What's New – December 2011

1. LAST CHANCE TO WIN A FREE REGISTRATION TO THE 2012 NATIVE TITLE CONFERENCE!

Just take 5 minutes to complete our publications survey and you will be in the draw to win a free registration to the 2012 Native Title Conference. Those who have already completed the survey will be automatically included. This will be the last opportunity to enter as we will be announcing the winner in next month's *What's New*. If you have any questions or concerns, please contact Matthew O'Rourke at the Native Title Research Unit on (02) 6246 1158 or morourke@aiatsis.gov.au.

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2. Cases

***Murgha on behalf of the Combined Gunggandji Claim v State of Queensland* [2011] FCA 1317**
14 November 2011
Federal Court of Australia, Brisbane
Dowsett J

This judgment concerns the authorisation of native title applicants. Before November 2004 this native title claim was being conducted by three named applicants. At a meeting in November 2004, a proposal was made to remove one of the named applicants, and the claim group decided that such a decision should be made by the elders. The elders held a separate meeting and decided that the person should be removed. Dowsett J subsequently made an order to remove that person as applicant, with the remaining two individuals continuing to act jointly as applicant. In August 2010, one of those two remaining applicants died. The sole remaining applicant, Mr Murgha, applied to have the deceased applicant's name removed from the application – effectively making himself the sole authorised applicant for the claim. The claim was scheduled for a consent determination in December 2011.

Mr Murgha argued he was entitled to make the application to remove the deceased applicant, in an exercise of his power as an authorised applicant. Cases cited in support of this argument were *Lennon v State of South Australia* [2010] FCA 743 (Mansfield J) and *Dodd on behalf of the Gudjala People Core Country Claim #1 v State of Queensland* [2011] FCA 690 (Logan J). Dowsett J, however, preferred the opposite view as expressed by Siopis J in *Sambo & Ors v Western Australia & Ors* (2008) 172 FCR 271. On that view, s 66B *Native Title Act 1993* (Cth) sets out the only method available for changing the named applicants for a native title application, and requires the 'new' applicant to be properly authorised by the claim group.

Dowsett J accepted that the claim group's original authorisation of Mr Murgha and the deceased applicant could, in principle, have contained an implied power for a surviving applicant to remove a deceased

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applicant. His Honour, however, did not consider that the evidence established that the claim group intended such an implied power when they originally authorised the applicants. He said 'Were the matter to be resolved purely upon the evidence as to the terms of the original authorization I would be inclined to the view .. that the claim group must authorise any application for the removal of Mr Harris as an applicant or, more correctly, authorizing Mr Murgha to act alone'.

There were additional facts, however, that supported a different outcome. Since the death of the other named applicant, the claim group had met as a whole to authorise a number of Indigenous Land Use Agreements, and various working groups from the claim group had met in regard to various aspects of the native title claim. The members of the claim group were certainly aware of the deceased applicant's death, and Dowsett J considered it reasonable to infer that they intended for Mr Murgha to continue as the sole applicant and had implicitly authorised him to do whatever was necessary to formalise that arrangement. Accordingly, Dowsett J considered that Mr Murgha was properly authorised pursuant to s 66B. His Honour made the order to make Mr Murgha the sole applicant for the claim.

***Smith v Marapikurrinya Pty Ltd* [2011] FCAFC 150**
25 November 2011
Full Court of the Federal Court of Australia, Perth
Stone, Siopis and Collier JJ

This judgment raises an issue of legal standing, and also deals with the question of whether a corporation offering to conduct Aboriginal heritage surveys in a native title claim area is purporting to act on behalf on individual members of the native title claim group.

The judgment is an appeal against a decision of Gilmour J in the Federal Court. A number of Kariyarra individuals had brought an action under the *Trade Practices Act 1974* (Cth) against Marapikurrinya Pty Ltd and its directors, alleging that the corporation had falsely represented that it is a representative of the Kariyarra People and entitled to act in that capacity. Before the case came to trial, the parties agreed to a consent orders intended to resolve the matter. One of the proposed orders was for the making of a declaration that 'The [Respondents] do not have and have not previously had authority to act for or on behalf of the Applicants in relation to any matters'.

Gilmour J refused to make this order for a number of reasons: first, on the grounds that the individual Kariyarra persons had no standing to bring the proceeding; second, because there would be no utility in making the declaration sought; and third, on the basis that there was 'no justiciable controversy' between the parties.

On the standing issue, his Honour considered that the *Trade Practices Act* matter was so closely connected to the Kariyarra Native Title claim that only the native title applicant (the person or persons authorised by the claim group) were capable of bringing an action complaining that the corporation was falsely claiming to represent the claim group. As individuals, the persons who had in fact brought the claim lacked the requisite standing.

The individual Kariyarra persons appealed from Gilmour J's decision, arguing that his Honour had wrongly decided the standing issue. On appeal, Stone, Siopis and Collier JJ supported Gilmour J's reasoning but found it unnecessary to make a final decision on the standing issue. Instead, their Honours considered that Gilmour J's refusal to make the declaration sought by the parties was a valid exercise of his discretion.

