

What's New September 2010

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1. Cases

Brown v State of South Australia [2010] FCA 875

13 August 2010

Federal Court of Australia, Adelaide

Mansfield J

This native title claim was close to being resolved through consent determination. The mining respondents wished to include a term in the determination whereby any compensation subsequently payable by them in respect of extinguished or impaired native title rights and interests would be applied in a specific way — it should be held by the prescribed body corporate (PBC) for the purposes of benefiting the existing members of the native title holders and their descendents. The native title claim group did not support the inclusion of such a term.

Justice Mansfield found that the parties have the capacity to agree on a sustainable benefit term as part of an ILUA or a consent determination, but none of the provisions of the *Native Title Act 1993* (Cth) (NTA) will allow for the inclusion of such a term where the parties are not in agreement about the inclusion of the term.

Justice Mansfield noted that, in any case, s. 56(3) of the NTA requires that the PBC hold the native title rights and interests on trust in accordance with certain regulations. These regulations include some financial accountability obligations imposed under the *Corporations (Aboriginal and Torres Strait Islander) (CATSI) Act 2006* (Cth). In this regard, the NTA provides a detailed regime under which native title holders (through their PBC) will hold the benefit of native title rights and interests anyway. He also stated that the term that the mining respondents wished to include in the determination was not worded in a way that was easily understandable or enforceable and that he suspected underlying the mining respondents' contention was a series of more precise expectations of how the compensation should be applied.

As the Court had answered the question in issue, the parties were able to return to negotiations.

Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen People v Northern Territory of Australia [2010] FCA 911

7 September 2010

Federal Court of Australia, Singleton

Collier J

The native title claim group, the Northern Territory Government and the other respondents to the proceeding had reached an agreement as to the terms of a determination over an area of land that covers 2,949 square

kilometres in the Northern Territory. The land is located 110 kilometres south of Tennant Creek and 310 kilometres north of Alice Springs.

The group that holds the native title rights in relation to the area are members of the Akwerlpe-Waake, lleyarne, Lyentyawel lleparranem or Arrawatyen landholding groups by virtue of descent (including adoption) or those who are accepted as a member of one or more of the landholding groups by senior members by virtue of a non-descent connection to an estate.

The native title rights and interests in relation to the area include the right to access and travel over any part of the land and waters, the right to live on the land and for that purpose to camp, erect shelters and other structures, to hunt, gather, take and use the natural resources of the land and waters, including the right to access, take and use natural resources on or in the land. They include the right to access, maintain and protect places and areas of importance on or in the land and waters, to engage in cultural activities, conduct ceremonies, hold meetings, teach the physical and spiritual attributes of places and areas of importance, participate in cultural practices relating to birth and death including burial rites and including the power to regulate the presence of others at any of these activities on the land and waters. They include the right to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves as governed by Aboriginal traditional laws and customs and who acknowledge the traditional laws and customs of the native title holders. They include the right to share and exchange natural resources obtained on or from the land and waters, including traditional items made from the natural resources. These native title rights and interests are held subject to and are exercisable in accordance with the traditional laws and customs of the native title holders and the valid laws of the Northern Territory and the Commonwealth of Australia. There are no native title rights in minerals or petroleum.

The other interests in the determination area include pastoral leases, state government easements, pipeline licences, interests of various groups granted under the *Mining Act 1982* (NT), the interests of Telstra, and the rights of access of an employee of the State as required for the performance of their statutory duties.

Other rights and interests in relation to the land prevail over the native title rights and interests but do not extinguish them and the existence and exercise of the native title rights and interests do not prevent to doing of any activity.

Justice Collier held that the proposed orders were within the power of the Court and that it was therefore appropriate for him to make the consent determination. The native title is not to be held on trust.

Tigan v State of Western Australia [2010] FCA 993
10 September 2010
Federal Court of Australia
Gilmour J

This case concerned the Mayala people's native title claim over the islands, reefs and waters of the Buccaneer Archipelago and the King Sound of the West Kimberley region.

Of the five people that made up the applicant, three wished to change the legal representation of the claim group, while two did not. At a meeting of the claim group, the majority of the group voted to change the legal representation, and a notice of change of solicitor was filed. The two members of the applicant that had not agreed to the change in legal representation noted that they had not consented to the filing of this notice.

