

What's New October 2010

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1. Cases

M.B. (Deceased) v State of Western Australia [2010] FCA 110

25 June 2010

Federal Court of Australia, Perth

Siopis J

The Yued people applied under s. 66B(1) of the *Native Title Act 1993* (Cth) for an order replacing the current applicant with a new applicant; jointly comprised of five individuals.

The resolution made at the claim group meeting included a clause that, to remove doubt, where one or more of the individuals that made up the applicant cease to be willing and able to act as part of the applicant, the remaining individuals that form the applicant are authorised to make the application and deal with matters arising in relation to the matter, without the need for further decision by the members of the Yued native title claim group.

Justice Siopis was satisfied that the claim group meeting was sufficiently representative to be competent to make decisions on behalf of the claim group, that the Yued people did not have a traditional decision-making process for the purposes of s. 251B(a) for this type of decision and accepted the adopted decision making process of the Yued people for the purposes of s. 251B(b). An order that the applicant be replaced was made.

State of Western Australia and Cyril Gordon and others on behalf of the Kariyarra People and Christopher Murray Paterson and Carey Rae Paterson trading as Pilbara Livestock Depot (future act determination)

23 September 2010

Hon CJ Sumner, Deputy President

National Native Title Tribunal, Perth

The State of Western Australia gave notice of its intention to compulsorily acquire an area of land approximately fifteen kilometres south of Port Hedland to enable the issuing of a lease for the purpose of stock holding yards to Pilbara Livestock Depot. In 2009, the State had made an application for a future act determination on the basis that the parties had not reached agreement on the doing of the proposed future act (the granting of the lease). The native title party's objection that the grantee party had not negotiated in good faith had been rejected in that hearing.

Deputy President Sumner looked at a number of issues raised by the native title party as he considered whether the compulsory acquisition could be done. Principally, he took into account the fact that the native title rights and interests over the area had already been affected as a result of past and current pastoral use of the land and thereby the capacity of the native title party to exercise their native title rights and interests had already been greatly restricted. Further, it was found that there was insufficient evidence to confirm that areas or sites of particular significance would be interfered with or that the way of life, culture and traditions enjoyed within the area would be affected by the compulsory acquisition.

It was found that the compulsory acquisition in the area could be done. Native title in the area will be suspended during the currency of the lease but not permanently extinguished.

Atkinson on behalf of the Mooka and Kalara United Families Claim v Minister for Lands for the State of New South Wales [2010] FCA 1073

1 October 2010

Federal Court of Australia, Sydney

Jagot J

This matter had a long history before the Courts, but the applicants had failed to comply with the orders of the Court on several occasions. The claim had also never been accepted for registration by the Native Title Registrar. The Minister for Lands filed a motion seeking orders that the applicants file an amended application by 1 October 2010, failing which the proceedings be dismissed.

Justice Jagot noted that the applicants had been permitted to exhaust every opportunity to gain funding in order to make their native title claim but were still not in a position to do so. At the applicants' own admission, their claim could not progress without funding to address unresolved issues. Justice Jagot considered that it was contrary to the interests of justice to waste further time and resources on the matter without a foreseeable outcome.

It was found that there was no 'compelling reason' not to dismiss the application under s. 94C(3) of the *Native Title Act 1993* (Cth) and accordingly, an order was made that the date by which the applicants were required to amend and file their native title determination application and any materials on which they would rely be extended to 29 October 2010. Further, if, by that date, the applicants have not complied, the proceedings will be dismissed. The parties may apply to re-list the proceeding for further orders on seven days notice and, if the proceedings are not dismissed, a further directions hearing will take place on 9 November 2010.

Wuthathi People No. 2 v State of Queensland [2010] FCA 1103

5 October 2010

Federal Court of Australia, Cairns

Greenwood J

This matter was an application for an injunction to prevent a native title claim group meeting taking place the day after the hearing on the Cape York Peninsula. The applicants claimed that the meeting did not give notice to descendants of apical ancestors who they claimed ought to be included within the description of addressees in the notice, and accordingly, requested the Court prevent the meeting from taking place. The meeting had been called to discuss the composition of the claim group and the boundaries of the claim.

It was noted that the claim group meeting had been convened, at great expense, by the Cape York Land Council. Justice Greenwood concluded that he could find no utility in wasting that expenditure, effort, time and energy by preventing the meeting from taking place. He concluded that if resolutions were passed at the meeting that were not sound, then the applicants could always challenge those decisions in Court. The injunction application was dismissed.