In particular, the Court on appeal agreed with Gilmour J's view that the evidence did not establish that the corporation had purported to act on behalf of each individual person in the Kariyarra claim group. Any evidence that the corporation had purported to represent the claim group as a whole did not amount to evidence that the corporation had purported to represent each member individually. This meant, in the Court's view, that it was inappropriate to make the declaration sought, and so the appeal against Gilmour J's decision was dismissed.

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***Pat v Yindjibarndi Aboriginal Corporation* [2011] WASC 354**
29 November 2011
Supreme Court of Western Australia (in Chambers), Perth
Master Sanderson

This judgment deals with the grant of an injunction to prevent certain actions being taken at the annual general meeting of an Aboriginal corporation and registered native title body corporate.
The plaintiffs commenced proceedings to have a receiver appointed to the Yindjibarndi Aboriginal Corporation, and to reinstate certain persons as members and directors of the Corporation. Before the substantive hearing in those proceedings, the plaintiffs applied for an injunction that would:

- prevent the Corporation from holding its annual general meeting unless 21 days' notice was given to the plaintiffs and certain other persons;
- prohibit the Corporation from preventing the plaintiffs and certain others from attending the meeting and participating as members;
- prevent the Corporation from considering certain matters or draft resolutions.

The plaintiffs' case in the substantive proceeding was that at the previous annual general meeting the Corporation had purported to cancel the membership of numerous persons including the plaintiffs. They say this cancellation was ineffective because it required notice of a special resolution to be given prior to the meeting (s 201.35(1)(c) *Corporations (Aboriginal and Torres Strait Islander) Act 2006*). No such notice was given.

In the circumstances, Master Sanderson considered that it would be unfair to allow the Corporation to conduct its 2011 annual general meeting without having given proper notice to the plaintiffs, and without allowing the plaintiffs to participate in debates and cast their votes. Accordingly, the injunction in respect of those matters would be granted.

In relation to the matters to be decided at the meeting, Master Sanderson agreed to grant an injunction preventing the meeting from considering a resolution that would amend the eligibility criteria for membership. The plaintiffs argued that such amendment would be used to exclude them from membership, and would be oppressive and contrary to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. Master Sanderson did not make a final determination on that question, but considered that there was a serious question to be tried and was therefore satisfied that an injunction was appropriate.

***McKenzie v Minister for Lands* [2011] WASC 335**
6 December 2011
Supreme Court of Western Australia, Perth
Martin CJ

This decision does not deal directly with native title issues, but instead relates to the legislation under which the Western Australian government can compulsorily acquire land. Native title is raised primarily in relation to issues of legal standing.

In 2008 James Price Point (known as Walmadany to traditional owners) was named by the Western Australian government as the preferred site for a plant to process liquefied natural gas from the Browse basin. If the development goes ahead, it will use land for a number of purposes, including a port, processing plants, pipelines, light industrial facilities, accommodation and other infrastructure. All the land in the vicinity of James Price Point is unalienated Crown land, but is subject to native title claims.

The State, Woodside Energy Ltd and the Kimberley Land Council (KLC) entered into a Heads of Agreement and a Heritage Protection Agreement. A schedule to the Heritage Protection Agreement contained a map setting out the approximate location of the various components of the development, including workers' accommodation and light industrial area. The KLC indicated during negotiations that it was unable to express

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a preference about the location of the workers' accommodation and light industrial facilities, because it did not have the time and appropriate resources to focus on the question of what commercial and land-use arrangements the traditional owners may want in the compensation package.

In May 2010, the State intended to compulsorily acquire land for the development, but there had not been sufficient heritage surveys or negotiations to identify the precise locations for the accommodation and light industrial areas, and therefore for a range of other infrastructure areas also. When the State issued the notices of intention to acquire the land, the notices identified a larger area of land from which smaller areas would be acquired, but did not specify the location of those smaller areas. The size of each smaller area and the total area was indicated, but no specification was made as to the configuration, boundaries or dimensions of the total land to be taken. A number of objections against the compulsory acquisition notices were lodged by traditional owners, many on the basis that the notices did not adequately describe the land required, and in particular did not identify the location and boundaries of the land which was proposed to be acquired. The Minister did not change his decision in response to these objections. A number of those traditional owners then brought an action in the Supreme Court of Western Australia to challenge the acquisition notices. The notices were alleged to be invalid because they did not contain a 'description of the land required' – a feature demanded by s 171(1) of the *Land Administration Act 1997* (WA).

The land to be acquired is subject to one registered native title application and two applications for which registration was refused. The plaintiffs are both members of the Goolarabooloo/Jabirr Jabirr native title claim group (the group whose application is registered) and each is a member of one of the other unregistered applications. One of the plaintiffs is also a Law Boss, whose responsibilities include speaking on behalf of the country, and acting as a custodian and protector of the country in accordance with traditional law and custom. The Minister argued that the plaintiffs lacked legal standing to challenge the acquisition notices, on the basis that the plaintiffs needed to invoke the Court's Federal jurisdiction under s 39(2) *Judiciary Act 1903* (Cth), which in turn required that they establish a 'matter' within the meaning of that section. A 'matter' involves the determination of an immediate right, duty or liability and the Minister argued that the plaintiffs have no such right because they are neither named applicants in their respective native title applications nor members of claim groups that have been already determined to hold native title over the relevant land.

