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NATIVE TITLE RESEARCH UNIT

# WHAT'S NEW IN NATIVE TITLE
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## *1. Case Summaries*

### *Weribone on behalf of the Mandandanji People v State of Queensland (No 3)* [2013] FCA 662

**1 July 2013, Application to replace applicant, Federal Court of Australia – Brisbane**

**Rares J**

This matter dealt with an application under s 66B of the *Native Title Act 1993 (Cth)* to replace the previous applicant with 12 new persons (the replacement applicant).

The grounds for this application were that the previous applicant was no longer authorised by the claim group to bring the native title application on behalf of the Mandandanji people. In March 2013, Justice Rares acknowledged that there was a dysfunction in the previous claim group, but the three authorisation meetings to replace that applicant in 2011 were not validly called and so those applications under s 66B of the Act were struck out.

Consequently, a new authorisation meeting was convened on 25 May 2013. His Honour was satisfied by the evidence that the meeting, attended by 173 persons who identified as claim group members, was properly convened and constituted. It was clear from the voting records, kept by an independent facilitator, that nearly all claim group members voted. Legal representatives also attended the meeting and made presentations. It was accepted at the meeting that the Mandandanji people did not observe a traditional decision-making process and therefore an honesty system would be adopted by which a written resolution would be read out, moved and seconded, before it was voted on by a show of hands. The Chairperson was responsible for a count being made and recorded.

According to this process, it was unanimously decided that for the purpose of the meeting only persons who identified as the descendants of apical ancestors Nellie Edwards, Combarngo Bill, Weribone Jack Senior, and Mary Weribone could participate in the meeting. The next two resolutions concerned the composition of the claim group

and the boundary of the claim area. It was decided that the claim group and claim boundary would remain as it was. Four preconditions to becoming a member of the replacement applicant were carried unanimously:

(1) the applicant would represent the whole claim group;
(2) if an individual was unable or unwilling to continue as a named applicant, the remaining individuals could continue to act without the need to appoint a replacement. If a named applicant missed three consecutive meetings they would be regarded as 'unable or unwilling';
(3) disagreements among the applicant group were to be resolved by a majority vote; and
(4) the signature of a majority of the persons constituting the replacement applicant would bind the applicant.

A further resolution was carried unanimously to constitute the replacement applicant with three persons from each of the four family groups identified by their apical ancestors. The Court noted that no person appeared to oppose the orders to replace the applicant. His Honour said that although the claim remains controversial, the position of uncertainty as to who the correct members of the native title claim group are remains to be resolved by the final hearing. The claim group, nonetheless, clearly wanted an applicant capable of reaching a determination of native title.

Justice Rares said the evidence demonstrated that the replacement applicant was authorised to make this application under s 66B and to deal with matters according to the decision-making process they adopted in accordance with s 251B of the Act. His Honour said it would have been better to have been provided with evidence of the advertisements and notification of the authorisation meeting. Nonetheless, his Honour was satisfied by the very large attendance at the authorisation meeting that all the various interests in the claim group were represented. The Court ordered that the applicant be replaced by the 12 persons comprising the replacement applicant.

### ***Strickland v State of Western Australia* [2013] FCA 677**

**3 July 2013, Application for leave to amend native title application, Federal Court of Australia – Sydney**

**Jagot J**

This matter involved the dismissal of a native title application, filed on 14 October 2010 by Marjorie May Strickland and Anne Joyce Nudding (the applicant), which had previously failed the registration test four times.

The matter was brought on the Court's own motion pursuant to s 190F(6) of the *Native Title Act 1993 (Cth)*. Section 190F(6) gives the court the power to make an order for dismissal where they are satisfied that the application is not likely to be amended in a way that would lead to a different outcome and there is no other reason why the application should not be dismissed. In response, the applicant sought leave to amend the application.

The applicant sought an amendment to the claim group to rectify a defect in authorisation which had led to the application failing to meet the registration test as per s 190C(4)(b) of the Act. The native title application had been brought on behalf of only a subgroup of the local descent group comprising the descendants of Kitty Bluegum. As a result the Native Title Registrar had concluded that the applicant was not authorised by all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.

The applicant subsequently obtained the authorisation of the wider descent group and argued that the power to amend a claim includes amendment of the native title claim group. The applicant argued that this amendment would lead to a different outcome and therefore preclude the Court from exercising their power to dismiss the application under s 190F(6) of the Act.

The respondent submitted that there was no power to amend the application to overcome the applicant's authorisation failure. The terms of s 61 of the Act provide that an application may be brought by a person authorised on behalf of all the persons of the native title claim group. Velickovic v State of Western Australia [2012] FCA 728 identifies the difficulties in the applicant's approach: 'A different set of people cannot reauthorise a claim brought on behalf of another set of people.'

In response to this, the applicant submitted that the power of amendment under s 64 of the NTA was not expressly limited and would extend to the amendment of a claim group, a power also contained within the Court's general power of amendment under r 8.21 of the Federal Court Rules 2011. Nor, it was argued, do the terms of s 84D(4) of the Act suggest that an authorisation defect cannot be overcome by amendment of the claim group.

The Court acknowledged the complexity of the issue and the potential for the respondent's argument to lead to injustice by preventing any changes to a claim group, for example, where a member of the claim group had been mistakenly excluded. However, the Court chose not to deal with the issue of whether it was within power for the claim group to amend the original claim group. Instead, the Court decided to exercise its discretion not to allow the amendment, whether or not there was such a power. This was because the applicant had intentionally filed the original application on behalf of the subgroup and not the whole local descent group (who were at the time involved as claimants in another native title claim).

The Court was satisfied that the application could not be amended to achieve a different outcome because amendment of the claim group had been denied. In exercising its discretion to dismiss the native title application under s 190F(6) of the Act, the Court highlighted that multiple applications had been made by this group, all of which had failed registration.

### ***Cheinmora v State of Western Australia* [2013] FCA 727**

**25 July 2013, Application to remove respondent party, Federal Court of Australia – Perth**

**Gilmour J**

The Court made orders on 21 June 2013 for Kalumburu Aboriginal Corporation (KAC) to cease to be a party to the proceedings pursuant to s 84(8) of the *Native Title Act 1993 (Cth)*. These are Justice Gilmour's reasons for so ordering, which largely reflect the submissions made by the applicant. Counsel for the KAC was granted leave not to appear at the hearing.

KAC was joined as a respondent on 13 September 2011 because at the time it had proprietary interests in part of the claim area (Kalumburu Reserve), which were said to be interests that may be affected by a native title determination. The applicant had since put forward a proposed minute of consent determination (minute) that protected the interests of KAC, which negated their interest in the proceeding.

The Court has a wide and unfettered discretionary power to dismiss parties under s 84(8) and (9) of the Act if a parties' rights are no more than that of any member of the public, and (i) their interests are therefore represented by the another party such as the state or (ii) they don't have or longer have interests that may be affected by the determination (see Byron Environment Centre Incorporated v Arakwal People [1997] FCA 797). The interests of justice will be enough to warrant the exercise of this discretionary power.

The creation and vesting of the Kalumburu Reserve is considered a past act under s 228 of the Act. The applicant sought to apply s 47A of the Act, which allows extinguishment of native title to be disregarded in areas held expressly for the benefit of Aboriginal peoples (such as Aboriginal reserves). By operation of s 230 of the Act, native title rights and interests would be suppressed in this area to the extent that they were inconsistent with rights created by the past act. In this case, those rights arising from the past act were granted to the Aboriginal Lands Trust and then further granted to KAC. Therefore, if there is any inconsistency between KAC's rights and the native title rights and interests in question, KAC's rights prevail as a matter of law.

The minute recognises KAC's interest in the Kalumburu Reserve as an 'other interest' pursuant to s 225(c) of the Act. The claim group nominated Balanggarra Aboriginal Corporation (BAC) as the Prescribed Body Corporate (PBC) on 10 May 2013 and instructed BAC to set up four Land Groups through which the PBC could do native title business in those respective areas.

KAC asserted an interest in the post determination management of native title in the area of its interest and that native title should therefore be held by two separate PBCs. Justice Gilmour concluded that KAC would no longer have a legitimate interest in managing native title after the determination. KAC had also raised concerns that it had not been acknowledged that Land Group 1 had authorised three individuals (members of the claim group) to act on

its behalf. On this point, his Honour said it was not relevant to these proceedings, as a respondent cannot act in a representative capacity for others.

