

What's New - August 2010

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1. Cases

Traditional Owners- Nyiyaparli People and Minister for Health Indigenous Affairs

State Administrative Tribunal of Western Australia

Justice Chaney

22 April 2009

The Minister for Indigenous Affairs granted Pilbara Infrastructure Pty Ltd and FMG Chichester Pty Ltd consent to construct and operate a mine in the Christmas Creek area, Western Australia. The proposed works were likely to detrimentally affect certain Aboriginal sites. The Nyiyaparli People had registered native title claims over the land in question and sought a review of the decision.

In such a case, s 18(5) of the Aboriginal Heritage Act 1972 (WA) (AHA) allows the 'owner of any land' who feels aggrieved by the Minister's decision to apply for its review. The Nyiyaparli People claimed that the rights they had in relation to the land brought them within the definition of 'owner of any land'.

In examining the AHA, Chaney J considered that provision for the Minister's consent arises in the context where a particular 'owner' wishes to undertake work on the land they own that may interfere with sites of Aboriginal heritage significance (rather than anyone who might simply satisfy the definition of owner). The Minister's role is then to preserve the community interest, with the competing interest being that of the proponent of the activities that require consent. He considered that this therefore meant that Aboriginal interests were automatically protected and the only 'owner of any land' that the Act envisages is an owner wishing to undertake such activities.

Further, he found that the fact that the Minister is required to inform the 'owner' of his decision in writing suggests that the AHA did not intend that several people be considered owners and also that the Parliamentary debate surrounding the provision supports his conclusion.

Justice Chaney found that there was no right of review available to the Nyiyaparli people and dismissed the application.

James v State of Western Australia [2010] FCAFC 77
Sundberg, Stone and Barker JJ
Federal Court of Australia, Western Australia District Registry
29 June 2010

This matter concerns the native title claim of the Martu people of the Western Desert area of Western Australia which was in the process of mediation. The presiding member of the National Native Title Tribunal had referred two questions relating to the proceeding to the Court, as it was considered that this would expedite the reaching of an agreement. The dispute concerned various mining leases held over the area.

The first question asked if the grant of a lease is a 'past act' (as defined in s 228(2) of the Native Title Act 1993 (Cth) (NTA)) for the purposes of Part 2 of the Titles (Validation) Act and Native Title (Effect of Past Acts) Act 1995 (WA).

The Court suggested that s 228(2) of the NTA, which defines a 'past act', asks whether, aside from the NTA, the grant of the mining lease was invalid to any extent. In this instance, it was invalid, by operation of s 10(1) of the Racial Discrimination Act 1975 (Cth) (RDA) because it did not allow the native title landholders to own and inherit property, including the right to be immune from the arbitrary deprivation of property to the same extent as enjoyed by any other landholder. These two laws are therefore inconsistent, and thus, s 109 of the Constitution will privilege the Commonwealth law (RDA) and render the State law invalid. Accordingly, the mining lease is a 'past act'.

The Court concluded that since it had been decided that the leases were past acts, each of the leases was a category C past act, as defined in s 231 of the NTA; a past act constituting the grant of a mining lease.

Roe v Kimberley Land Council Aboriginal Corporation [2010] FCA 809
Federal Court of Australia, Perth
Gilmour J
2 August 2010

Mr Roe and Mr Shaw were the joint applicant in this proceeding as well as in the native title claim of the Goolarabooloo and Jabirr Jabirr People. Mr Roe applied for leave to file an amended application in which he would be the sole applicant and Mr Shaw would cease to be a party to the proceeding. Mr Shaw opposed the bringing of this proceeding and did not support the proposed amendments.

Mr Roe suggested that s 84D of the Native Title Act 1993 (Cth) could be applied in this instance; allowing the Court to use its discretion to make such orders as it considered appropriate (s 84D(4)(b)). Justice Gilmour was not persuaded that s 84D could be used in these circumstances- he suggested that the provision is used to hear and determine native title applications notwithstanding a defect in the applicant's authorisation. He found that the present application was not such an application and that therefore, Mr Roe had no standing in the proceeding.

The Court ordered that both Mr Roe's motions be dismissed and that the application be dismissed. Mr Roe was ordered to pay the costs of the respondents and the other applicant.