Martin CJ in the Supreme Court rejected the Minister's argument about legal standing on three grounds:

(i) The plaintiff's challenge does not raise any issue arising under a law of the Commonwealth – it deals solely with the interpretation of a Western Australian statute and its application to uncontroversial facts. Therefore Federal jurisdiction is not engaged and there is no need for the plaintiffs to establish a 'matter'.

(ii) Even if previous ground were wrong, the Minister was mistaken in contending that the 'immediate right, duty or interest' to be determined in a 'matter' must be a right, duty or interest of the applicant for relief. If necessary, the plaintiffs could point to a 'matter' in the determination of the *Minister's* right to issue an order acquiring the land.

(iii) Finally, the Minister was incorrect in saying that traditional owner plaintiffs would only have a sufficient legal interest to challenge the acquisition notices if they were (a) the named applicants in a registered application (and therefore held procedural 'future acts' rights under the *Native Title Act 1993*); or (b) members of a claim group who had already been determined to hold native title over the area (and therefore had established substantive legal interests in the land).

This last point was based on the reasoning that a party may seek relief from a Court in relation to a public officer's performance of their duties *either* because that party's private rights are affected *or* because the party had some 'special interest' in the matter over and above other members of the public (*Boyce v Paddington Borough Council* [1903] 1 Ch 109; *Onus v Alcoa of Australia Ltd* [1981] HCA 80). Previous authority established that a party could establish this 'special interest' if they could point to an unresolved claim which would be adversely affected by the public act under challenge (*Robinson v Western Australian*

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Museum (1977) 138 CLR 283). The plaintiffs in the present matter have unresolved claims over the land that would be acquired pursuant to the Minister's notices, claims that would be extinguished should the acquisition go ahead. That was sufficient to establish their standing.

Having confirmed the plaintiffs' standing, Martin CJ went on to find that the acquisition notices had not adequately described the land to be acquired, and were therefore invalid.

***Dale & Ors v State of Western Australia & Ors* [2011] HCATrans 332**
9 December 2011
High Court of Australia, Canberra
Hayne, Crennan and Kiefel JJ

This is the transcript for an application for special leave to appeal from a decision of the Full Court of the Federal Court.

It raises issues of estoppels and abuse of process in the native title context. Special leave was refused.

In the relevant area of the Pilbara region, there were a number of native title claims that overlapped each other and were ordered to be heard together under s 67(1) *Native Title Act 1993* (Cth). There was a trial relating to a portion of the land area claimed by the present applicants (Dale and others, called the Wong-Goo-TT-OO group), and at that trial the Wong-Goo-TT-OO were held not to be a group capable of holding native title. The Wong-Goo-TT-OO group persisted with their claim over the rest of the claim area. The State of Western Australia applied for the claim to be summarily dismissed on the grounds that it would involve re-litigating the question of whether the Wong-Goo-TT-OO were a group capable of holding native title. The application for dismissal was successful; the trial judge held that the Wong-Goo-TT-OO were prevented from re-arguing the point by the rule of issue estoppel. They appealed against this decision, and on appeal the Full Court considered that, although issue estoppel did not necessarily prevent the Wong-Goo-TT-OO group from pursuing their claim, the claim should nevertheless be stayed as an abuse of process. They then applied for special leave to appeal to the High Court from the Full Court's decision.

Hayne, Crennan and Kiefel JJ refused special leave. They said that for the Wong-Goo-TT-OO claim to succeed, the applicants would have to controvert conclusions that had been made in the previous trial. Issue estoppel did not prevent the applicants from doing so, because not all of the parties to the current claim were parties in the previous trial. But principles of abuse of process were engaged under these circumstances, since it is 'well settled that an attempt to re-litigate an issue which has been resolved in earlier proceedings may constitute an abuse of process even though the earlier proceedings did not give rise to a res judicata or issue estoppel'. The previous findings about the Wong-Goo-TT-OO group were fundamental to the whole of the applicant's claim, and did not depend on geographical factors that may differ between different parts of the claim area. In these circumstances, Hayne, Crennan and Kiefel JJ considered that the applicants would have insufficient prospects of success in an appeal against the Full Court's finding on the abuse of process point. It was on that basis that they refused special leave.

***Kogolo v State of Western Australia* [2011] FCA 1481**
15 December 2011
Federal Court of Australia, Perth
Gilmour J

This case deals with a procedural issue necessary to overcome a mistake made in connection with s 47B *Native Title Act 1993*.

Section 47B allows native title to be recognised in circumstances where it would otherwise be extinguished by the previous creation of some other interest in the land. It requires the previous extinguishment to be disregarded where one or more members of the native title claimant group 'occupy' the area, but only if the relevant land is not covered by a freehold estate, a lease, or a 'reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity...'.