KAC further purported that its interest in the proceedings arise out of KAC's purposes, which include supporting the local traditional owners. However, the Court held that an Aboriginal corporation is not able to rely on the interests of its members to become a respondent in a native title proceeding: Harrington-Smith on behalf of The Wongatha People v State of Western Australia [2002] FCA 184. His Honour also relied on Adnyamathanha People No 1 v South Australia [2003] FCA 1377, in which it was said that the interests of the relevant corporation in that case were interests of the individual Aboriginal persons who were members of the corporation, and who could themselves be parties to the application (see also Combined Dulabed and Malanbarra/Yidinji Peoples v State of Queensland [2004] FCA 1097). His Honour said that the principles articulated with regard to 'interests' in these cases are applicable to the consideration of sufficient interests under s 84(9). As such, the purported interests are those of individual members of KAC and are therefore not a sufficient basis for KAC's continued involvement as a party to the proceeding. His Honour also noted that nothing in a determination of native title would affect KAC's ability to carry out its objectives in the future.

The Balanggarra application was lodged in 1995, almost 18 years ago. The Court believed the continued participation of the KAC in the proceedings was likely to cause further delay to working toward a hearing for the purposes of determining native title by consent on country in the week of 5 August 2013. His Honour decided it was in the interest of justice to resolve these proceedings expeditiously. Justice Gilmour was therefore satisfied that it was within the Court's discretion under s 84(8) of the Act to order that KAC cease to be a party to the proceedings.

## *WF (Deceased) on behalf of the Wiluna People v State of Western Australia* [2013] FCA 755

**29 July 2013, Consent determination, Federal Court of Australia – Puwana**

**McKerracher J**

This matter concerns three applications for native title: Wiluna, Wiluna #3 and Tarlpa. Although there is a significant degree of overlap between the Wiluna claim group and the Tarlpa claim group, the composition of each claim group is slightly different. The parties reached an agreement that native title exists over the Tarlpa and Wiluna #3 claim areas, and parts of the Wiluna claim area.

The Wiluna application was to an area of approximately 47,596 square kilometres of land and waters in the northwest goldfields region of Western Australia. The area includes the township of Wiluna, a number of pastoral leases, parts of the Canning Stock route, and areas of unallocated Crown land, including Lake Carnegie. The Wiluna application was made up of two previously separate applications that were combined in 1999. The Tarlpa application was filed in 2007 over an area of approximately 2,265 square kilometres to the south of the township of Wiluna. Wiluna #3 was filed in 2012 over an area of approximately 3,597 square kilometres of pastoral lease. The pastoral lease, Windidda station, is held by members of the Wiluna #3 native title claim group.

In 2009, Central Desert Native Title Services (on behalf of the applicants) provided connection material to the State. The applicants and State agreed to depart from the usual process for connection assessment by adopting a two stage process of an experts' conference and on country meeting, both of which took place in 2009. The expert anthropologists engaged by the applicant and the State attended and provided written material and advice. The State was satisfied that the connection material met the State's Guidelines and agreed to enter into negotiations towards a determination. The process of reaching agreement was through court-convened mediation from December 2010 to June 2013.

The applicants are an identifiable subset of the wider Western Desert cultural bloc ('society' for native title purposes), with rights and responsibilities to the land and waters that comprise the application areas. As such, the applicants share a body of law and custom with other Western Desert native title groups. Many of the applicants live at Kutkububba, Bondini, Windidda or in the township of Wiluna and describe themselves as Martu. Traditionally, association with the land was the result of being conceived, born, or initiated on country or by having acquired knowledge of the country through growing up on country, a long association with country or being descended from a person who had those connections.

The applicants have an intimate knowledge of the law and custom including an extensive knowledge of Western Desert dreaming tracks and associated sites, stories and songs, and their importance in the context of the broader Western Desert. The anthropological material also considered the responsibility of applicants to transmit knowledge, systems of kinship and codes of behavior, that language is generally spoken by the applicants, and traditional names for people and places are generally known.

Sadly, since the initial authorisation of the Wiluna applicant in 1998, eight of the 15 named applicants have died. Similarly, since the initial authorisation of the Tarlpa applicantion in 2007, three of the four persons named as applicant have died. The Court considered that despite this all important decisions had been directed by the claim group; the respective claim groups had continued to direct the representative applicants; and at every opportunity on the death of a named applicant, the claim groups either formally or informally expressed their authorisation of the surviving members of the applicant group. The Court therefore accepted that the Wiluna and Tarlpa applications remained authorised.

Before the Court exercised its power under ss 87 and 87A of the *Native Title Act 1993* (Cth) to make a consent determination in accordance with the written agreement of the parties, it considered whether the conditions of these provisions had been met and concluded:

(a) The notice period required by s 66 of the Act had been met
(b) The agreement had been reduced to writing, signed by the parties and filed with the Court
(c) The making of an order consistent with the terms of the agreement would be within the power of the Court
(d) It was appropriate for the Court to make a determination consistent with the terms of the parties' agreement
(e) There is an agreement for a determination in relation to part of the area covered by the Wiluna application
(f) The relevant notice was given to those who did not become or were not required to become parties to the Wiluna application
(g) The Court has taken into account any objections to the Wiluna application

In relation to whether it was appropriate for the Court to make orders under ss 87 and 87A of the Act, the Court noted that this discretion must be exercised in accordance with the object of the Act to encourage the resolution of disputes outside of the litigation process. The Court placed importance on the submissions of all the parties, which stated that: all parties received legal representation; the State actively participated in the negotiations on behalf of the wider community through a rigorous and detailed assessment of the connection material; the State acted in good faith and rationally; and a determination would be justified in the circumstances.

The parties also agreed that the pre-conditions had been met for extinguishment to be disregarded in relation to pastoral leases held by native title claimants (s 47), Aboriginal reserves (s 47A), and vacant Crown land (s 47B). The Court was satisfied that the State determined the extent of other interests within the determination area and an agreement was freely entered into on an informed basis. Justice McKerracher congratulated the applicants, the State, non-State respondent parties, legal representatives and all those involved in the agreement.

The parties agreed that the applicant may seek a variation of the native title determination if the Court's position regarding pastoral improvements changes through appeal of the decision in Brown (on behalf of the Ngarla People) v State of Western Australia (2012) 203 FCR 505 to the High Court. The orders direct the native title holders to nominate a Prescribed Body Corporate within 12 months.

### *Far West Coast Native Title Claim v State of South Australia (No 5)* [2013] FCA 717

**30 July 2013, Application for joinder, Federal Court of Australia – Adelaide**

**Mansfield J**

In this matter, Michael Alfred Laing filed and interlocutory application to be joined as a respondent pursuant to s 84(5) of the *Native Title Act 1993 (Cth)*. This was heard on the papers by Justice Mansfield.

The native title claim area is a substantial area of land running east from the South Australian/Western Australia border along the coast to about Fowlers Bay, South Australia. The current claim is a consolidation of two previously separate native title applications brought by the Far West Coast people and the Mirning people. The negotiations

between the claim group and the State have reached the stage where a draft consent determination has been drafted.

Mr Laing relied on his two affidavits, an expert anthropologist's report and written submissions. The Far West Native Title Claim Group (the claim group) and the State of South Australia (the State) filed written submissions opposing the application for joinder. Mr Laing is the grandson of Gordon Charles Naley, who he claims was a Mirning man. However, Mr Naley was not included as an apical ancestor in the original Mirning claim and therefore not in the consolidated claim.

Mr Laing's interest in the native title claim is not novel. Since 2009 Mr Laing has been litigating in order to be included in the claim group or to be joined to the claim as a respondent. In 2011 Mr Laing discontinued his application relating to the status of the Naley descendants. The Court accordingly ordered that he cease to be a party to the application and dismissed his application to have Mr Naley recognised as an apical ancestor of the Mirning people. In 2012, an application was made by Robert Victor Miller to deconsolidate the Far West Coast and Mirning claim. This litigation was supported by Mr Laing. At the hearing, Mr Miller withdrew his application to be joined as a respondent party.

On 18 April 2012, Mr Laing filed a separate native title application on behalf of the Naley descendants which overlapped the Far West Coast claim area. The motive for doing so was to gain "far greater rights" than that of respondent party. This claim was struck out on 7 September 2012 on the basis that the Naley descendants were a subgroup of the full claim group and therefore the claim was not properly authorised by a full claim group. Mr Laing subsequently filed the joinder application under question on 21 November 2012. Mr Laing did not assert in the joinder application that the descendants of Mr Naley should be included in the claim group.

