Development Opportunities

See the Aurora Project: 2011 Program Calendar [PDF 100Kb] for information about Learning and Development Opportunities for staff of native title representative bodies and native title service providers. Applications are open for Aurora's NTRB Training Programs.

11. Events

2011 National Native Title Conference (1-3 June, Brisbane) – Registrations Open!

The National Native Title Conference is convened annually by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and this year co-convened by Queensland South Native Title Services (QSNTS), and hosted by the Turrbal, Jagera, Yuggera and Ugarapul Peoples, the traditional owners of the wider Brisbane area. The conference promotes native title as an agenda for justice for people and country, including the broader relationships between traditional owners and country. This year's conference 'Our Country, Our Future' is reflected in the following themes:

- Decisions, Actions, Results
- Enduring Cultures, Resilient Societies
- Country, Heritage and Development
- Tenure, Title and Possession

Visit the Conference Website for further details.