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The original native title application in this matter, filed in 1996, covered areas that had never been subject to any extinguishing rights, interests or reservations etc, as well as four areas that had at one stage been reserved for public purposes. The former areas were together the subject of a positive native title consent determination in 2007. At that time, the parties decided that the remaining areas would be dealt with together at a later date, after evidence about the occupation of those areas had been provided. In December 2008 a second native title application was filed in respect of the four excluded areas, and several weeks later the applicants filed a discontinuance in the first application in respect of the same four areas.

In 2010 it was discovered that one of the four areas, that had previously been subject to a stock route reserve, was subject to an exploration permit when the second native title application was made in December 2008. The exploration permit was granted in 2000, but its operation had been subsequently suspended. At the time that the first native title application was discontinued, all parties assumed that this suspension meant that s 47B could still apply to disregard the previous extinguishment (namely, the stock route reserve). Later, it transpired that even though the operation of the permit was suspended, the permit itself remained on foot, and as such prevented the application of s 47B.

The original application, however, had been filed before the exploration permit had been granted. This meant that s 47B would still apply and the extinguishing effect of the stock route reservation would be disregarded. The applicants therefore applied to have the discontinuance of the original application set aside, and the State respondent consented to this. The Court, however, still had to determine whether it could and should make the order sought.

Gilmour J found that the discontinuance should be set aside on two grounds. Firstly, the applicants' act of filing the discontinuance was a 'nullity' in the eyes of the law, because it was the result of an innocent mistake rather than a deliberate and informed decision. The applicants had relied on the statement by the State's solicitor that s 47B would apply to the stock route reservation, and were not obliged to inquire further into the existence of any extinguishing interests over the land. In light of this, the law regards the discontinuance as never having taken effect. Secondly, the Court has an inherent power to prevent injustice, to be exercised according to judicial discretion weighing up various factors. In this case, if no discontinuance were allowed, the applicants would not have the opportunity of obtaining a determination to which they would otherwise be entitled. There was a viable explanation for the mistake, the application would be likely to succeed if reinstated, and the State would not suffer prejudice (and indeed had consented to the proposed order).

***Banjima People v State of Western Australia* [2011] FCA 1454**
15 December 2011
Federal Court of Australia, Perth
Barker J

This case deals with two aspects of evidence law. The first issue relates to evidence given by witnesses to support an order to restrict certain men's evidence in the trial. The second question relates to the tendering of affidavits of deceased witnesses.

In the trial of this matter, two of the applicant's witnesses gave restricted men's evidence which was made the subject of confidentiality orders. The State wanted to cross-examine the witnesses about aspects of that restricted men's evidence in open court on the basis that those aspects should not be restricted. The applicant opposed this, and called the two witnesses to give further evidence (subject to the same confidentiality orders) explaining why the whole of the original evidence should continue to be restricted. In light of that further evidence, the Court ruled that the original evidence would continue to be restricted in its entirety.

The applicant then applied for that further evidence to be treated as evidence in support of their substantive native title claim, rather than just evidence supporting the confidentiality orders. The applicant argued that the Court could only properly understand the original restricted evidence if it was put into context by the further evidence. The State opposed this course, arguing that the further evidence was only relevant to the narrow question of the confidentiality orders, having been received in a 'trial within a trial' (called a *voir dire*).

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The State also argued that it had been open for the applicant to lead this evidence in the normal course of the trial, but that the applicant had not done so. Accordingly, the State argued, if the applicant wanted to have the further evidence considered in support of their substantive native title claim, they would have to tender it again.

Barker J first noted that the section of the *Evidence Act 1995* (Cth) that deals with *voir dire* evidence (s 189) does not apply to questions about whether particular evidence should be restricted. Rather, s 189 addresses preliminary questions as to whether evidence should be admitted, or whether evidence can be used against a person, or whether a witness is competent or compellable. Barker J went on to say that, even if a broader view of 'preliminary questions' is taken, 'the authorities predominantly support the view that the evidence given on a *voir dire* (or trial within a trial) in such a proceeding as this is evidence in the proceeding and does not need separate tender in order to receive it'. His Honour considered that the witnesses' further evidence was relevant to matters in issue, and that there was no other reason to exclude it.

The second issue considered in this judgment related to affidavit evidence sworn by four witnesses who had subsequently died. The applicant wished to tender the affidavits into evidence, and the State objected on the grounds that it would be unfairly prejudicial because the State had not had an opportunity to cross-examine other witnesses about the matters discussed in the affidavits.

The applicant argued that it had notified the State of its intention to tender the affidavits some six months earlier, when it gave the State a list of documents to be tendered at trial. Against this, the State argued that the applicant should have tendered the affidavits at the opening of the trial to give the State an opportunity to cross-examine other witnesses about the material in the affidavits. The State said it was not obliged to cross-examine on a document just in case the applicant wishes to tender it later.