According to s 84(5) of the Act, the Court may join any person as a party to native title proceedings if their interest may be affected by the native title determination. Justice Mansfield said that the only interest Mr Laing had in proceeding which may satisfy the requirements of s 84(5) flow from him being an alleged Mirning man with native title rights and interests. The Court reviewed the judicial principles governing s 84(5), including *Wakka Wakka People #2 v State of Queensland* [2005] FCA 1578 which involved similar facts to the present case. In this case the Court said the person seeking to be joined did not explain how his descendants were taken to be members of the relevant claim group or their connection with the land in question. He therefore failed to show a prima facie case in relation to an interest.

Mr Laing's submissions confirm that although he claims to be a Mirning man descended from Mr Naley, he does not seek to have the description of the claim group changed to include Mr Naley as an apical ancestor. For present purposes, Mr Laing's position is akin to that of an assumed dissentient member of a native title claim group who wants to intervene directly in the conduct of that native title claim. Yet despite the opportunities available to Mr Laing, his status as a member of the claim group has not been formally determined.

Justice Mansfield concluded that Mr Laing's interests are no greater than that of the Mirning people generally. His Honour held that making Mr Laing a respondent party was neither a necessary or appropriate step because: (i) he has disclaimed the use of the joinder application for the purpose of determining the status of the Naley descendants and (ii) there is a more appropriate avenue to pursue such an issue. His Honour held that if Mr Laing asserts that the claim group should be described differently, then this should be done by a final determination of that issue on admissible evidence.

The Court also found that, in view of the procedural history, delay and prejudice to the Far West Coast native title claim were valid discretionary considerations which militate against joining Mr Laing as a respondent party to the native title claim.

The Court refused the application by Michael Alfred Laing to be joined as a respondent party to the application.

***BP (Deceased) v State of Western Australia* [2013] FCA 760**

**30 July 2013, Extinguishment of native title resulting from grant of pastoral leases, Federal Court of Australia – Sydney**

**Jagot J**

## BACKGROUND

This matter concerns the question of whether the extinguishment of native title resulting from the grant of pastoral leases over two areas of land must be disregarded in accordance with s 47B(2) of the *Native Title Act 1993 (Cth)*. The claim area covers land the subject of two pastoral leases, Earaheedy pastoral lease and the Lorna Glen pastoral lease.

Section 47B(2) applies to a native title claim if, when filed, the relevant area is not subject to:

> Section 47B(1)
>
> (i) a freehold or lease;
> (ii) a Crown reservation, proclamation, dedication, condition, permission, authority or any Act that reserves the land for a public purpose or a particular purpose; or
> (iii) a resumption process.

The State of Western Australia (the State) contended that as at 28 October 2004, when the native title application was filed, the area was subject to a permission under which the whole or parts of the claim area were to be used for public purposes or a particular purpose and/or were subject to a resumption process. The reason this was contentious is that it would negate the application of s 47B(2) to the claim area, which allows for extinguishment the result of the grant of a pastoral lease to be disregarded.

Section 457B(5)(b) states that an area is subject to a resumption process if at the relevant time all interests last existing in relation to the area were acquired, resumed or revoked by, or surrendered to the Crown who had and continues to have a bona fide intention of using the area for public purposes. The parties agreed on the dates on which the pastoral leases commenced and when they were surrendered to the State. The issues under dispute concerned whether as at 28 October 2004 all of the elements of this provision were satisfied, particularly the Crown's bona fide intention to use the land for conservation purposes.

## SECTION 47B(1)(B)(II) – THE PERMISSION ISSUE

The areas in this case are unallocated Crown land, which is governed by the *Land Administration Act 1997 (WA)* (Land Act).The State's submission that the area was subject to a permission at the relevant time, pursuant to s 47B(1)(B)(ii), was said to be constituted by a memorandum of understanding between the Department of Conservation and Land Management (CALM) and the Department of Land Administration, entered into in March 2000 (MOU). This date is before the two pastoral leases were surrendered to State. It is common ground that at no time had the areas of land in the present case been reserved for a public purpose under the Land Act or the *Conservation and Land Management Act 1984 (WA)* (CALM Act). Instead, CALM exercised de facto control over the land under the MOU.

The stated purpose of the MOU was to formalise arrangements between the two departments for the interim holding of land purchased or transferred under pastoral lease title to add to the conservation estate. The MOU recognises the State's commitment to establishing a comprehensive reserve system in the rangelands of Western Australia though the acquisition of pastoral leases. The MOU also specifies that CALM will manage the lands in accordance with their goals, which include conservation priorities and facilitating public enjoyment.

The MOU specifies that for the pastoral leases to be held by CALM, it is necessary to obtain clearances from government agencies, specifically the Department of Minerals and Energy, and native title interests enabling the land to be set aside for conservation. Until this is achieved, the MOU endorses an interim holding tenure, which consists of the land remaining unallocated Crown land but subject to a management arrangement under s 33(2) of the CALM Act.

The State submitted that the MOU operated as a permission conferred by the Crown under which the whole of the area was to be used for the public purpose of conservation and recreation, thereby satisfying s 47B(1)(b)(ii) of the Act. The Court said that the question of whether the MOU constitutes a permission under s 47B(1)(b)(ii) depends on the terms of the instrument.

The Court held that, firstly, assuming the MOU constituted the relevant permission, it did not consider that the land in question is to be used for the public purposes of conservation and recreation under that permission. Secondly, the

Court said it was clear from the terms of the MOU that it documents an informal interim arrangement for land to be added to the conservation estate if, but only if, all the necessary approvals could be obtained. His Honour said: 'what emerges from the MOU is nothing more than a holding arrangement pending the obtaining of all required approvals to add the land to the conservation estate at some indeterminate future time in circumstances where those required approvals, both from within and outside the government, might or might not be obtained.'

For these reasons, the Court found that the area was not covered by permission under which whole or part of the land were to be used for public purposes or for a particular purpose.

**SECTION 457B(5)(B) - THE RESUMPTION ISSUE**

Subsections 47B(5)(b)(ii) and (iii) are concerned with the intention of the Crown at two times – first, when all interests last existing in relation to the areas before the test time were acquired, resumed or revoked by, or surrendered to, the Crown and, second, when the application was made.

Regarding the resumption issue, the State submitted that interests which exist before the test time (28 October 2004) and continue to exist after the test time, such as native title rights and interests, are irrelevant. Such interests, they argued, are not interests 'last existing before the test time'. What is relevant according to the correct construction of the resumption provision, the State submitted, is that the interests last existing before the test time were the two pastoral leases.

The applicant contended that s 47B(5)(b) requires all interests in relation to the area to have been acquired, resumed or revoked by, or surrendered to the Crown. They contend that it is irrelevant whether or not those interests continue to exist after the test time. The Court preferred the State's construction, indicating that the wording of the provision suggests an interest that has ceased to exist before the test time.

With regard to ascertaining the Crown's intention, the Court identified extensive governmental material that records the history of the two leases from the time of their commencement. The Executive Director of CALM offered to purchase both pastoral leases 'for conservation purposes'. Funding for this was made available through the National Reserve System program. On 13 June 2001, the Department of Minerals and Energy provided CALM with advice about the 'significant potential' for mineral exploration on the Lorna Glen pastoral lease and the need to consider CALM's ongoing management of the area. On 20 November 2002, the Western Australian Cabinet endorsed a new conservation reserve system for the State that directs relevant agencies to give priority attention to converting already purchased pastoral leases into formal conservation reserves.

On 28 February 2003 the Shire of Wiluna advised CALM that it opposed the reservation, to which CALM responded saying that both leases were purchased for conservation purposes. This correspondence also noted that there is no requirement for the consent of the local government authority before reservations can proceed under the Land Act or CALM Act. On 23 May 2003 the Department of Mineral Resources wrote to CALM stating that it considers that the conservation reservation is not an appropriate tenure for areas of moderate to high mineral or petroleum potential (which included Earaheedy and Lorna Glen), in that restrictions on access act as a disincentive to industry investment. They recommended the prospective portions of properties which they partially support (which included Earaheedy and Lorna Glen) be set aside as an appropriate tenure that would allow for mineral and petroleum resource access.

On 9 July 2003, CALM wrote to the Wiluna claimants regarding the mechanism that would need to be applied to protect native title rights and interests, suggesting an Indigenous land use agreement enabling the creation of reserves. It also stated that it may be possible in the future to transfer title to the traditional owners under an amended CALM Act. The Native Title Representative Bodies and native title claimants opposed the reservation until such time as the CALM Act was amended to recognise the rights and interest of traditional owners. In summary, the two main issues requiring resolution before the leases could be reserved were mining access and native title.