Justice Gilmour found, based on previous case law, that although the members of the applicant are authorised individually, they must act jointly. Certain members of the applicant can not cause the applicant as a whole to deal with a matter arising under the *Native Title Act 1993* (Cth) (NTA) by majority decision of the claim group — the applicant must act 'in concert'. If disagreement arises between members of the applicant, there are procedures within the NTA whereby the claimant group can change the membership of the applicant.

It follows that the notice of change of solicitors was not authorised by the applicant and as such, Gilmour J ruled that it be removed from the court file. The question of costs was reserved to a later date.

Budby on behalf of the Barada Barna People v State of Queensland [2010] FCA 1017
15 September 2010
Federal Court of Australia, Perth
Collier J

The applicant in this proceeding sought an order that the Wiri Cultural Heritage and Community Development Aboriginal Corporation (the Corporation) and two individuals be removed as respondent parties to the proceedings.

Justice Collier found that the basis on which the Corporation claimed to have an interest in the case was identical to the interest that was asserted by individual respondents. He found that there was no evidence that the Corporation had any interest above that of an ordinary member of the public or that its interest was other than by association through its individual members. Not being satisfied that the Corporation had any interest that may be affected by a determination in the proceedings, he ordered that the Corporation cease to be a party to the proceedings.

In relation to the two individuals, Collier J found that the evidence demonstrated that they had a prima facie case that they were descended from the apical ancestors named in the native title claim. He therefore dismissed the application that those individuals be struck out as respondents and ordered their solicitor to file and serve an affidavit outlining the nature and extent of the native title rights and interests of the respondents and the area in respect of those rights and interests.

Jones v State of Western Australia [2010] FCA 1038
16 September 2010
Federal Court of Australia, Perth
Siopis J

Monlor Pty Ltd (Monlor) ceased to be a party to this proceeding in April when the Court ordered that any party who wished to continue to be a party to the proceeding was required to inform the Court of this, and Monlor failed to do so.

Monlor brought this application, requesting that they be reinstated as a party to proceeding as they hold a leasehold interest over a lot within the area that is subject to the native title determination application. Mr Miller, a director and shareholder of Monlor stated that he had misunderstood the content and operation of the Court's order in April. Justice Siopis ordered that Monlor be reinstated as a party to the proceeding.

Mr Miller also holds a leasehold interest in a nearby lot that is subject to the native title determination application and also applied to become a party to the proceeding. Justice Siopis was satisfied that Mr Miller had a personal interest in the land and joined Mr Miller as an individual party to the proceedings.

QGC Pty Ltd v Bygrave (No 2) [2010] FCA 1019
17 September 2010
Federal Court of Australia, Alice Springs (heard in Brisbane)
Reeves J

The Imam people made an application for a determination of native title in relation to an area in southern Queensland.

QGC Pty Ltd (QGC) wished to develop a gas project within the area of the determination, and through negotiations a written agreement between QGC and the native title claim group was prepared that would operate as an ILUA in relation to the future act that QGC wished to carry out.

In a previous decision, the Delegate of the Native Title Registrar had found that because one of the nine individuals that made up the registered native title claimant (RNTC) had refused to sign the agreement, she was not party to the agreement. She found that it was not the RNTC that must be a party to the agreement but each of the individuals who make up the RNTC. In these circumstances, all individuals must act collectively and in accordance with the authority given to them by the claim group. The Delegate surmised that as s. 24CD of the *Native Title Act 1993* (Cth) (NTA), which, as she saw it, required all individual members of the RNTC to be party to the agreement, had not been fulfilled, she was neither obligated nor empowered to give notice of the agreement.

In this appeal, Justice Reeves found that there is no requirement that the members of the RNTC act collectively or unanimously. He noted that the Delegate's construction allows the opportunity for an individual member of a RNTC to veto a native title group from entering an ILUA, which should be avoided. He also found that the assumption that the absence of Ms Barnes' signature to the agreement meant that she did not consent to be a party to the agreement was not valid. He noted that there is nothing in the language of s. 24CD that requires any of the parties to an ILUA to sign it. The ILUA provisions of the NTA provide evidence independently that a native title contracting group has assented to the ILUA.