Barker J noted that the affidavits had been prepared for a different claim lodged in 1999, that the State had been aware of the affidavits for some 11 years, and that they had been notified of the applicant's intention to tender the affidavits in the current proceedings. Further, the State and other parties had extensively cross-examined witnesses about ancestral matters and questions about traditional law and custom. In light of these facts, his Honour was not satisfied that the probative value of the affidavits would be outweighed by the potential prejudice to the State's case. The affidavits were accepted into evidence.

***QGC Pty Limited v Bygrave* [2011] FCA 1457**

16 December 2011
Federal Court of Australia, Brisbane
Reeves J

This judgment concerns a challenge to a decision by a delegate of the Native Title Registrar not to register an Indigenous Land Use Agreement (ILUA). It deals with authorisation issues.

The ILUA sought to be registered was executed between QGC Pty Ltd and representatives of the Bigamul People native title claim group – the only group with a registered native title application in the relevant area. A meeting about the proposed QGC-Bigambul agreement had been held in December 2009, attended by approximately 140 people of whom 38 identified as Kamilaroi/Gomeroi, 6 identified as both Bigambul people and Kamilaroi people, and 75 identified as Bigambul people. Before resolutions relating to the QGC-Bigambul agreement were passed, between 50 and 60 people walked out of the meeting, many of whom identified as Kamilaroi/Gomeroi. The meeting then proceeded to pass resolutions adopting a decision-making process, authorising the making of the QGC-Bigambul agreement in accordance with that adopted process, and authorising QGC to apply to the Native Title Registrar to register the agreement.

A delegate of the Registrar refused to register the agreement because she was not satisfied that all the persons who hold or may hold native title in the relevant land area had authorised the making of the agreement as required by s 251A of the *Native Title Act 1993*. In particular, she was 'not satisfied that the Kamilaroi/Gomeroi People, as persons identified through the process set out in s 24CG(3)(b)(i) have authorised the making of the [QGC–Bigambul agreement] as required by s 24CG(3)(b)(ii) and s 24CL(3) [of the *Native Title Act*]'. QGC challenged the delegate's decision in the Federal Court.

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Reeves J held that the delegate had made a mistake in finding that the Kamilaroi/Gomeroi were entitled to participate in the authorisation process for the ILUA.

His Honour found that there were two distinct groupings of people referred to in the relevant sections of the *Native Title Act 1993*: the first was 'all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement'; and the second was 'the persons who hold or may hold the common or group rights comprising the native title'. The former grouping is relevant to s 24CG(3)(b) – all reasonable efforts must be taken to identify persons falling within that description, and all persons so identified must authorise the making of the agreement. The latter grouping is relevant to the definition in s 251A of what processes constitute valid authorisation by the former group. Under s 251A, the authorisation process that must be followed is either a process prescribed by 'the traditional laws and customs of the persons who hold or may hold the common or group rights comprising the native title', or if there is no such 'traditional' process, a process agreed to and adopted by that same latter group.

Reeves J found that the former grouping 'is to be construed expansively and inclusively to mean every individual, group of persons, or community, of Aboriginal or Torres Strait Islander descent, who holds native title, or by any means makes a claim to hold native title, or otherwise has a characteristic from which it is reasonable to conclude that person, group, or community holds native title, in any part of the area covered by the agreement'. He rejected the proposition that a person must be a member of a claim group who had a registered native title application, and specified that the broad grouping would include unregistered applications and even informal claims made orally at an authorisation meeting.

By contrast, Reeves J found that the latter grouping, the persons who 'hold or may hold the common or group rights comprising the native title', has a confined and exclusive meaning. His Honour considered contextual matters that suggested that the purpose of that narrow phrasing was to limit the number of groups with whom non-Indigenous parties are required to negotiate. The second reading speech for the relevant provisions indicated that the Attorney-General's intention was to use the registration test as a gateway to the statutory benefits available under the *Native Title Act 1993*, and that only those groups with credible claims would be negotiating with developers. Reeves J considered that it is 'fair and just to an existing registered native title claimant by requiring that any other community or group seeking to advance conflicting claims to its claims, has to submit those claims to the discipline of the [registration and authorisation] processes'. Further, certainty for outside parties is served by ensuring that the people with whom developers are negotiating are actually entitled to speak on behalf of the native title claimants. All of these factors led Reeves J to conclude that authorisation procedures under s 251A must be those defined by the traditional law and custom of, or agreed to by, a native title claim group with a registered application. A group who wishes to oppose the registration of an ILUA must therefore file a native title application and have it registered before they can demand to be included in the authorisation as a separate group.

As Kamilaroi/Gomeroi people did not have a registered native title application over the area of the ILUA, they were not able to challenge the decision-making process adopted by the Bigambul meeting. Reeves J did not need to consider how the authorisation process in s 251A would operate where two or more conflicting groups have registered claims over the same area of land.

