

What's New - February 2011

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1. Cases

Puutu Kunti Kurrama & Pinikura People; Puutu Kunti Kurrama & Pinikura People #2/ Magnesium Resources Pty Ltd; Anthony Warren Slater/Western Australia [2011] NNTTA 2

31 January 2011

**National Native Title Tribunal, Brisbane
Deputy President John Sosso**

The Puutu Kunti Kurrama and Pinikura People sought an extension of time to provide witness statements in relation to disputed applications for mining tenements in the West Pilbara. The Puutu Kunti Kurrama and Pinikura People submitted that key witnesses were not available during January due to cultural business, and cited limited funding and ongoing mediation.

The Tribunal had earlier granted an extension of time for compliance with the good faith component of the dispute, with the parties' agreement that the substantive hearing of the application would not be delayed. The Puutu Kunti Kurrama and Pinikura People told the Tribunal that the grantee party, Magnesium Resources, through its solicitors Green Legal, had agreed to the extension during mediations, but Green Legal denied such an agreement.

The application was refused by Deputy President Sosso. He emphasised that s. 36 of the *Native Title Act 1993* (Cth) requires the Tribunal to determine a s. 35 application 'as soon as practicable', and cited case law on case management principles.

Gale on behalf of the Darug Tribal Aboriginal Corporation v New South Wales Minister for Land and Water Conservation [2011] FCA 77

2 February 2011

**Federal Court of Australia, Sydney Registry
Justice Jagot**

The applicants were granted leave to discontinue the proceedings and the Darug People and the descendents of Maria Locke cannot commence or maintain a proceeding to any part of the claim area without the leave of the Court. In *Gale v The Minister for Land and Water Conservation for the State of New South Wales [2004] FCA 374* (the Gale proceeding), Mr Gale sought a determination that native title existed in relation to a parcel of land at Lower Portland in New South Wales: [10]. This land had been the subject of a claim by Deerubbin Local Aboriginal Land Council ('Deerubbin') under the *Aboriginal Land Rights Act 1983* (NSW). Because of the Gale proceeding, there could be no transfer of the land to Deerubbin. The Deerubbin claimed that the proceedings were 'kept on foot as leverage to induce State Governments to negotiate with the applicants and other outcomes pursuant to an [ILUA]': [14].

The Deerubbin relied on *McKenzie v State of South Australia [2006] FCA 89* which notes that that each party will bear its own costs of proceedings under the *Native Title Act 1993* (Cth). However, the Deerubbin claimed that the proceeding had been an abuse of process since 31 March 2004 because the applicants should have 'been aware from that time, as a consequence of Madgwick J's decision in the Gale proceeding, that they could not succeed.': [25]. Justice Jagot did not accept this argument but agreed to impose further conditions on any future applications given the delay caused to the Deerubbin land rights claim.

Dann v State of Western Australia [2011] FCA 99

14 February 2011

Federal Court of Australia, Perth Registry

Justice Barker

The Amangu native title claim group needed to authorise a new group of individuals to be the applicant to their claim. One member of the previous applicant had died, and they also needed to include other individuals representing the family groups. Section 66B of the *Native Title Act 1993* (Cth) allows the court to replace the existing Applicant group with a new group. Due to the applicant's responsibilities in a claim, the court's approach here was to scrutinise the decision-making process, to ensure the change was properly authorised by the claim group.

The claim group meeting was attended by around 90 Amangu people. The meeting was advised about the role of the applicant group to the claim, and discussed representation from each family group as descendant from apical ancestors. Resolutions authorising a new applicant group, which included most of the previous applicant group, were made and recorded.

Justice Barker was satisfied that the meeting had been properly notified by post to Amangu people, faxes to community organisations, advertisements in local newspapers and by community liaison officers and lawyers of Yamatji Marlpa Aboriginal Corporation. The reasons for judgment outline the steps that had been taken to notify the claim group and run the meeting. His Honour was satisfied that the replacement applicant was properly authorised.

Roe v State of Western Australia (No 2) [2011] FCA 102

15 February 2011

Federal Court of Australia, Perth Registry

Justice Gilmour

Joseph Roe and Cyril Shaw commenced an application as representatives on behalf of the Goolarabooloo / Jabirr Jabirr (GJJ) native title claim group. However, Mr Roe and Mr Shaw have been unable to agree on how to negotiate with recent proceedings against the Kimberley Land Council (KLC) and their positions as joint applicants became unworkable.