Corunna on behalf of the Swan River People v State of Western Australia [2010] FCA 1113

14 October 2010

Federal Court of Australia, Perth

Siopis J

This case concerned the native title claim of the Swan River people over a large part of the Perth metropolitan area and adjacent waters. Mr Walley, who did not form part of the claim group, argued that he and six other individuals were in fact part of the claim group and had not authorised the persons comprising the applicant to make the application. He argued that the application be dismissed, because, in not being lawfully authorised (i.e. by the whole claim group), the application did not comply with s. 61 of the *Native Title Act 1993* (Cth) (NTA). Mr Walley further claimed that, in any case, the application also hadn't been lawfully authorised by the members of the claim group on whose behalf the application was being made.

Schedule R to the application explained that each individual comprising the applicant had been authorised by their family group within the claim group and then, each of the individuals authorised in this way had authorised each other to bring the native title application.

Justice Siopis considered this process and found that there had never been an authorisation of the applicant made by *all* the members of the native title claim group, as required by s. 251B of the NTA. He also concluded that there was a real question as to whether there were other people who claim native title over the area that had been excluded from the native title claim group. He therefore ordered, under s. 84D(1) of the NTA that those comprising the applicant provide evidence that the native title determination application was authorised within the meaning of s. 251B of the NTA. It was also decided that further submissions in relation to the claim for summary dismissal of the application would be heard.

Freddy on behalf of the Wiluna Native Title Claimants v State of Western Australia [2010] FCA 1158

26 October 2010

Federal Court of Australia, Perth

McKerracher J

Mr Ghaneson, a past director and shareholder and current creditor of Seven Star Investment Group (SSIG), brought this application in the Federal Court. SSIG had applied for an exploration licence within the area over which a native title claim had been made by the Wiluna native title claim group.

Mr Ghaneson brought a notice of motion seeking that he be joined as an interested party to the proceedings, that the functions and effectiveness of the Central Desert Native Title Services Ltd (CDNTS) be investigated, that CDNTS's government funding be terminated, that CDNTS be replaced by another representative body in these proceedings and that these proceedings cease until the Court had considered this motion.

The alleged unsatisfactory performance of CDNTS was not considered by the Court as McKerracher J found that under s. 203DF of the *Native Title Act 1993* (Cth) (NTA), the power to assess such conduct lies with the Commonwealth, not the Court.

Turning to the joinder application, McKerracher J did not accept that SSIG had an interest that would be affected by a determination, as required by s. 84(5) of the NTA. He further noted that the interest claimed by Mr Ghaneson (based on the fact that he was a creditor of SSIG) was even more tenuous and based on the boundaries set out in *Yorta Yorta Aboriginal Community & Ors v The State of Victoria* [1996] FCA 453, that interest was not sufficient for joinder to the proceedings. The motion was dismissed.

Cheedy on behalf of the Yindjibarndi People v State of Western Australia (No 2) [2010] FCA 1154

26 October 2010

Federal Court of Australia

McKerracher J

This costs hearing followed the decision in *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2010] FCA 690.

Justice McKerracher found that in the exercise of the discretion to award costs under s. 43 of the *Federal Court of Australia Act 1976* (Cth) relevant matters should be taken into account, including the nature of the proceeding, whether important and novel questions were being responsibly pursued and the desirability of resolution of those questions without costs being inflicted adversely as a penalty. He found that the application satisfied the criteria in *Murray v Registrar* [2003] FCAFC 220, that the matter was centrally concerned with the meaning of important provisions of the *Native Title Act 1993* (Cth) (NTA) and therefore, in taking into account the 'spirit' of s. 85A of the NTA, there was no order made as to costs.

2. Legislation

Native Title Bill (No. 1) 2010

The Native Title Amendment Bill (No. 1) 2010 contains measures to facilitate the provision of public housing and associated infrastructure in Indigenous communities which is, or may be, subject to native title.

Some state governments have indicated that uncertainty in relation to native title being a barrier to meeting housing and service delivery targets. This has been deemed a risk this may create delays in the delivery of housing. Therefore, this Bill introduces a new process specifically for public housing and a limited class of community facilities including education, health and emergency services facilities, and staff housing associated with these facilities. It will apply primarily to acts of State, Territory and local government bodies. The process will sunset after 10 years. The 10 year period approximates the duration of the National Partnership Agreement on Remote Indigenous Housing under which \$5.5 billion has been committed.