***Franks and Lester for the Plains Clans of the Wonnarua People v National Native Title Tribunal* [2011] FCA 1530*; Franks and Lester for the Plains Clans of the Wonnarua People v National Native Title Tribunal (No 2)* [2011] FCA 1531**
19 December 2011
Federal Court of Australia, Sydney
Jagot J

In the first judgment, the applicant sought leave for an extension of time to file an appeal against a decision of the National Native Title Tribunal. The Tribunal had decided that the mining parties that had been negotiating with the Wonnarua people native title claimants, had negotiated in good faith as required by the *Native Title Act 1993*. The native title claimants sought to appeal this decision on the basis that the Tribunal

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should have held a hearing and allow cross-examination of witnesses, but instead made a decision on the papers alone. The time limit for filing an appeal had elapsed and so the native title claimants needed to apply for an extension of the time limit.

Jagot J considered six factors relevant to the decision whether or not to grant the extension: whether or not there was an acceptable explanation for the delay in filing the appeal; any other action the applicants had taken; any prejudice to other parties that the delay would cause; any other effects on other persons; the merits of the substantial application; and fairness. His Honour held that there was no acceptable explanation for the delay, and also that the substantive case was not particularly strong. Accordingly, no extension of time was granted.

In the second judgment, the Wonnarua native title claim group appealed to the Federal Court from a decision of the National Native Title Tribunal. The Tribunal had decided that a mining lease was to be granted without any conditions. The Tribunal had made that decision without holding a hearing.

The question of whether the Tribunal was to make a decision on the papers or by way of a hearing was discussed at a directions hearing in June 2011. At that directions hearing, the Wonnarua people's lawyer proposed that the Tribunal consider whether or not the future act should be done, and then hear further evidence and submissions on any conditions to be imposed. The Tribunal decided that this course was not open to it, and noted that there was no material before it that related specifically to conditions to be imposed should the mining lease be granted. Asked what further material about conditions he would seek to provide, the Wonnarua lawyer said 'Well I haven't got any other evidence at the moment but I am instructed that I should be in a position of having further evidence in terms of putting a value on what would be destroyed [should the mining lease be granted]'. The Deputy President of the Tribunal said that it was 'one of these matters I think where, I'll have to determine whether the future act be done or not be done. Full stop.' From the Wonnarua lawyer's responses to this, the Tribunal took him to be consenting to that course of action.

On appeal, the Wonnarua lawyer argued that the Tribunal had misunderstood what he had been agreeing to, and further that the Tribunal had not specifically asked itself whether the matter could adequately proceed on the papers without a hearing. Jagot J examined the transcript of the Tribunal directions hearing and concluded that the Tribunal had clearly considered the merits of proceeding without a hearing, proposed adopting that course of action, and given the Wonnarua people's lawyer an opportunity to raise objections or concerns. In addition to this, Jagot J found that the notice of appeal was inadequate. The notice of appeal stated the question of law to be determined on appeal by the Federal Court: ' Whether in making the [decision of 24 June 2011] the Tribunal erred in law in determining that the... grant of Mining Lease 351 may be done without conditions'. Jagot J found that this was not a question of law, and therefore did not present a valid ground of appeal under s 169 *Native Title Act 1993*. For that reason, the Court did not have jurisdiction to determine the appeal.

The appeal was dismissed.

3. Legislation and Policy

Commonwealth

Prescribed Bodies Corporate Amendment Regulations

The Native Title (Prescribed Bodies Corporate) Amendment Regulations 2011 ('the Amendment Regulations') were registered on 14 December 2011 and are now in operation. The Amendment Regulations are made under the *Native Title Act 1993* (Cth) and implement a number of recommendations concerning the structures and processes of Prescribed Bodies Corporate (PBC). These recommendations originate from a review of the native title system conducted in 2005 and can be found in the Structures and Processes of Prescribed Bodies Corporate Report (the 'PBC Report').

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The Amendment Regulations are designed to improve the effectiveness of the post-determination management of native title by PBCs. The Amendment Regulations will amend the existing regulations to:

- improve the flexibility of the PBC governance regime by:
- enabling an existing PBC to be determined as a PBC for subsequent determinations of native title;
- removing the requirement that all members of a PBC must also be the native title holders (where agreed by the native title holders);
- clarifying that standing authorisations in relation to particular activities of a PBC need only be issued once; and
- subject to certain exceptions, including native title holder consent, allowing PBCs to substitute their own consultation requirements in relation to native title decisions rather than follow the requirements in the regulations;
- provide for the transfer of PBC functions in circumstances where there has been failure to nominate a PBC, where a liquidator is appointed, or where a PBC wishes this to occur; and
- enable PBCs to charge a fee for costs incurred in providing certain services and set out a procedure for review by the Registrar of Indigenous Corporations of a decision by a PBC to charge such a fee.