The Court indicated that the persuasive burden of satisfying s 47B(5)(b) lies upon the State because evidence of the Crown's bona fide intention, save for public documents, is effectively in the control of the Crown. The State submitted that at all material times the Crown intended to use Earaheedy and Lorna Glen for the purposes of conservation and recreation, both of which are public purposes. Subsections 47B(5)(b)(ii) and (iii) are concerned with the intention of the Crown. The State submitted that it is immaterial to the consideration of the Crown's intention

that the pastoral leases had not yet been formally reserved as conservation parks, but that this was the intention. The Court took the view that intention is to be determined objectively on the whole of the evidence, as the establishment of a conservation reserve evidently requires a coordinated approach across government agencies. Furthermore, the Minister for Lands is unlikely to act unilaterally in such a matter.

The Court did not accept that the Crown's intention could be determined solely based on the Cabinet's policy regarding the conservation estate at the time it purchased the two leases. This was because, firstly, these policies are expressed at a high level of generality and the focus of s 47B(5) is the specific area the subject of the native title application. Further, as noted above, the reservation required a whole of government position. Secondly, his Honour noted that the intention is to be considered at two relevant times and the intention may have altered since the land was purchased. For these reasons the Court was not convinced that the Cabinet's policy determined the future use of the land for conservation and recreation purposes.

The Court outlined some steps for consideration of 'bona fide intention':

1. It is to be determined on the whole of the evidence.
2. It must be more than a generalised and vague desire or wish.
3. A specific desire or wish may not be enough if it is impossible or impractical to fulfill and the Crown knew or ought to have knowledge of that impossibility or impracticality.
4. The existence of a desire or wish to use the land for alternative and potentially conflicting causes.
5. The firmness or permanence of the state of mind attributed to the Crown, e.g., is the future use of land in state of flux or indecision.

The Court first considered the Crown's intention as at 28 October 2004 pursuant to s 47B(5)(iii), because this discarded with the need for extensive consideration of s 47B(5)(ii).

The Court observed that CALM's management activities on the land were not determinative as they were no more than that of any responsible land owner and were equally not inconsistent with any other future use of the land (e.g. mining). Even the interim holding tenure under the MOU was subject to not interfering with mining legislation applicable to the area. Consequently, Justice Jagot stated that CALM's position would be more appropriately described as a mere desire or wish.

The reality was that CALM needed the support of other government departments, including the Department of Mineral Resources, to enable the reservation of the land for conservation purposes. This is evidenced by its consultations with affected government agencies. The problem for the State is that it had reached an impasse where CALM desired the whole area for conservation purposes and the Department of Mineral Resources opposed any tenure that would impede mining/extraction purposes.

While some public purposes may be consistent with native title rights and interests, the native title holders in this case opposed the reservation of Earaheedy and Lorna Glen for conservation purposes. CALM had to contend with the future use of the land with not only the rest of government, but also native title holders. Justice Jagot said that this too indicates that CALM's position as at 28 October 2004 was best described as a desire or wish.

His Honour briefly considered the intention of the Crown when the pastoral leases were acquired (17 March 1999 for the Earaheedy pastoral lease and 1 August 2000 for the Lorna Glen pastoral lease) pursuant to s 47B(5)(b)(ii). His Honour said the fact that CALM's intention was always inherently hedged by the significant uncertainties of future positions of other government agencies and native title holders weighed against the possibility of finding a bona fide intention to use the land for public purposes. His Honour further noted that the dual requirements of s 47B(5)(b) are an important safeguard for native title claimants against instances where the intention of one arm or agency of government does not reflect the government as a whole or where genuine intentions are later confounded by practical and political realities.

His Honour determined that as at 28 October 204, on the evidence, it could not be said that the Crown had a bona fide intention of using the area for the public purposes of conservation and recreation. Section 47B(5)(b)(iii) is therefore not satisfied and, as a result, s 47B(2) applies such that extinguishment of native title rights and interests through the grant of the Earaheedy and Lorna Glen pastoral leases can be disregarded. The Court held that the

native title determination to which the parties agree the applicant is entitled must reflect the terms of s 47B(2) and directions will be made accordingly.

***Brooks on behalf of the Mamu People v State of Queensland (No 3)* [2013] FCA 741**

**31 July 2013, Whether State can withdraw consent to native title determination, Federal Court of Australia – Brisbane (Heard in Innisfail)**

**Dowsett J**

In this matter the applicants on behalf of the Mamu people sought a determination that native title exists. The original application was filed in 2001 and notified according to s 66 of the *Native Title Act 1993* (Cth). The respondents include the State of Queensland (the State), a number of Regional Councils, Ergon Energy and various fishing parties.

The claim area is no larger than about 50 kilometres squared, bordering the Pacific coast to the east, and between Cooper Point in the north and North Maria Creek in the south. The anthropologist's report states that: 'Mamu country centres on the watersheds of the North and South Johnstone Rivers and their major tributaries such as the Beatrice and Russell Rivers.'

The original claim group comprised the descendants of 53 named apical ancestors. The original claim group agreed to amend the claim group description in 2011 to reflect the results of further anthropological research conducted in 2010 and 2011. On the recommendation of the anthropologist, Annie Musycon was removed, as she was said to be the daughter of "Polly", and "Polly" and "Bella" were added to the list of ancestors. By April 2011 the applicant and the State were negotiating in the hope of achieving a consent determination. The terms of the proposed consent determination were filed on 25 July 2012.

The Court's jurisdiction in native title consent determinations is usually exercised in an open court, save for any statutory exceptions. Section 87A of the Act creates an exception by providing for a determination of native title by consent without a hearing. The Court considered a number of cases that discuss the meaning of the word 'hearing'. The relevant question for the Court was whether s 87A should be read as: (i) authorising a determination to be made in an open court, but without a hearing or; (ii) authorising the court to make a determination 'on the papers' and not in Court. Justice Dowsett considered the latter to be the clear intention of s 87A of the Act. His Honour said that this provision, however, leaves it open to the Court to determine the process after the filing of the proposed determination. The Court concluded that the discretion conferred by s 87A(4) was wide enough to permit the hearing of some parts of the case to clarify certain matters.

The matter was originally set down for consent determination on 3 September 2012. However at a directions hearing on 16 August 2012 a solicitor employed by North Queensland Land Council indicated that there was a dispute about the inclusion of Bella as an apical ancestor and that the Wanyurr Majay people had asserted an interest in an area in the north of the claim area. Justice Dowsett therefore vacated the consent determination date and it was rescheduled for 25 March 2013.

On 23 February 2013 the claim group approved the removal of Bella as an apical ancestor. On the basis of protecting alleged Wanyurr Majay interests in the claim area, two Wanyurr Majay people made an application for joinder. Justice Dowsett dismissed the application for joinder due to insufficient evidence (which was revisited and upheld at [124]-[127] of the decision). At this same hearing, the State sought an adjournment of the hearing scheduled for 25 March 2013 in order to further consider the Wanyurr Majay claim. On 20 March March 2013 the State advised that it was withdrawing consent to the proposed determination and sought an order to vacate the hearing dates. There was not adequate time to hear the State's application to vacate the hearing and so it was listed for hearing on 25 March 2013.

At the 25 March 2013 hearing the State contended that the primary concern was the Wanyurr Majay people's interest in the disputed area and the removal of Bella from the apical ancestors, owing to her strong association to the area. The State suggested that the doubt about the status of the apical ancestors might favour the Wanyurr Majay claim. The State contended that if those ancestors were not Mamu then they must have been Wanyurr Majay. The Court noted that it was open to the Wanyurr Majay people to take appropriate action to assert their claim at

any time after the filing of the Mamu application: 'If they did not enquire as to [the Mamu claim area] boundaries, it was their own fault.' His Honour further said that, even now, the Wanyurr Majay people could lodge a native title application to compel consideration of their claim to the disputed area. But there was no suggestion of an actual or imminent Wanyurr Majay native title claim to the area.

The Court considered whether the filing of a signed proposed determination under s 87A of the Act has contractual effect. The State pointed to no authoritative basis for withdrawing consent after filing. The Court took the view that all parties continue to be bound by its consent to the proposed determination unless it was rescinded, declared void or lawfully terminated. His Honour said that if parties were permitted to withdraw consent, the process contemplated by s 87A would be easily derailed, depriving native title groups and other parties of the expected benefit of such engagement. Justice Dowsett pointed out that the State participates in native title litigation as a party and is bound by the Court's ultimate decision.

Before the Court could determine whether it was appropriate to make an order in terms of the proposed consent determination, Justice Dowsett considered the voluminous anthropological material in evidence (see [48]-[111] of the decision).