Click here to download a PDF version of the Bill:

http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s767_first/toc_pdf/1021220.pdf;fileType=application%2Fpdf

Click here to download a copy of the Second Reading Speech:

http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2010-09-30/0021/hansard_frag.pdf;fileType=application%2Fpdf

Click here to download a copy of the Explanatory Memorandum:

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s767_ems_5fe05330-329f-4b93-a221-8cee45777656/upload_pdf/347527em.pdf;fileType=application%2Fpdf

3. Policy

Federal Court Priority Cases:

The Federal Court has released a list of priority cases within the pending native title case load. It is recognised by the Court, due to limited resources of the Court and parties involved, that some cases must be prioritised so that cases are efficiently progressed to trial or mediated outcomes

The process of making decisions about the order in which a Court will deal with pending cases involves numerous factors to be taken into account. This process is complicated by the need to consider cases on a State, Territory or regional basis.

The criteria the Court refers to when determining priorities includes:

- whether the case involves a matter of the public interest;
- whether the resolution of the case will impact on other cases or the attitudes of the parties and in turn speed up the resolution of other related cases;
- the level of future act activity;
- the views of the parties;
- the level of preparedness of the Applicant (that is, the extent of evidence gathered and issues identified); and
- the age of the case.

[Click here to go to the list of priority native title cases](#)

Upcoming Submissions

Consultations on the *Leading Practice Agreements: Maximising Outcomes from Native Title Benefits* discussion paper and *the Native Title, Indigenous Economic Development and Tax* discussion paper were suspended due to caretaker conventions when the Federal election was called on 17 July 2010. Following the return of the Government they have been completed in the early part of November 2010.

The Federal Government is now seeking written submissions from interested parties and the general public on the following discussion papers:

Leading Practice Agreements

On 3 July 2010, the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs released the *Leading Practice Agreements* discussion paper on a package of possible reforms to promote leading practice in the governance of native payments and sustainable agreement-making.

The key measure on which the Government is consulting is a proposed new independent statutory function to receive future act and development related native title agreements, and assess some agreements to see if they are sustainable and reflect best practice agreement principles. The individual or body would also be able to assist parties, with their consent, to maximise the financial and non-financial benefits from native title agreements, now and for future generations. The individual or body would also educate on and promote leading practice agreements, advise the Government and make policy recommendations.

The Government is consulting on a range of related governance measures and complementary measures to streamline future acts processes. It is also consulting on an amendment to clarify the meaning of 'in good

faith' under the right to negotiate provisions. Copies of the discussion paper can be obtained from the [FaCHSIA website](#)

Native Title, Indigenous Economic Development and Tax

On 18 May 2010, the Assistant Treasurer, the Minister for Families, Housing, Community Services and Indigenous Affairs and the Attorney-General released the *Native Title, Indigenous Economic Development and Tax* discussion paper on the tax treatment of native title, including the interaction of native title, Indigenous economic development and the income tax system.

The discussion paper seeks feedback on possible approaches to this reform:

- an income tax exemption for native title payments,
- a new income tax exempt vehicle, or
- a native title withholding tax in place of income tax.

The discussion paper also explores how existing deductible gift recipient categories could be adapted to reflect the needs of Indigenous communities. Copies of the discussion paper can be obtained from the [Treasury website](#)

Written submissions for both papers will be accepted until **5:00pm on 30 November 2010**.

4. 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
- 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
 - 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](#).

5. Indigenous Land Use Agreements (ILUAs)

- In October 2010, **4** ILUAs were registered with the National Native Title Tribunal. All of these ILUAs were registered in Queensland. Two of the ILUAs were Body Corporate Agreements (BCA) and 2 were Area Agreements (AA).
- 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 [National Native Title Tribunal Website: ILUAs](#)
- Further information about specific ILUAs is available in the [Agreements, Treaties and Negotiated Settlements \(ATNS\) Database](#).