In order to resolve this impasse which had resulted in the KLC being unable to obtain instructions from the applicant, the KLC helped organise and facilitate a meeting of the GJJ claim group on 3 August 2010 to consider replacing the current applicant. As a result of resolutions passed at that meeting, Mr Roe made objections to the substantive application for the court to make orders under s. 66B to replace him as an applicant on the basis that:

1. five of the six applicants on the motion were not the descendants of the apical ancestors listed in Form 1 and were therefore not members of the claim group;
2. nor were eighty-five of the two-hundred and twenty-eight persons who attended the meeting on 3 August 2010; and that
3. six applicants are also applicants in the Jabirr Jabirr claim which overlaps with the GJJ claim and therefore there is a conflict of interest.

Mr Roe argued that the applicants did not discharge the burden of proof that the KLC has appropriately carried out its statutory functions to maintain a claim group list. Gilmour J did not accept that the list was inaccurate or unreliable after a review of the anthropological evidence.

Mr Roe also contested the notification of the 3 August Meeting 2010 and its conduct but the court was satisfied that the requirements under ss. 203BB(1) and 203BC(1) were met. Gilmour J accepted that the people present at the 3 August 2010 meeting were members of the claim group.

Further, Mr Roe contested the validity of the new nominations under s. 66B(1) which requires that only a person or persons who are members of a native title claim group can apply for an order to replace an applicant. The Court considered the background of the claim and noted that Goolarabooloo started the claim and it was open to Jabirr Jabirr to be a part of the application. The provisions of s. 190C(3) also meant that the Jabirr Jabirr cannot be registered so long as the GJJ claim is extant and that there was no conflict of interest. Therefore, Gilmour J ordered that the six nominations are added jointly as the applicant on a notice of motion, filed on 16 August 2010, to replace Mr Roe and Mr Shaw under s. 66B.

***Anderson on behalf of the Numbahjng Clan within the Bundjalung Nation v New South Wales
Minister for Lands [2011] FCA 114***

17 February 2011

Federal Court of Australia, Sydney Registry

Justice Jagot

Leave was sought by the applicant to amend a native title determination application. This was contested by the NSW Minister for Lands on the basis that the proposed amendments are not likely to lead to the registration of the Application by the Native Title Registrar. The applicant argued that whether an application is 'obviously futile' should not be considered on the basis of whether there is a possibility of the registrar being satisfied but should be considered within the context of the entire application. Justice Jagot granted leave to amend the application noting that registration was not a condition precedent to the making of a determination of native title based on *Gurambilbarra People v State of Queensland [2008] FCA 1518*. Justice Jagot made his decision for the following reasons:

- a) This was a case where the applicants were willing and able to amend the application.
- b) The application was made in good faith.
- c) The proposed amendments were supported by affidavits which were not available to the Registrar at the time of the registration decision as per s. 190A(3)(a) of the *Native Title Act 1993* (Cth).
- d) The proposed amendments represent the best attempt of the applicants to advance the application.
- e) The reasons for the failed registration are available and the need for the court to make a predictive assessment of the outcomes of an administrative decision should be avoided based on *Gurambilbarra People*.
- f) The function of the registrar is not discretionary and needs to follow the requirements established under s. 190A(6)(b).
- g) If the amended claim is not registered the process under s. 190F(6) remains available to the applicants.

2. Legislation

Revised Notices Determination to commence on 11 April 2011

The Native Title (Notices) Determination 1998 will be revoked and replaced by the Native Title (Notices) Determination 2011 (No. 1) on 11 April 2011. The new Determination clarifies and defines terms which have created some uncertainty for stakeholders and brings the instrument in line with the *Native Title Act 1993* (Cth) following recent legislative amendments. All changes to the previous determination are outlined in the Explanatory Statement which can be downloaded here: '[Explanatory Statement – Native Title \(Notices\) Determination 2011 \(No. 1\) \[PDF 32KB\]](#)'. All stakeholders will be required to comply with the new notice requirements from 11 April 2011.

3. Policy

Native Title Anthropologists Grants Program

Applications are now open for the second round of funding in 2011–12. Applications are invited from consultants, organisations, educational institutions and other interested parties working directly with anthropologists in the native title sector. An amount of \$526,000 is available for grants in 2011–12. Applications close on 18 March 2011 at 5.00pm EDT. For further details see the Attorney-Generals website: http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_NativeTitle_NativeTitleAnthropologistGrantsProgram

4. Indigenous Land Use Agreements

In February 2011, 6 ILUAs were registered with the National Native Title Tribunal (NNTT).

- 5 ILUAs were registered in Queensland. They were all Area Agreements (AA).
- 1 ILUA was registered in Victoria. It was a Body Corporate Agreement (BCA).
- The **Native Title Research Unit** maintains an **ILUA summary** which provides hyperlinks to information on the NNTT and ATNS websites.
- For more information about ILUAs, see the **NNTT Website: ILUAs**
- Further information about specific ILUAs is available in the **Agreements, Treaties and Negotiated Settlements (ATNS) Database**.