Pursuant to s 251B the authorisation process must comply with any requirements of the group's traditional laws and customs or, absent any requirements, be in accordance with a decision-making process that the group has agreed to. At some stage the group must settle on a claim group description or authorise the applicant to do so under s 61(4) of the Act. The use of apical ancestors is a common method for compliance with s 61(4) and may assist in establishing connection to the claim area. His Honour held that the composition of the claim group is a matter for the claim group and the applicant does not need to show that each member of the claim group is descended from the identified persons; It is enough that the members identify by one another as members of that community living under its laws and customs: *Mabo v State of Queensland (No 2)* [1992] HCA 23 at [61]. The Court was satisfied that the identification of the claim group had been settled by the claim group. The outstanding question was, according to his Honour, whether that claim group could demonstrate that it was the holder of native title over the disputed area.

His Honour assessed the Mamu and Wanyurr Majay claims to the disputing parts of the claim area. His Honour observed that the Mamu case was very strong and there could be no doubt they were the Indigenous people at Cooper Point and further south in 1871, when survivors of the wreck of *Maria* reached the Johnstone River. His Honour said that the Wanyurr Majay claim seemed unsustainable given the historical association of the Mamu in the North Johnstone and Russell Rivers. The Court pointed out that although both groups claim to have enjoyed access to and attended gatherings in the area in recent times; enjoyment does not alone establish traditional ownership. On this point, the Court concluded that given the strength of the Mamu claim to the whole area, it seemed that the Wanyurr Majay claim must be to some shared or usufructuary interest. Even so, the basis for any claim to the disputed area is unclear and there is no suggestion that the filing of a Wanyurr Majay native title claim to the area is imminent.

His Honour drew attention to the Wanyurr Majay's failure to act until very recently, suggesting this was because either they did not consider their claim was strong or there was dissention within the claim group as to such claim. After so much delay (the Mamu claim being lodged in 2001) and effort, the Court concluded that the Mamu people were entitled to resolution of their claim. 'The State made it decision and should now be held to it, at least in the absence of any suggestion that it was misled by the applicant.'

Justice Dowsett held that the Court should proceed to a consent determination pursuant to s 87A and according to the terms of the proposed consent determination, to which the parties had agreed to and filed with the Court.

## 2. Legislation

**Term of Reference for the Review of the *Native Title Act 1993 (Cth)***

The Hon. Mark Dreyfus QC MP, former Attorney-General of Australia, announced the terms of reference for a Review of the *Native Title Act 1993 (Cth)*. The review refers to the Australian Law Reform Commision (ALRC) for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996*, Commonwealth native title laws and legal frameworks in relation to two specific areas:

- Connection requirements relating to the recognition and scope of native title rights and interests and;
- Any barriers imposed by the Act's authorisation and joinder provisions to claimants' and respondents' access to justice.

In relation to these areas and in light of the Preamble and Objectives of the Act, the Commission is requested to consider what, if any, changes could be made to improve the operation of Commonwealth native title laws and legal frameworks. The review has also been asked to consider: the Act and any other relevant legislation, including how laws and legal frameworks operate in practice; any relevant case law; relevant reports, reviews and inquiries regarding the native title system and the practical implementation of recommendations and findings; the interests of key stakeholders; and any other relevant matter concerning the operation of the native title system.

Professor Lee Godden has been appointed as Commissioner to lead the ALRC's inquiry. ALRC President Professor Rosalind Croucher said in a media statement, 'Professor Godden has extensive experience in this complex area of law and I am delighted to welcome her to the ALRC to lead this Inquiry and the wide-ranging consultation process that it will involve'.

The ALRC expects to release a first consultation paper for this Inquiry towards the end of November 2013. The ALRC will provide regular updates about the progress of this inquiry. Subscribe to the Native Title Inquiry on the ALRC website. Further information about the ALRC's inquiry work can be found at www.alrc.gov.au/inquiries.

The ALRC must provide its final report to the Attorney-General by March 2015.

**Report on the Review of the *Aboriginal Land Rights Act 1983 (NSW)***

In accordance with Section 252A of the *Aboriginal Land Rights Act (1983) (NSW)* ('ALRA'), a review of the Act must be undertaken every 5 years to consider whether the policy objectives are still valid and if its terms remain suitable for achieving those objectives. The Minister for Aboriginal Affairs, The Hon. Victor Dominello MP, announced in December 2011, a working group to conduct the Review.

The report was produced by the working group and comprises 47 recommendations and a wide range of supporting information, analysis and findings concerning the ALRA. This report was followed by a series of public consultations as per its first recommendation.

A full copy of the working group report is available on the Parliament of NSW website.

Copies of the proposals for reform of the ALRA are included in the following papers:

- The summary paper produced by the NSW Government, in consultation with the New South Wales Aboriginal Land Council (NSWALC)
- A complete list of recommendations, taken from the consultation paper
- A detailed explanation of the regulatory reform proposals developed by the NSW Government, in consultation with the NSWALC.

To view these proposals see the NSW Aboriginal Affairs website.

## 3. Indigenous Land Use Agreements

The Native Title Research Unit within AIATSIS maintains an ILUA summary which provides hyperlinks to information on the National Native Title Tribunal (NNTT) and the Agreements, Treaties, and Negotiated Settlements (ATNS) websites.

In August 2013, **19** ILUAs were registered with the National Native Title Tribunal.

| Registration date | Name | Tribunal file no. | Type | State or Territory | Subject matter |
|---|---|---|---|---|---|
| 5/8/2013 | Pitta Pitta People/Pollygammon and Tour-ur-rong ILUA | QI2013/025 | AA | Qld | Access Pastoral |
| 5/8/2013 | Pitta Pitta People/Blair Athol ILUA | QI2013/024 | AA | Qld | Access Pastoral |
| 5/8/2013 | Pitta Pitta People/Toolebuc and Wilgunya ILUA | QI2013/023 | AA | Qld | Access Pastoral |
| 5/8/2013 | Pitta Pitta People/Kheri ILUA | QI2013/022 | AA | Qld | Access Pastoral |
| 5/8/2013 | Pitta Pitta People/Bengeacca and Stockport ILUA | QI2013/021 | AA | Qld | Access Pastoral |
| 5/8/2013 | Pitta Pitta People/Hartnell Downs ILUA | QI2013/020 | AA | Qld | Access Pastoral |
| 5/8/2013 | Pitta Pitta People/Momedah ILUA | QI2013/019 | AA | Qld | Access Pastoral |
| 5/8/2013 | Pitta Pitta People/Alderley ILUA | QI2013/018 | AA | Qld | Access Pastoral |
| 5/8/2013 | Pitta Pitta People/Westward-Ho ILUA | QI2013/017 | AA | Qld | Access Pastoral |
| 5/8/2013 | Pitta Pitta People/Waterford ILUA | QI2013/016 | AA | Qld | Access Pastoral |
| 5/8/2013 | Pitta Pitta People/Datchet South and Strathelbiss ILUA | QI2013/015 | AA | Qld | Access Pastoral |
| 5/8/2013 | Pitta Pitta People/Cazna Downs, Elrose, Granton and Warenda ILUA | QI2013/014 | AA | Qld | Access Pastoral |
| 5/8/2013 | Pitta Pitta People/Coorabulka and Marion Downs ILUA | QI2013/013 | AA | Qld | Access Pastoral |
| 5/8/2013 | Pitta Pitta People/Canary ILUA | QI2013/012 | AA | Qld | Access Pastoral |
| 5/8/2013 | Pitta Pitta People/Braeside ILUA | QI2013/011 | AA | Qld | Access Pastoral |
| 12/8/2013 | GunaiKurnai and Mt Hotham Alpine Resort | VI2013/004 | BCA | Vic | Development Infrastructure |
| 19/8/2013 | Kintyre Mining Development ILUA | WI2013/002 | AA | WA | Development Mining |
| 21/8/2013 | Etheridge Shire Council -Tagalaka People #2 | QI2013/031 | BCA | Qld | Access Government |

| Registration date | Name | Tribunal file no. | Type | State or Territory | Subject matter |
|---|---|---|---|---|---|
| 21/8/2013 | Croydon Shire Council - Tagalaka People Determination ILUA | QI2013/030 | BCA | Qld | Access Government |

For more information about ILUAs, see the NNTT Website and the ATNS Database.

## 4. Native Title Determinations

The Native Title Research Unit within AIATSIS maintains a determinations summary which provides hyperlinks to determination information on the Austlii, NNTT and ATNS websites.