Justice Reeves noted that despite Ms Barnes refusing to sign the agreement, all nine of the individuals that make up the RNTC are named as parties to the agreement, which is all that is required by s. 24CD of the NTA. There was no need for Ms Barnes to assent to the agreement and therefore her failure to do so had no effect on the status of the agreement. Justice Reeves nevertheless found that the decision as to whether the agreement was within the meaning of s. 24CA (which extends to more than the prerequisites in s. 24CD) is a decision that the Registrar needs to make. He ordered that the Delegate's decision be set aside, made a declaration that the requirements of s. 24CD(1) and (2)(a) have been met by naming the members of the RNTC as parties to the agreement and an order directing the Delegate to give notice to the QGC- Imam agreement

Bell on behalf of the Ngunawal People v New South Wales Minister for Lands [2010] FCA 1056
29 September 2010
Federal Court of Australia
Jagot J

In November 2009, the Registrar refused to register this native title claim as it did not satisfy the merit conditions of the registration test. The applicant was given an opportunity to amend the application so that it could be registered. The applicant then advised that they wished to withdraw from the matter and was not present at the hearing on 24 September. Justice Jagot found that the proposed amended application did not address the deficiencies that the Registrar originally identified and dismissed the application through s. 190F(6) of the *Native Title Act 1993* (Cth).

2. Legislation

COMMONWEALTH

Attorney-General's legislative agenda

Attorney-General, Robert McClelland, on the 30 September 2010, reintroduced a range of legislative reforms which contribute to the Government's agenda for a secure and fairer Australia. These Bills cover a range of areas in the Attorney-General's portfolio including national security, native title, anti-discrimination and law enforcement.

Native Title Bill (No. 1) 2010

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

Second Reading

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

Explanatory Memorandum

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

VICTORIA:

Traditional Owner Settlement Act 2010 (Vic)

The Traditional Owner Settlement Act 2010 (Vic) was passed by the Victorian Parliament on the 14 September 2010. **Click here to download a PDF Version of the Act.**

3. Policy

Government Caretaker Arrangements

Joint Working Group on Indigenous Land Settlements

Governance Workshop: Sustainable Benefits Management in Native Title Settlements

On 8 April 2010, the intergovernmental Joint Working Group on Indigenous Land Settlements convened a governance workshop on sustainable benefits management in native title settlement agreements. Dr Mary Edmunds, a prominent anthropologist, accredited mediator and former member of the National Native Title Tribunal, facilitated the workshop and produced an independent report on workshop outcomes.

The Joint Working Group will consider all stakeholder feedback received through the workshop process to assist with developing recommendations against its 2009-10 Terms of Reference, which will then be put forward to Native Title Ministers for consideration.

Submissions on the workshop report initially closed on Thursday 5 August 2010. However, The Joint Working Group is now accepting further submissions from those who did not want to comment before the outcome of the election up until **5pm AEST on Friday 15 October 2010.**

Attorney General and FaCHSIA

Leading Practice Agreements: Maximising Outcomes from Native Title Benefits

The Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs released the discussion paper entitled "Leading Practice Agreements: Maximising Outcomes from Native Title Benefits" on 3 July 2010 for public consultation on a possible package of reforms to promote leading practice in native title agreements and the governance of native payments. The paper also canvasses possible amendments to streamline future acts processes and an amendment to clarify the meaning of 'in good faith' under the right to negotiate provisions.

Submissions on the discussion paper initially closed on Thursday 5 August 2010. However due to caretaker conventions they have been postponed. New dates have not yet been declared. Check the [Attorney General's Department website](#) or the [FaCHSIA website](#) for up-to-date information.

Treasury

Native Title, Indigenous Economic Development and Tax Consultation Paper

On 18 May 2010, the Government released a consultation paper entitled '[Native Title, Indigenous Economic Development and Tax](#)'. The consultation paper discusses the interaction between the income tax system and native title and sets out three possible approaches to reform. The consultation paper also discusses how existing deductible gift recipient categories could be better adapted to reflect the needs of Indigenous communities. The consultation paper also discusses whether a new general DGR category that includes organisations that carry out activities across multiple DGR categories would better reflect the needs of Indigenous communities.

The closing date for submissions has been suspended due to the federal election. New dates for submission are currently being organised. [See the native title section of the Treasury website for up to date information.](#)

4. Public Notices

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

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

The public notice must occur in both:

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

To access the most recent public notices visit the [NNTT website](#) or the [Koori Mail website](#).