Close on behalf of the Githabul People #2 v State of Queensland [2010] FCA 828

Federal Court of Australia, Brisbane

Collier J

6 August 2010

The applicant for the Githabul People #2 native title determination sought leave to discontinue the application on the basis that he was unable to proceed as a result of a split in the claim group. The discontinuation was supported by all other parties to the proceeding.

The Court was satisfied that no injustice would be caused to the respondent parties and granted the applicant leave to discontinue with the proceeding.

Brown (on behalf of the Ngarla People) v State of Western Australia (No 3) [2010] FCA 859

6 August 2010

Federal Court of Australia

Bennett J

This (partial) consent determination concerns the native title claim of the Ngarla people over an area in North Western Australia. Non-exclusive native title rights and interests were found to exist in certain parts of the determination area, but not in others.

These rights and interests allow native title holders to access and camp on the land and waters, to take flora, fauna, fish, water and other traditional resources (excluding minerals) from the lands and waters, to engage in ritual and ceremony, and care for, maintain and protect particular sites and areas of significance to the native title holders from physical harm. They do not include the right to possess, occupy, use and enjoy the area to the exclusion of all others or the right to control access to the area and its resources. They are exercisable in accordance with the traditional laws and customs of the native title holders and the laws of the State and the Commonwealth and do not include rights in relation to minerals, petroleum or geothermal energy resources.

Justice Bennett was satisfied that the applicant was entitled to the determination proposed. The Wanparta Aboriginal Corporation will hold native title in trust for the native title holders.

Newchurch v The Minister for Aboriginal Affairs and Reconciliation [2010] SASC 245

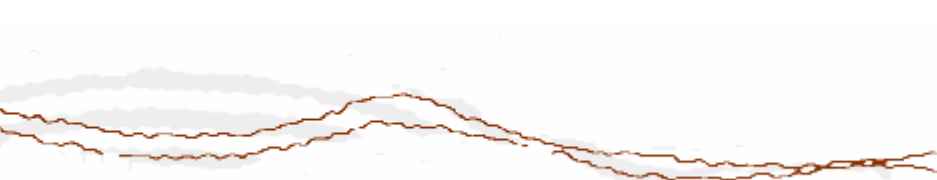
Supreme Court of South Australia

Judge Burley

10 August 2010

The applicant sought permission to proceed with a judicial review concerning a determination that allowed a hospital to be built on land over which the applicant claimed he was a traditional owner in central Adelaide.

Judge Burnley found that the applicant's submission lacked appropriate detail and did not demonstrate that the plaintiff had standing to seek such relief. He refused the applicant permission to proceed with the matter.



Atkinson on behalf of the Gunai/Kurnai People v State of Victoria [2010] FCA 904
Atkinson on behalf of the Gunai/Kurnai People v State of Victoria (No 2) [2010] FCA 905
Atkinson on behalf of the Gunai/Kurnai People v State of Victoria (No 3) [2010] FCA 906
Atkinson on behalf of the Gunai/Kurnai People v State of Victoria (No 4) [2010] FCA 907
Federal Court of Australia, Melbourne
North J
16 August 2010

These four cases concern four separate parties that wished to be joined as respondents to Gunai/Kurnai People's native title claim over an area in Gippsland, in Eastern Victoria.

The Court dismissed the four applications. Justice North found that the four applicants; the Australian Deer Association, David James Baldwin, William Maxwell Rheese and Colin Francis Wood, did not have sufficient interest in the case to be joined as parties under s 84(5) of the Native Title Act 1993 (Cth). He also found that their non-appearances at the hearings were also reason for the dismissal of their joinder applications.

Edwards on behalf of the Wamba Wamba, Barapa Barapa, Wadi Wadi People v State of Victoria [2010] FCA 744
Federal Court of Australia, Melbourne
North J
16 August 2010

In this application for the determination of native title, North J considered an agreement that had been reached between the native title claimants and the State which extended the date at which the application would be finalised from the date that had earlier been provided. The Court was concerned that the time for the conclusion of the application had almost doubled and therefore, despite the agreement of the parties and the recommendation of the NNTT, the matter was called on for further explanation.

The parties were using the recently introduced Victorian Native Title Settlement Framework but the Court did not consider that this kind of delay was the intended result of the operation of the Framework.

Justice North adjourned the directions hearing until 29 November 2010, at which time the Court would hear a report on the progress of the application, as well as reports on attempts to expedite an outcome earlier than predicted.