5. Native Title Determinations

- In February 2011, 3 native title determinations were handed down.
 - All 3 were handed down in Queensland and were consent determinations. Native title was deemed to exist in the entire determinations areas.
- The **Native Title Research Unit** maintains a **Determinations Summary** which provides hyperlinks to determination information on the Austlii, NNTT and ATNS websites.
- Also see the **NNTT Website: Determinations**
- The **Agreements, Treaties and Negotiated Settlements (ATNS) Database** provides information about native title consent determinations and some litigated determinations.

6. Registered Native Title Bodies Corporate

The **Native Title Research Unit** maintains a **Registered Native Title Bodies Corporate Summary document** which provides details about RNTBCs in each state/territory including the RNTBC name, RNTBC type (agent or trustee) and relevant native title determination information. Additional information about the RNTBC can be accessed through hyperlinks to corporation information on the **Office of the Registrar of Indigenous Corporations (ORIC) website**; case law on the **Austlii website**; and native title determination information on the **NNTT** and **ATNS** websites.

7. 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**.

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. Native Title Publications

Native Title Publications:

- **Senate Legal and Constitutional Affairs Legislation Committee**
 - Report on Provisions of Schedule 4 of the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Budget and Other Measures) Bill 2010. Available from:
http://www.aph.gov.au/Senate/committee/legcon_ctte/fachsia_4/report/report.pdf
- **Australian Human Rights Commission - Native Title Report 2010**
 - Chapter 1 of the Native Title Report 2010 explores themes in native title on which the Commissioner will focus during his five-year term. These include: building an understanding of, and respect for, rights to lands, territories and resources throughout Australia; creating a just and fair native title system through law and policy reform; promoting effective engagement between governments and Aboriginal and Torres Strait Islander peoples; and enhancing capacity to realise social, cultural and economic development aspirations.

Chapters 2 and 3 build on the importance of 'effective engagement' in the creation of stronger relationships between governments and Indigenous peoples. An analysis of a selection of laws, policies and reform proposals that affect our rights to lands, territories and resources is included. The Native Title Report 2010 is available from:
http://hreoc.gov.au/social_justice/nt_report/ntreport10/index.html

- **South West Aboriginal Land and Sea Council - The Noongar Dialogue Report February 2010**
 - Report available from:
<http://www.noongar.org.au/images/pdf/misc/NoongarDialogueWebVersion.pdf>
- **Yamatji Marlpa Aboriginal Corporation (YMAC) – Uranium and Native Title**
 - You can contact YMAC at (08) 9268 7000 to request a copy complete with DVD. Alternatively it is available for download from the YMAC website:
<http://ymac.org.au/download.cfm?DownloadFile=3CA26015-1372-5CE6-243C18666343FB85>

Other Publications:

- Jon Altman, *Alternate Development for Indigenous Territories of Difference*, Topical Issue 5, CAEPR, Canberra, March 2011.
- **Closing the gap - Prime Minister's Report 2011**
 - The Closing the gap - Prime Minister's Report 2011 is categorised into 3 sections. Part A details the progress against targets; Part B focuses on the building the relationship between Indigenous and non-Indigenous Australians on a national and local level; and Part C identifies seven key building blocks, addressing specific areas of Indigenous disadvantage. The Report is available from:
http://www.fahcsia.gov.au/sa/indigenous/pubs/closing_the_gap/2011_ctg_pm_report/Documents/2011_ctg_pm_report.pdf
- **2010 Indigenous Expenditure Report**
 - The Report contains estimates of the levels and patterns of government expenditure on services relating to Indigenous Australians in 2008-09. The Report is available to download from: <http://www.pc.gov.au/ier/publications/ier-2010>

10. Training and Professional Development Opportunities

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

Australian Government - Rio Tinto NTRB Scholarships / Master of Laws (LLM) in Mineral Law and Policy in Scotland

The Australian Government and Rio Tinto are offering two scholarships to lawyers currently working or interested in working at Native Title Representative Bodies (NTRBs) or Native Title Service Providers (NTSPs). Successful candidates will undertake a one-year Master of Laws (LLM) in Mineral Law and Policy at the Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP) at the University of Dundee, and must commit to work within an NTRB or NTSP for a minimum period of two years upon their return.

The timing of the scholarships will correspond to the European academic year, commencing in September 2011. Further information is available from the [Aurora Project website](#) and the [University of Dundee website](#).

Applications open from Monday 21 February, and close on Friday 18 March 2011.