6. Native Title Determinations

- In October 2010, 4 determinations were handed down. Of these determinations, 3 took place in Queensland and 1 in Victoria. The determinations in Queensland (Jirrbal People #1, #2, #3) were Consent Determinations (conditional). Native title exists in the entire determination area. The Victorian determination (Gunai/Kurnai People) was a consent determination, and native title rights were deemed to exist in parts of the determination area. This determination was the first to use the Traditional Owners Settlement Act 2010 (Vic). For more information on the Gunai/Kurnai determination see the Department of Justice Victoria [Gunaikurnai Native Title Agreement Frequently Asked Questions](#).
- 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 [National Native Title Tribunal Website: Determinations](#)
- The [Agreements, Treaties and Negotiated Settlements \(ATNS\) Database](#) provides information about native title consent determinations and some litigated determinations.

7. 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](#); and native title determination information on the [NNTT](#) and [ATNS](#) websites.

8. 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.

9. Media Releases

15/10/2010

Indigenous Land Corporation

[Tourism and jobs the winners as Indigenous Land Corporation buys Ayers Rock Resort](#)

20/10/2010

Joint Media Release by Hon Bill Shorten MP, Assistant Treasurer, The Hon Robert McClelland MP Attorney-General and The Hon Jenny Macklin MP Minister for Families, Housing, Community Services and Indigenous Affairs

[Consultations on Native Title Agreements and Payments](#)

22/10/2010

Native Title Services Victoria

[Gunaikurnai win respect and recognition](#)

22/10/2010

Joint Media release by the Commonwealth Attorney-General, Hon Robert McClelland MP and Minister for Families, Housing, Community Services and Indigenous Affairs, Hon Jenny Macklin MP.

[Gunaikurnai Native Title Recognition](#)

26/10/2010

Yamatji Marlpa (NTRB):

[Aboriginal enterprise supports Coral Bay land agreement](#)

10. Native Title Publications

Guide to future act decisions made under the right to negotiate scheme









National Native Title Tribunal as at 21 October 2010

This guide provides a summary of future act decisions made by the National Native Title Tribunal and Federal Court under the right to negotiate provisions of the Native Title Act 1993 (Cth). It outlines decisions made under the Native Title Act 1993 prior to its amendments. The guide deals with the substantive law as well as the procedures applicable to the Tribunal's inquiry function under the Commonwealth right to negotiate regime.

Click here to download the PDF:

<http://www.nntt.gov.au/Future-Acts/Procedures-and-Guidelines/Documents/Future%20Act%20guide%20to%20cases%20-%2021%2010%2010.pdf>

Annual reports (2009-2010) from organisations/agencies involved in the native title sector are available for download:

Organisation	Download
AIATSIS	(4.6Mb) 
Attorney General's Department	(5.0 Mb) 
National Native Title Tribunal	(2.3 Mb) 
South West Aboriginal Land and Sea Council	(3.5 Mb) 
Torres Strait Regional Authority	(6.67 Mb) 
Goldfields Land Council	(1.4 Mb) 
Central Land Council	(4.1 Mb) 
Central Desert	(6.32 Mb) 
Kimberley Land Council	website

NB. These organisations had their annual reports available for viewing at the time of writing.
To view annual reports from other organisations/agencies, see their respective websites.

Good Practice Guide: Indigenous Peoples and Mining / International Council on Mining and Metals

This Guide aims to assist help companies achieve constructive relationships with indigenous peoples. The Guide highlights good practice principles, discusses the challenges in applying these principles at the operational level and provides real-world examples of how mining projects have addressed these challenges. It also explores the cost of getting it wrong.

It is not intended as a one-size-fits-all but is designed to provide useful information and direction for both companies and indigenous communities when considering issues around engagement and participation, agreements, impact management, benefits sharing and dealing with grievances.

Click here to [download PDF](#)

10. Upcoming Conferences

17th Annual Native Title & Cultural Heritage Forum

November 30th – December 1st 2010 at the Brisbane Hilton

Key reforms to be addressed at the forum include:

- Joint discussion paper on building stronger governance regimes in Indigenous native title corporations
- Emerging federal reforms to heritage regulation – (ATISHP Act)
- Changes to the Traditional Owners Settlement Framework and the Victorian landscape of native title regulation
- Moves towards engagement in Queensland's Native title and Heritage clearance reform
- The impending review of the SA Aboriginal Heritage Act
- Northern territory perspectives on Native title and Heritage assessment

For more information including speakers, prices and program schedule download the flyer here:

<http://www.informa.com.au/iir-events/mining-events/mining-resources/metals-minerals/native-title-cultural-heritage/E1037.pdf>

To register contact Angus Munro

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E: angus.munro@informa.com.au

11. Training and Professional Development Opportunities

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