Sampi on behalf of the Bardi and Jawi People v State of Western Australia (No 2) [2010] FCAFC 99
Federal Court of Australia, Perth
North and Mansfield JJ
18 August 2010

The Bardi Jawi appeal decision was handed down in April 2010 (Sampi on behalf of the Bardi and Jawi People v State of Western Australia [2010] FCAFC 26). In that case, the Bardi and Jawi peoples' native title rights and interests over their traditional lands were recognised. Orders were made for the parties to seek agreement to form a consent determination. The parties had substantially reached an agreement but the following areas of contention remained: the manner in which the right to care for, maintain and protect should

be defined; the clarity with which Brue Reef should be defined and whether the determination should identify the rock feature known as Lalariny.

The right to care for, maintain and protect

Although it was not explicitly stated that the right to care for, maintain and protect was non-exclusive, North and Mansfield JJ stated the reasons and the decisions the Full Court referred to make this clear. The right to protect does not amount to an exclusive right.

Brue Reef

The Court held that Brue Reef would be included in the list of areas in which no native title exists. It was found that this was adequate and that it was not necessary (as the State and Commonwealth had suggested) to mention it specifically in other schedules.

Lalariny

The appellants requested that the exact location of Lalariny (a rock formation) not be revealed in the determination as it was not revealed in primary Judge's decision and its disclosure would be culturally problematic.

Justices North and Mansfield stated that they understood the concerns of the appellants, however, the omission of the location of Lalariny from the determination would create serious difficulties in the enforcement of native title rights and interests and future act processes in relation to it.

The determination

With the above mentioned disputes resolved, the Court was able to make the determination.

Native title rights and interests are held by the Bardi and Jawi people, and exist in relation to certain parts of the determination area but not in others.

In areas where there has been no extinguishment or areas where extinguishment has been disregarded, the native title rights and interests in relation to the land and waters are the right of possession, occupation, use and enjoyment of that part as against the whole world. These include the right to live on the land, to access, move about on and use the land and waters, the right to hunt and gather on the land and waters, the right to engage in spiritual and cultural activities on the land and waters, the right to access, use and take any of the resources of the land and waters (including ochre) for food, shelter, medicine, fishing and trapping fish, weapons for hunting, cultural, religious, spiritual, ceremonial, artistic and communal purposes, the right to refuse, regulate and control the use and enjoyment by others of the land and its resources, the right to have access to and use the water of the land for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal purposes.

In areas seaward of the mean high watermark, the native title rights and interests include the right to access, move about, in and on and use and enjoy those areas, the right to hunt and gather including for dugong and turtle, the right to access, use and take any of the resources thereof (including water and ochre) for food, trapping fish, religious, spiritual, ceremonial and communal purposes.

The native title rights and interests in relation to the Lalariny and the Alarm Shoals are the right to care for, maintain and protect those areas but do not include the right to access, move about in or on or use those parts, the right to hunt or gather in those parts, the right to access, use or take any of the resources on those parts.

There are no exclusive native title rights or interests in waters which flow within any river, creek, stream or brook or waters from and including an underground water source. There are no native title rights to minerals, petroleum or gas.

The native title rights and interests must be exercised in accordance with the traditional laws and customs of the traditional owners and the laws of the States and the Commonwealth. If these native title rights and interests prevent the doing of any activity permitted by any other rights and interests, the other rights and interests prevail over the native title rights and interests, but do not extinguish them.

Bullen v State of Western Australia [2010] FCA 900

Federal Court of Australia, Perth

Siopis J

(20 August 2010)

This case was brought by members of the Esperance Nyungar native title claim group. The two people that made up the applicant for this claim group died before 2006, and in 2007, two mining leases were granted under the Mining Act 1978 (WA) over the land subject to the native title claim.

Section 28(1)(b) of the Native Title Act 1993 (Cth) (NTA) states that where there is no native title party, an act (such as the granting of a lease) is not invalid if done before negotiation or an objection or appeal (where otherwise, it would be). The respondents claimed that as the applicant was deceased at the time the leases were granted, there was no native title party and the granting of the leases was valid. Conversely, the applicants to this proceeding claim that there was a registered applicant at the time the leases were granted and the granting of the leases was invalid.