In August 2013, **2** native title determinations were handed down.

| Short Name (NNTT) | Case Name | Date (NNTT) | State | Outcome | Legal Process | Type | RNTBC /PBC |
|---|---|---|---|---|---|---|---|
| Balanggarra (Combined) | Cheinmora v State of Western Australia (No 2) [2013] FCA 768 | 07/08/2013 | WA | Native title exists in parts of the determination area | Consent determination | Claimant | Balanggarra Aboriginal Corporation |
| Balanggarra #3 | Cheinmora v State of Western Australia (No 3) [2013] FCA 769 | 07/08/2013 | WA | Native title exists in parts of the determination area | Consent determination | Claimant | Balanggarra Aboriginal Corporation |

## 5. Future Acts Determinations

The Native Title Research Unit within AIATSIS maintains summaries of Future Acts Determinations summary which provides hyperlinks to information on the National Native Title Tribunal (NNTT).

In August 2013, **27** Future Acts Determinations were handed down.

| Determination date | Parties | NNTTA number | State or Territory | Decision/Determination |
|---|---|---|---|---|
| 1/8/2013 | Maggie John & Ors on behalf of Malarngowem – (WC1999/044) (native title party)<br>- and -<br>The State of Western Australia (Government party)<br>- and -<br>Geological Resources Pty Ltd (grantee party) | NNTTA 105 | WA | Objection - Expedited Procedure Applies |
| 5/8/2013 | Native title parties as listed in the attached schedule (native title parties)<br>- and -<br>State of Western Australia (Government party)<br>- and –<br>Grantee parties as listed in the attached schedule (grantee parties) | NNTTA 107 | WA | Objection - Dismissed |
| 5/8/2013 | Apex Gold Pty Ltd (grantee party)<br>- and -<br>WF (Deceased) & Ors on behalf of Wiluna (WC1999/024) (native title party)<br>- and -<br>The State of Western Australia (Government party) | NNTTA 106 | WA | Future Act - Dismissed |

| | | | | |
|---|---|---|---|---|
| 9/8/2013 | Violet Drury & Ors on behalf of Nanda (WC2000/013) (WO2012/1030)<br>(Nanda Native Title Party)<br>- and -<br>Ike Simpson & Ors on behalf of Wajarri Yamatji – (WC2004/010) (WO2012/1034) (Wajarri Yamatji Native Title Party)<br>-and-<br>The State of Western Australia (Government party)<br>- and -<br>Muggon Copper Pty Ltd (grantee party) | NNTTA 108 | WA | |
| 12/8/2013 | Wanparta Aboriginal Corporation on behalf of its (native title party)<br>members - (WCD2007/003)<br>-and-<br>The State of Western Australia (Government party)<br>-and-<br>FMG Pilbara Pty Ltd (grantee party) | NNTTA 110 | Various | Objection - Dismissed |
| 12/8/2013 | Various dismissal dates (See attached decision)<br>Native title parties as listed in the attached schedule (native title parties)<br>- and -<br>State of Western Australia (Government party)<br>- and –<br>Grantee parties as listed in the attached schedule (grantee parties) | NNTTA 109 | WA | Objection - Dismissed |
| 12/8/2013 | Various Dismissal Dates (see Determination document for details)<br>Native title parties as listed in the attached schedule (native title parties)<br>- and -<br>State of Western Australia (Government party)<br>- and –<br>Grantee parties as listed in the attached schedule (grantee parties) | NNTTA 111 | WA | Objection - Dismissed |
| 13/8/2013 | Daisy Lungunan & Ors on behalf of the Nyikina & Mangala Native Title Claimants (WC1999/025) (native title party)<br>- and -<br>The State of Western Australia (Government party)<br>- and -<br>William Robert Richmond (grantee party) | NNTTA 113 | WA | Objection - Expedited Procedure Applies |
| 13/8/2013 | Daisy Lungunan & Ors on behalf of the Nyikina & Mangala Native Title Claimants (WC1999/025) (native title party)<br>- and -<br>The State of Western Australia (Government party)<br>- and -<br>William Robert Richmond (grantee party) | NNTTA 112 | WA | Objection - Expedited Procedure Does Not Apply |
| 14/8/2013 | Buurabalayji Thalanyji Aboriginal Corporation - (native title party)(WCD2008/003)<br>-and-<br>The State of Western Australia (Government party)<br>-and-<br>GTI Resources Ltd (grantee party) | NNTTA 117 | WA | Objection - Dismissed |
| 14/8/2013 | Harvey Murray on behalf of the Yilka Native Title Claimants (WC2008/05) (native title party)<br>- and -<br>The State of Western Australia (Government party)<br>- and -<br>Eastern Goldfields Mining Company Pty Ltd (grantee party) | NNTTA 116 | WA | Objection - Expedited Procedure Applies |

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|---|---|---|---|---|
| 14/8/2013 | Kevin Cosmos on behalf of Yaburara & Mardudhunera (WC1996/089) (native title party)<br>- and -<br>The State of Western Australia (Government party)<br>- and -<br>FMG Pilbara Pty Ltd (grantee party) | NNTTA 115 | WA | Objection - Expedited Procedure Applies |
| 14/8/2013 | Kevin Cosmos on behalf of Yaburara & Mardudhunera (WC1996/089) (native title party)<br>- and -<br>The State of Western Australia (Government party)<br>- and -<br>FMG Pilbara Pty Ltd (grantee party) | NNTTA 114 | WA | Objection - Expedited Procedure Applies |
| 19/8/2013 | Banjo Wurrunmurra and Others on behalf of the Bunuba (WC1999/019) (native title party)<br>- and -<br>George Brooking and Others on behalf of Bunuba #2 (WC2012/004) (native title party)<br>- and -<br>The State of Western Australia (Government party)<br>- and -<br>Carnegie Exploration Pty Ltd (grantee party) | NNTTA 118 | WA | Objection - Expedited Procedure Does Not Apply |
| 20/8/2013 | Wintawari Guruma Aboriginal Corporation - on behalf of Eastern Guruma (WCD2007/001) (native title party)<br>-and-<br>The State of Western Australia (Government party)<br>-and-<br>Jayvee Resources Pty Ltd (grantee party) | NNTTA 135 | WA | Objection - Dismissed |
| 20/8/2013 | WF (deceased) on behalf of Wiluna (native title party)<br>- and -<br>The State of Western Australia (Government party)<br>- and -<br>Kubwa Iron Ore Holdings Pty Ltd (grantee party) | NNTTA 119 | WA | Objection - Expedited Procedure Applies |
| 21/8/2013 | Limpet Giggles & Ors on behalf of Gobawarrah Minduarra Yinhawanga - (native title party) (WC1997/043)<br>-and-<br>The State of Western Australia (Government party)<br>-and-<br>Australian Copper Pty Ltd (grantee party) | NNTTA 133 | WA | Objection - Dismissed |
| 21/8/2013 | Wintawari Guruma Aboriginal Corporation - (native title party) (WC97/89)<br>-and-<br>The State of Western Australia (Government party)<br>-and-<br>Geological Resource Solutions (grantee party) | NNTTA 131 | WA | Objection - Dismissed |
| 21/8/2013 | Native title parties as listed in the attached schedule (native title parties)<br>- and -<br>The State of Western Australia (Government party)<br>- and -<br>Grantee parties as listed in the attached schedule (grantee party) | NNTTA 121 | WA | Objection - Dismissed |