The Amendment Regulations were made following a comprehensive public consultation process conducted in 2010. In addition to some minor technical and other corrections, changes made to the Amendment Regulations as a result of the consultations include:

- a mandatory requirement to consult and obtain the consent of native title holders in relation to decisions:
- affecting native title when an Indigenous Land Use Agreement or a Right To Negotiate agreement is entered into;
- allowing non-common law holders to become members of the PBC, and
- consenting to one or more consultation processes in the PBC's constitution;
- requiring the Registrar of Indigenous Corporations to give written reasons for an opinion about a fee charged by a PBC for costs incurred in providing certain services; and
- allowing the Registrar of Indigenous Corporations to seek information from the applicant and the PBC when reconsidering an opinion or decision not to give an opinion (about a fee charged by a PBC) and consequential changes to timeframes for the giving of an opinion.

The Amendment Regulations are registered on the Federal Register of Legislative Instruments and are available at the following link.

- Native Title (Prescribed Bodies Corporate) Amendment Regulations 2011

An Information Sheet providing more detailed guidance material on the Amendment Regulation can be accessed via the links below.

- Native Title (Prescribed Bodies Corporate) Amendment Regulations 2011 Information Sheet
  PDF [51kB] | RTF [126kB]

Consultation on Native Title (Consultation and Reporting) Determination 2011

The *Native Title Amendment Act (no. 1) 2010* inserted subdivision 24JA into the *Native Title Act 1993*. This subdivision created a new native title process for the timely construction of public housing and infrastructure in communities on Indigenous held land which is, or may be, subject to native title.

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In accordance with section 24JAA(16) the Commonwealth Minister is able to set reporting requirements by legislative instrument. Comments are being sought on the draft Native Title (Consultation and Reporting) Determination and the accompanying Explanatory Statement. A discussion paper has been included to assist in facilitating comments.

A copy of the discussion paper is available for download below.

- Discussion Paper - Consultation and Reporting Determination 2011 [DOC 58KB]
- Discussion Paper - Consultation and Reporting Determination 2011 [PDF 181KB]
- Attachment A - Native Title (Consultation and Reporting) Determination 2011 [DOC 254KB]
- Attachment A - Native Title (Consultation and Reporting) Determination 2011 [PDF 144KB]
- Attachment B - Native Title (Consultation and Reporting) Determination 2011 - Explanatory Statement [DOC 47KB]
- Attachment B - Native Title (Consultation and Reporting) Determination 2011 - Explanatory Statement [PDF 128KB]

No public consultation sessions will be held. Written submissions are due by 29 February 2012.

Queensland

Queensland Pastoral ILUA Template

The Queensland Department of Environment and Resource Management has released at Pastoral ILUA template. The template is available here:
http://www.qsnts.com.au/publications/QueenslandPastoralILUATemplate.pdf

Pastoral leases cover almost 50 percent of Queensland. Making native title agreements over these areas can often be a long and expensive process. This template is the result of collaboration betweeen QSNTS, the Queensland Government, the National Native Title Tribunal and pastoralist groups in order to facilitate native title agreement-making.

Western Australia

Cultural Heritage Due Diligence Guidelines - November 2011 (PDF 177 Kb)
The Guidelines were developed to identify reasonable and practical measures for ensuring that activities are managed to avoid or minimise harm to Aboriginal sites protected by the *Aboriginal Heritage Act 1972* (WA). For further information about Aboriginal heritage see the Department of Indigenous Affairs webpage about Section 18 applications.

4. Indigenous Land Use Agreements

- In December 2011, **15** ILUAs were registered with the National Native Title Tribunal (NNTT). See table below for more details.
- 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.

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Date	NNTT File No.	Name	Type	State/Territory	Subject Matter
02/12/2011	QI2011/053	Hopevale Congress Aboriginal Corporation Body Corporate ILUA	BCA	Queensland	Access Tenure resolution
08/12/2011	QI2011/038	Quandamooka State ILUA	AA	Queensland	Government
09/12/2011	QI2011/040	Australia Pacific LNG Pty Limited Wulli Wulli Djaku-nde and Jangerie Jangerie ILUA	AA	Queensland	Petroleum/Gas Pipeline
09/12/2011	QI2011/028	Arrow Jangga LNG Project ILUA	AA	Queensland	Pipeline
09/12/2011	QI2011/039	Quandamooka Redland City Council ILUA	AA	Queensland	Government
09/12/2011	QI2011/037	Cairns Regional Council - Wanyurr Majay ILUA	AA	Queensland	Consultation protocol Government Infrastructure Communication Community
12/12/2011	QI2011/041	Juru (Cape Upstart) People Protected Area ILUA	AA	Queensland	Access Government
12/12/2011	QI2011/042	Juru (Cape Upstart) People (formerly known as the Birri Gubba (Cape Upstart) People) and Ergon Energy	AA	Queensland	Access Infrastructure
14/12/2011	QI2011/031	Arrow Barada Barna People LNG Project ILUA	AA	Queensland	Pipeline
14/12/2011	QI2011/033	Arrow Barada Barna People and Wiri People LNG Project ILUA	AA	Queensland	Pipeline
14/12/2011	QI2011/034	Arrow Wiri LNG Project ILUA	AA	Queensland	Pipeline
14/12/2011	QI2011/035	Arrow Birri LNG Project ILUA	AA	Queensland	Petroleum/Gas Pipeline
19/12/2011	QI2011/056	Dauanalgaw (Torres Strait Islanders) Corporation and Islanders Board of Industry and Services ILUA	BCA	Queensland	Government
22/12/2011	QI2011/048	Combined Gunggandji and Cairns Regional Council ILUA	AA	Queensland	Consultation protocol Government
23/12/2011	VI2011/002	Gunai / Kurnai – Stan Wassylko ILUA for EL5229	AA	Victoria	Exploration

5. Native Title Determinations

- In December 2011, **8** native title determinations were handed down by the Federal Court of Australia. See table below for further details.
- The Native Title Research Unit maintains a Determinations Summary which provides hyperlinks to determination information on the Austlii, NNTT and ATNS websites.