The Court found that the applicants' contention was consistent with the fundamental concepts that the NTA is based on. Justice Siopis contended that the NTA makes it clear, through the language and structure of s66B that even a deceased person remains the applicant, even in an inchoate form, until replaced on the register by a 'new applicant'. That section also uses the term 'the current applicant' not 'the former applicant' to describe the applicant, even after they have died. Those individuals will remain the applicant until replaced by a new applicant, despite being incapable of carrying out their statutory functions.

Justice Siopis also found that, contrary to the respondent's contention, the applicants' construction of the NTA would not render the right to negotiate provisions unworkable. He noted that subdivision P allows the government and grantee parties to obtain relief where native title parties unduly delay the replacing of the applicant, s 30(4) allows the applicant to be replaced during the negotiation process and subdivision P is flexible enough to deal with undue delay that could occur in replacing the applicant, where the applicant cannot satisfy their duties. This includes allowing the parties to negotiate in good faith, applications to arbitral bodies and Ministerial interventions.

It was found that if the construction the respondents advanced is correct, this would allow the act to be done. Justice Siopis considered that it was unlikely that this was Parliament's intention and concluded that the respondent's construction was therefore incorrect.

It was also suggested by one of the respondents that, on the applicants' construction, when an applicant died, their personal representatives or executors would then automatically succeed them. Justice Siopis found that this was not correct and that the only way of replacing the applicant is through s66B of the NTA.

The Court found that there was a registered native title claimant in respect of the area over which the mining leases were granted at the time the leases were granted. The leases were therefore found to be invalid.

Sambo v State of Western Australia (No 2) [2010] FCA 927

Federal Court of Australia, Perth

McKerracher J

26 August 2010

A possible dismissal of these proceedings had already been considered in August 2009. There was a state of deadlock between various members of the applicant that was causing many issues. At that time, McKerracher J had declined to dismiss the proceedings, in order to allow the applicant to hold a claim group meeting to resolve some key issues. This claim group meeting never occurred.

Section 190F(6) allows a Court to dismiss a proceedings where the Court is satisfied that the application has not been amended since consideration by the Registrar, and, where there is no other reason that the application should not be dismissed.

Justice McKerracher suggested that to overcome defects in the in the claim, all the descendents of named apical ancestors that had previously been excluded from the claim would need to be included and those in relation to which there was insufficient material to prove connection would need to be deleted. He also found that the claim would need to be amended to remove the overlap with the Widji native title claim and that an authorised applicant would need to be appointed.

Justice McKerracher found that the application had not been amended since it had been previously considered by the Registrar and was not likely to be amended in a way that would result in any different conclusion by the Registrar. He found that there was no other reason the application shouldn't be dismissed, and therefore ordered its dismissal.

Murray on behalf of the Yilka Native Title Claimants v State of Western Australia (No 2) [2010] FCA 926

Federal Court of Australia, Perth

McKerracher J

26 August 2010

A number of parties had given notice that they wished to become party to the to the Yilka native title claim. The applicant suggested that their notices were deficient and shouldn't be accepted.

Justice McKerracher examined the notices and found that Perlie Wells, Lynette Graham, Bessie Dimer, Daisy Dookie Rundle, Laurel Cooper and Lorraine Griffiths should not be added as parties to the proceeding, however, Michael Tucker, Fabian Tucker, Alison Tucker, Daniel Tucker, Ron Harrington-Smith, Kathy Tucker, Corina Bennell, Lisa Bennell, Jarred Dimer, Brett Dimer, Shondelle Dimer/Garlett, Quinton Tucker, Shaun Dimer, Matthew Bennell and Hilda Dimer were granted leave to apply to be joined as parties to the proceeding. Contrary to the contention of the joinder parties, McKerracher J did not consider that the applicant's motion was unnecessary, as the motion was successful in part. He also stated that the applicant was not acting unreasonably by submitting comprehensive submissions. As this was not found to be unreasonable conduct as per s 85A(2) of the Native Title Act 1993 (Cth), which requires the unreasonable party to pay costs, McKerracher J ordered that each party pay their own costs.

2. Legislation & Policy

Government Caretaker Arrangements:

The Government is still in caretaker mode after the Federal election on 21 August 2010. Under the caretaker conventions, the Government will not make policy decisions that would bind an incoming Government or limit its freedom of action. Therefore the Government will not be in a position to consider submissions on the native title agreements discussion paper and the Treasury consultation paper. See the native title section of the [FaHCSIA](#) and [Treasury](#) websites for further information.