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|---|---|---|---|---|
| 21/8/2013 | Raymond William Ashwin, June Rose Ashwin, Geoffrey Alfred Ashwin and Ralph Edward Ashwin on behalf of the Wutha People (WC1999/010) (native title party)<br>- and -<br>The State of Western Australia (Government party)<br>- and -<br>Cliffs Asia Pacific Iron Ore Pty Ltd (grantee party) | NNTTA 122 | WA | Objection - Expedited Procedure Applies |
| 21/8/2013 | Various Dismissal dates (See Schedule Document) Native title parties as listed in the attached schedule (native title parties)<br>- and -<br>State of Western Australia (Government party)<br>- and –<br>Grantee parties as listed in the attached schedule (grantee parties) | NNTTA 120 | WA | Objection - Dismissed |
| 22/8/2013 | Jaru Native Title Claimants (WC2012/003) (native title party)<br>- and -<br>The State of Western Australia (Government party)<br>- and -<br>Golden Granite Pty Ltd/ Krama Pty Ltd (grantee parties) | NNTTA 123 | WA | Objection - Expedited Procedure Does Not Apply |
| 23/8/2013 | Russell Doctor and Others on behalf of Bigambul People (QC2009/002)(native title party)<br>- and -<br>The State of Queensland (Government party)<br>- and -<br>RMA Energy Limited (grantee party) | NNTTA 125 | Qld | Objection - Dismissed |
| 23/8/2013 | Taroom Coal Pty Ltd (grantee party)<br>- and -<br>Richard Doyle and Ors on behalf of Iman People #2 (QC1997/055) (native title party)<br>- and -<br>The State of Queensland (Government party) | NNTTA 124 | Qld | Future Act - Can be done |
| 27/8/2013 | Kevin Cosmos on behalf of Yaburara & Mardudhunera (WC1996/089) (native title party)<br>- and -<br>The State of Western Australia (Government party)<br>- and -<br>Baracus Pty Ltd (grantee party) | NNTTA 126 | WA | Objection - Expedited Procedure Applies |
| 27/8/2013 | Koongie-Elvirie Native Title Claimants (WC1999/040) ('Koongie-Elvirie native title party')<br>-and-<br>Jaru Native Title Claimants (WC 2012/003) ('Jaru native title party')<br>- and -<br>The State of Western Australia (Government party)<br>- and -<br>JML Resources Pty Ltd (grantee party) | NNTTA 127 | WA | Objection - Expedited Procedure Applies |
| 28/8/2013 | Johnson Taylor and Others on behalf of Njamal (WC1999/008) (native title party)<br>- and<br>The State of Western Australia (Government party)<br>- and -<br>XFE Pty Ltd (grantee party) | NNTTA 128 | WA | Objection - Expedited Procedure Does Not Apply |

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

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

Information on RNTBCs and PBCs including training and support, news and events, research and publications and external links can be found at nativetitle.org. For a detailed summary of individual RNTBCs and PBCs see PBC Profiles.

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

## 7. Native Title in the News

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

## 8. Related Publications

**J.K. Weir, D.R.J. Crew & J.L. Crew - Australiasian Journal of Environmental Management**

'Wetland forest culture: Indigenous activity for management change in the Southern Riverina, New South Wales'

This article applies the experience of one Indigenous organisation's activity in advocating the adoption of a cultural and environmental management approach in the forested wetlands of the Edward/Kolety and Wakool rivers, New South Wales. These experiences are analysed using Indigenous people's philosophies of 'Country'. In doing so, different understandings of fact and governance are shown to have implications for natural resource and environmental management. Indigenous people express attachments to place and culture as part of reconfiguring of modernity to create better conditions for their knowledges and priorities. This analysis takes place in the context of degraded river ecologies, intense debates about over-allocated river systems, the transfer of riverine forest lands to the conservation estate, and the contested Indigenous presence in colonial-settler societies.

Available at Taylor & Francis online.

**Eve Vincent - Australian Journal of Human Rights**

'"Sticking up for the land": Aboriginality, mining and the lived effects of native title'

The High Court's celebrated judgment in Mabo v Queensland (No 2), 1992, represents a critical milestone in the legal recognition of Indigenous property rights. As is well known, the decision found that native title still exists in Australia, overturning the legal doctrine of terra nullius. The *Native Title Act 1993 (Cth)* (NTA) provides a mechanism for determining traditional owners' claims to native title. This article concerns the lived effects of the the Act.

Available at Academia online.

**Lauren Butterly - The Conversation**

'Native title rights, regulations and licenses: the Torres Strait Sea Claim' – 8 August 2013

The full bench of the High Court ruled in favor of a group of Torres Strait Islander native title holders. The Court held that the native title right to fish for commercial purposes was not extinguished by commercial fishing laws. While represntatives from the Queensland Seafood Industry Association (QSIA) says that he does not expect the ruling to have any adverse consequences on the industry.

Available at The Conversation online.

## Media Releases

**The Treasury**

'Taxation of native title and traditional owner benefits and governance working group' – July, 2013

The Taxation of Native Title and Traditional Owner Benefits and Governance Working Group was established to examine existing arrangements for holding, managing and distributing land-related payments, and to identify options to strengthen governance and promote sustainability. Its particular focus was on the tax treatment of current arrangements and of proposed options for holding, managing and distributing land-related payments.

The Government announced the Working Group's report and its response to the Working Group's recommendations on 3 August 2013 including a detailed response.

See Media Release for more details.

**Aboriginal Areas Protection Authority**

'Historic conviction of miner for desecrating sacred site' – 2 August, 2013

OM Manganese was convicted of desecrating a sacred site at the Bootu Creek manganese mining operation north of Tennant Creek. In he

r ruling, Magistrate Sue Oliver found that OM Manganese had made a decision to favour 'business and profit' over its obligations to protect the sacred site and fined the company $150,000. CEO of OM Holdings Peter Toth (which owns OM Managnese) said after the hearing, 'We sincerely regret the damage and the hurt caused and I unreservedly apologise to the site's custodians and traditional owners'. The case represents the first time a charge of desecration has been contested and won in Australia.

See Media Release for more details.

**The Hon. David Bradbury MP, The Hon. Jenny Macklin MP, The Hon. Mark Dreyfus QC MP**

'Benefiting Indigenous communities through native title reform' – 3 August 2013

The former Australian Government announced its support for further reforms to the native title system to continue to drive economic and social benefits for Indigenous Australians. The reforms are based on the recommendations of the Working Group on Taxation of Native Title and Traditional Owner Benefits and Governance. The Working Group's report is also being released by the Government today.

The former Assistant Treasurer David Bradbury, Attorney-General Mark Dreyfus QC and Minister for Indigenous Affairs Jenny Macklin said the Government is providing in-principle support for all of the Working Group's recommendations and will develop these recommendations further in consultation with stakeholders.

Available at Treasury online.

**Australian Institute of Aboriginal and Torres Strait Islander Studies**

'Indigenous cultural heritage sites in a "crisis of neglect"' – 5 August 2013

A leading Indigenous archaeologist has branded Australia's recognition, management and protection of its Indigenous cultural heritage sites as being 'in crisis of neglect' which is resulting in the loss or destruction of unique and ancient Indigenous heritage records.

See Media Release for more details.

**McCullough Robertson Lawyers**

Native title working group recommendations, the ALRC inquiry and *Akiba* – 13 August 2013

On 3 August 2013, the Rudd Government indicated support for recommendations from a Government working group relating to land-related payments received by native title holders and Indigenous communities from agreements under the *Native Title Act 1993 (Cth)* (NTA). These recommendations will be relevant for resource companies, pastoralists and any other organisations who are negotiating Indigenous land use agreements with

traditional owners. Notably, the Government made the referral 4 days before the High Court confirmed on 7 August 2013 the Torres Strait Regional Seas Claim Groups rights to fish for commercial purposes in the Torres Strait.

Available at McCullough Robertson Lawyers online.

**Australian National University**

'Centre for native title anthropology funded' – 27 August 2013

The Centre for Native Title Anthropology will receive $677,050 over three years from the Department of the Attorney-General. Attorney-General Mark Dreyfus QC MP and Member for Fraser Dr Andrew Leigh today visited The Australian National University to announce Native Title Anthropologist Grants for the next three years. The Director of the Centre, Professor Nic Peterson says that the funding from the Attorney-General Department will allow the Centre for Native Title Anthropology to build on a number of successful existing programs.

See Media Release for more details.

**Australian Institute of Aboriginal and Torres Strait Islander Studies**

'Review of the Australian Institute of Aboriginal and Torres Strait Islander Studies'

The AIATSIS Council and Board would like to invite feedback from its stakeholders to the Review of Australian Institute of Aboriginal and Torres Strait Islander Studies.

The review of AIATSIS will provide advice to the Minister for Science and Research (the Minister) on how:

- AIATSIS has been performing against its legislated functions (established in section 5 Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989);
- its role as a national research institution could be strengthened to further support Aboriginal and Torres Strait Islander research, higher education and training;
- AIATSIS contributes to broader Australian Government policy objectives and how this might be strengthened, including in:
  - cultural diversity and social inclusion;
  - Closing the Gap in Aboriginal and Torres Strait Islander disadvantage; and
  - harnessing the resource of Indigenous knowledge to build our nation, economy and society; and
- to assist Government in considering its response to the recommendations of recent inquiries within the scope of the review.

The independent review is being undertaken by ACIL Allen Consulting, led by Dr Les Trudzik (Project Leader), Professor Mark Rose (Project Partner), Dr Mark McMillan (Project Partner) and Mr Charlie Tulloch (Project Manager). A reference group has also been established to advise the review team. Reference group members, chosen for their expertise in research, higher education, public sector and Indigenous affairs, are: Professor Ian Anderson and Ms Patricia Turner AM.

The review is expected to report to the Australian Government in late 2013.