5. Indigenous Land Use Agreements (ILUAs)

- In September 2010, **15** ILUAs were registered with the National Native Title Tribunal. Of these, 14 were in Western Australia and 1 in Queensland.
- The [Native Title Research Unit](#) maintains an [ILUA summary](#) which provides hyperlinks to information on the NNTT and ATNS websites.
- For more information about ILUAs, see the [National Native Title Tribunal Website: ILUAs](#)
- Further information about specific ILUAs is available in the [Agreements, Treaties and Negotiated Settlements \(ATNS\) Database](#).

6. Native Title Determinations

- In September 2010, **1** determination was handed down in the Northern Territory. The Singleton determination was a consent determination, and native title rights were deemed to exist in parts of the determination area.
- The [Native Title Research Unit](#) maintains a [Determinations Summary](#) which provides hyperlinks to determination information on the Austlii, NNTT and ATNS websites.
- Also see the [National Native Title Tribunal Website: Determinations](#)
- The [Agreements, Treaties and Negotiated Settlements \(ATNS\) Database](#) provides information about native title consent determinations and some litigated determinations.

7. Registered Native Title Bodies Corporate

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

8. Native Title in the News

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

9. Native Title Publications

Native title and taxation reform

Topical Issue 4 / 2010

September 2010

This brief paper is adapted from a submission in response to the Australian Government's Consultation Paper 'Native Title, Indigenous Economic Development and Tax'. The Consultation Paper mainly canvasses options for income taxation reforms with very little actually said about Indigenous economic development.

This paper raises four key issues and ends with a brief conclusion and five recommendations. The issues discussed are:

- What is motivating the native title taxation reform process given that the recently completed (Henry) Review of Australia's Future Tax System made no mention of taxation of native title
- What are the intersections between native title payments and the income tax system?
- What are the lessons to be learnt from the operations of the Mining Withholding Tax?
- What are the lessons to be drawn for tax policy making from the 2010 Resources Super Profits Tax debate?

[Visit the CAEPR website here to download the paper](#)

Focus: New Victorian 'Aboriginal title' and negotiation regime

20 September 2010

Emily Gerrard and Chris Schulz, Allens Arthur Robinson

In brief: New Victorian legislation enables the granting of a new 'Aboriginal title' and the creation of a state-based negotiation regime for conducting activities on public land. Senior Associate Emily Gerrard and Partner Chris Schulz explain the new regime.

[Visit the Allens Arthur Robinson website here to read the full article](#)

10. Upcoming Conferences

National Indigenous Land and Sea Management Conference (NILSMC)

The NILSMC will bring together Indigenous traditional owners and leaders, community organisations and people who work in the environmental conservation industry, key stakeholders and industry partners from around Australia. It will be a time for delegates to share knowledge and experiences and exchange ideas for sustainable natural resource and cultural heritage management. It will also be a time for the Aboriginal people and the wider community of Broken Hill to come together to showcase their region and take part in a truly national Indigenous event.

This NILSMC 2010 details are:

Date: November 2-5

Location: Broken Hill Regional Events Centre Broken Hill, NSW

Register – [Click here to register](#)

Location – [Click here to find out more information about Broken Hill and how to get there.](#)

Contact Us - [Click here](#) for details

17th Annual Native Title & Cultural Heritage Forum

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

Key reforms to be addressed at the forum include:

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

Insights presented by government, Indigenous and Industry stake holders including:

- Dr John Avery, Director, Indigenous Heritage Law Reform, Department of the Environment, Water, Heritage and the Arts
- Brett Mackie, Director – Native Title Services, Mines, Department of Employment, Economic Development and Innovation, QLD
- Dean Cowie, Chief Negotiator, Native Title Unit, Department of Justice, VIC
- Tiffany Karlsson, Principal Legal Officer, Native Title Unit, Attorney-General's Department
- Stephanie Walker, Director Indigenous Relations, South Australian Chamber of Mines and Energy
- Alister Trier, Executive Director, Minerals and Energy, Department of Resources, NT
- Peter Jeffries, Regional Manager Pilbara, Yamatji Marlpa Aboriginal Corporation
- Warren Fish, Director Environment and Heritage, CITIC Pacific Mining
- Cheyne Mann, Jundee Operations, Newmont

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

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

To register contact Angus Munro

T: +61 2 9080 4425

F: +61 2 9290 3677

E: angus.munro@informa.com.au

11. Training and Professional Development Opportunities

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