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- 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.

Date	Short Name	Case Name	State/ Territory	Outcome	Legal Process
19/12/2011	Gawler Ranges People	*McNamara on behalf of the Gawler Ranges People v State of South Australia* [2011] FCA 1471	SA	Native title exists in parts of the determination area	Consent determination
13/12/2011	Eringa No. 2 and Wangkangurru/ Yarluyandi	*King on behalf of the Eringa Native Title Claim Group and the Eringa No 2 Native Title Claim Group v State of South Australia* [2011] FCA 1387	SA	Native title exists in parts of the determination area	Consent determination
13/12/2011	Eringa	*King on behalf of the Eringa Native Title Claim Group v State of South Australia* [2011] FCA 1386	SA	Native title exists in parts of the determination area	Consent determination
12/12/2011	Juru (Cape Upstart) People	*Prior on behalf of the Juru (Cape Upstart) People v State of Queensland (No 2)* [2011] FCA 819	QLD	Native title exists in the entire determination area	Consent determination
12/12/2011	Kalkadoon People #4	*Doyle & Ors on behalf of the Kalkadoon People #4 v State of Queensland* (unreported, FCA, 12 December 2011, Dowsett J)	QLD	Native title exists in parts of the determination area	Consent determination (conditional)
09/12/2011	Quandamooka People #1	*Delaney on behalf of the Quandamooka People v State of Queensland* [2011] FCA 741	QLD	Native title exists in parts of the determination area	Consent determination
09/12/2011	Quandamooka People #2	*Delaney on behalf of the Quandamooka People v State of Queensland* [2011] FCA 741	QLD	Native title exists in parts of the determination area	Consent determination
09/12/2011	Wanyurr Majay People	*Wonga on behalf of the Wanyurr Majay People v State of Queensland* [2011] FCA 1055	QLD	Native title exists in the entire determination area	Consent determination

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.

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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; and
- proposed mineral development licences.

The public notice must occur in both:

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

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

8. Native Title in the News

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

9. Native Title Publications

Newsletters

Native Title Services Victoria, NTSV Newsletter, Issue 22, December 2011

Yamatji Marlpa Aboriginal Corporation, YMAC News, Issue 16, December 2011

10. Job opportunities and Professional Development

Native Title Job Opportunities

Seeking Expressions of Interest
The Australian Institute of Aboriginal and Torres Strait Islander Studies is Australia's premier research institution on Indigenous issues. We are seeking expressions of interest from individuals seeking temporary employment. Applicants will be included on the Institute's temporary employment register from which temporary staff may be selected.

In particular, we have short-term vacancies in the Native Title Research Unit, in the Indigenous Country and Governance Research Program. We are looking for people with skills in one or more of the following areas:

- disciplinary and interdisciplinary research assistance
- legal analysis
- support of Prescribed Bodies Corporate
- project management and executive coordination

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We have positions available at the APS 4 ($52,963–$57,507), APS 5 ($59,074–$62,639), APS 6 ($63,803–$73,292) and Executive Level 1 ($81,680–88,207).

We are looking to fill these positions to 30 June 2012. Negotiations for our next 3 year funding agreement are in hand. We will shortly be re-advertising these and other positions as expected vacancies for the 1 July 2012 to 30 June 2015 funding period.

Applicants are expected to have a knowledge and understanding of both Indigenous cultures and the issues affecting Indigenous Australians today and an ability to communicate effectively with Aboriginal and Torres Strait Islander peoples. All positions require good writing and project management skills, initiative, communication and team work attributes.

The Institute values a skilled and diverse workforce to meet the needs of the organisation in the promotion of knowledge and understanding of Australian Indigenous cultures, past and present. Aboriginal and Torres Strait Islander people are especially encouraged to register.

If you are interested in these positions, or other opportunities at AIATSIS, please send an email with your CV to HR@aiatsis.gov.au requesting placement on the temporary employment register. If you are interested in the native title positions, please also advise your interest to jess.weir@aiatsis.gov.au, and state your availability.

More details on the temporary employment register and the Native Title Research Unit are available from our website:

http://www.aiatsis.gov.au/

If you require further information about the native title positions, please contact Jessica Weir, Director of Indigenous Country and Governance (Atg), jess.weir@aiatsis.gov.au or 02 6246 1162.

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