For more information, including the discussion paper and the full terms of reference, see ACIL Allen Consulting.

See Media Release for more details.

## News Broadcasts and Podcasts

**Australian Institute of Aboriginal and Torres Strait Islander Studies**

'Culture in Crisis? The protection and trade of Indigenous heritage in the 21st century'

Contributors to this series have explore different aspects of Australia's cultural heritage information economy and its articulation with other social and economic agendas. Speakers have profiled successful Indigenous-led strategies for managing heritage, as well as drawn attention to where legal and policy regimes are failing.

Speakers involved in this seminar series include Dave Johnston, Dr Barbara Glowczewski, Ben Scambary and Gina Smith, Margo Neale, Prof. Ciaran O'Faircheallaigh and Dr Graeme Ward.

Available at AIATSIS online.

**SBS news**

'Native title reforms announced'– 3 August, 2013

The former federal government announced support of further reforms to the native title system which it says will continue to drive economic and social benefits for Indigenous Australians. The reforms are based on a working group's recommendations that considered how future generations of native title groups will benefit from development on their land. The recommendations include considering statutory trusts to hold native title benefits and a creation of an Indigenous not-for-profit body for communities.

Available at SBS online.

**SBS News** – 7 August 2013

'Torres Strait Islanders win commercial fishing rights case'

The full bench of the High Court ruled in favor of a group of Torres Strait Islander native title holders. The ruling found that commercial fishing rights for the native title holders still exists and has not been extinguished by a law that controls commercial fishing. Michael Gardner from the Queensland Seafood Industry Association (QSIA) says that he does not expect the ruling to have any adverse consequences on the industry.

Available at SBS online.

**ABC The World Today** – 7 August 2013

Available at ABC online.

**National Indigenous Radio Service** – 8 August 2013

Available at NIRS online.

**National Indigenous Radio Service**

'"Failure to educate" about native title' – 11August, 2013

Queensland South Native Title Services says there's been a failure to educate Indigenous groups about what the native title process means for them. The Service says there is a major lack of knowledge about the system when mobs first engage with them. Spokesperson Tim Wishart says the way the legal system has interpreted the *Native Title Act* has changed since the Mabo decision and it's a difficult process.

Available at NIRS online.

**SBS News**

'Land rights storm brewing in Queensland' – 13 August 2013

Concerns have been raised over the implications of the Queensland State Governments' plans to increase its food production within 30 years. National Manager of The Wilderness Society's Indigenous Conservation Program, Tony Esposito, said under the current system, the government was effectively extinguishing native title rights. Queensland is moving to secure better tenure for farmers by altering state conservation laws, but the current native title law is

proving a sticking point. Some are now predicting that a Coalition-led federal governement could bring about changes to the *Native Title Act*.

Available at SBS online.

**National Indigenous Radio Service**

'Call for native title Closing the Gap target' – 14 August, 2013

The Chief Executive of the National Native Title Council has suggested issues relating to native title could be included in Closing the Gap targets. Brian Wyatt made the comments at a discussion on treaties and agreements hosted by the National Congress of Australia's First Peoples. Mr. Wyatt says they've approached the Government on improving the *Native Title Act* with a view to addressing Indigenous disadvantage, but to date there's been no action.

Available at NIRS online.

**National Indigenous Radio Service**

'Noongar body defends "nation-based" approach' – 26 August 2013

An organisation claiming to represent south-west native title interests says a benefits package to extinguish their rights takes a Noongar 'nation-based approach'. The Government of Western Australia has offered Noongar people a $1.3 billion deal to settle all native title claims over the region. However, some sections of the community have criticised the approach as not considering the individual clans within the broader group.

Available at NIRS online.

## *9. Training and Professional Development Opportunities*

**The Aurora Project**

See the Aurora Project: 2013 Program Calendar for information on training and personal development for staff of native title representative bodies, native title service providers, RNTBCs and PBCs.

**Monash University Indigenous Australian Archives Scholarship**

Monash University, the National Archives of Australia, the Australian Society of Archivists Inc., and the Australian Computer Society (ACS) are offering a scholarship for Indigenous Australians to undertake a Masters degree or Graduate Diploma specializing in Electronic record keeping and archiving.

This scholarship is linked to the Bringing Them Home Report, which recommended that Indigenous Australians archivists be involved in archival projects that enable Indigenous Australians to locate records.

Applications closing **Friday 21 February 2014 for semester 1, 2014 entry**. For more information, see Monash University website.

**Aurora Native Title Research Scholarships**

In 2008, the Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) conducted a review of funding for the native title system to identify blockages and reallocate funds to target priority areas of need. The review found a shortage of experienced research staff, including anthropologists, cultural heritage researchers and historians, working in native title and a difficulty attracting and retaining junior professionals. In response, the government launched the Native Title Research Scholarship Program in 2010.

Conditions of the scholarship program:

- Funding provided by the scholarship is not fixed. It will depend on the tuition fees that apply for the university and the program undertaken.
- Scholarships are only offered in the year following the expiry of the tenure of the previous recipient. A maximum of three scholarships would run at any point in time and of these two may be PhD scholarships.

This year there are two scholarships being offered. These will be available for:

- Full-time study, with a maximum funding period of one year for a Masters by coursework, two years for a Masters by research and four years for a PhD.
- Part-time study, with a maximum funding period of two years for Masters by coursework and four years for a Masters by research.

For more information, see Aurora Project website. Download an application form or contact the Aurora team ntrbscholarships@auroraproject.com.au.

## *10. Events*

**2013 National Indigenous Health Conference**
***Building Bridges in Indigenous Health***
**Date:** 25-27 November 2013
**Location:** Pullman Cairns International Hotel
**Registration:** For registration information go to 2013 National indigenous Health Conference website or email admin@indigenoushealth.net
The 2013 National Indigenous Health Conference is designed to bring together both government and non-government agencies who are working in the field of Indigenous health with the belief that working together can close the gap between the state of Indigenous health as compared to the health of mainstream Australians.

**Centre for Aboriginal Economic Policy Research (CAEPR) Seminar Series 2013**
**Date:** Every Wednesday
**Time:** 12:30-2:00pm
**Location:** Australian National University, Haydon Allen G052
**Enquiries:** For more information, please see CAEPR Seminars 2013 of call Centre Administration on (02) 6125 0587

**50 Years On: Breaking Barriers in Indigenous Research and Thinking**
**Date:** 26-28 March 2014
**Location:** National Convention Centre, Canberra, ACT
In 2014, AIATSIS will be celebrating its 50th year. To celebrate this milestone, AIATSIS will be holding its biennial National Indigenous Studies Conference with the theme '50 years on: Breaking Barriers in Indigenous Research and Thinking'. The conference will celebrate how far we have come in the area of Indigenous studies in Australia in the past 50 years. It will celebrate the 50th anniversary of the legislated establishment of the Australian Institute of Aboriginal Studies (now AIATSIS) as well as 50 years of leadership and excellence in Indigenous studies by AIATSIS.
For more information including Call for Papers and Registration, please see AIATSIS website or contact Alexandra Muir: (02) 6261 4223

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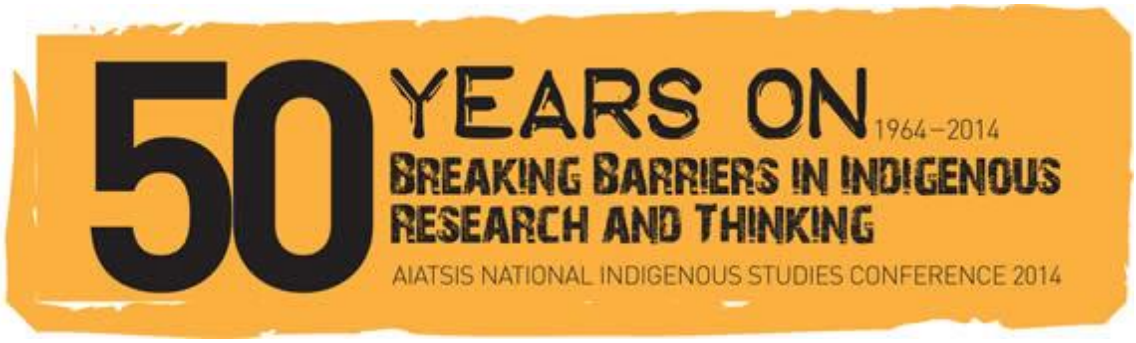


**The Native Title Research Unit produces monthly publications to keep you informed on the latest developments in native title throughout Australia. You can subscribe to NTRU publications online, follow @NTRU_AIATSIS on Twitter or 'Like' NTRU on Facebook.**