3. 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](#).

4. Indigenous Land Use Agreements (ILUAs)

- In August 2010, **7** ILUAs were registered with the National Native Title Tribunal. Of these, **5** were in the Queensland, **1** in Western Australia and **1** in South Australia.
- 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](#).

5. Native Title Determinations

- In August 2010, **3** determinations were handed down. Of these, **2** took place in Queensland and **1** in Western Australia.
 - The [Ngarla People \(Mount Goldsworthy Lease Proceeding\)](#) (WA) determination was a consent determination where native title exists in parts of the determination area.
 - The [Torres Strait Regional Sea Claim](#) (QLD) was a litigated determination where native title exists in parts of the determination area.
 - The [Combined Dulabed and Malanbarra Yidinji Claim](#) (QLD) where native title exists in the entire 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.

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

7. 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.

8. Native Title Publications

Articles

- P Sutton, 'Mediating conflict in the age of native title', *Australian Aboriginal Studies*, No. 1, 2010, pp. 4-18.
- M Gregory & J Tropiano, 'Bardi & Jawi People's native title claim - a "single society"', *Australian Resources and Energy Law Journal*, Vol. 29, No. 2, 2010, pp. 151-156.
- S Young, 'A climate for change? : the 2009 Native Title Report', *Indigenous Law Bulletin*, Vol. 7, Issue 18, 2010, pp. 20-24.

RNTBC Toolkits

The NTRU has compiled toolkits for Registered Native Title Bodies Corporate (RNTBC). These toolkits have been created to assist native title holders to access information and resources regarding funding and training opportunities that may be relevant to their RNTBCs. The need for such toolkits was highlighted in the 2007 Australian Government report 'Structures and Processes of Prescribed Bodies Corporate' (Recommendation 2). The State and Territory Toolkits have recently been updated.

Download toolkits here:

- [New South Wales](#) (July 2010)  169Kb
- [Northern Territory](#) (July 2010)  191Kb
- [Queensland](#) (July 2010)  196Kb
- [South Australia](#) (July 2010)  143Kb
- [Victoria](#) (July 2010)  165Kb
- [Western Australia](#) (July 2010)  230Kb

National Report: Native Title - September 2010

The Tribunal's bi-annual report on the status of native title in Australia, *National report: native title*, has been released. The report outlines progress of native title claims during the period 1 January – 30 June 2010.

9. Upcoming Conferences

Australian Anthropological Society (AAS) Annual Conference

The Society's principal academic activity each year is the Annual Conference. Attendance at the Annual Conference is open to all interested persons, whether or not they are members of the AAS, on payment of the conference fee. Each year, the conference is hosted by a different University.

The AAS Conference 2010 details are:

Date: September 22-24

Location: Deakin University, Waterfront Campus, Geelong, Victoria

Hosts: Anthropology, School of History, Heritage & Society, Deakin University

Register: Registrations are now open. Register through the [AAS website](#).

Conference Website: <http://www.deakin.edu.au/arts-ed/shhs/events/aas2010.php>

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 - To register attendance go to [Register Now](#)

Location - Find out more information about [Broken Hill](#) and how to get there.

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

10. 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.](#)

Aurora Project - The Native Title Law and Practice Program

The Native Title Law and Practice Program is the next event on the Aurora Project Program Calendar. It provides a review and analysis of the native title process, which will equip legal staff of NTRB's to undertake work in an NTRB.

The program focuses on:

- the Native Title Act processes, including the claim process, consent determinations and alternative settlements
- proof of maintenance of traditional law and custom and connection, including issues of shared country, succession and proof of particular rights and interests, and State/territory guidelines on connection

- recognition of native title under the NTA and related issues, such as extinguishment and the beneficial provisions of the Native Title Act
- an overview of the Native Title Act future act regime, including applying the future act provisions and relevant state legislation.

Entry requirements:

To enrol in the program you need to be currently employed by an NTRB or NTSP.

Downloadable Flyer:

The program will be taking place in Brisbane on the 19th October through to the 22nd. The 2010 flyer is not yet available but will be available soon from the [Aurora website](#).

Further information:

For further information about Aurora programs contact Aurora's Learning & Development team on (02) 9469 8115 or [fill in a contact form on the Aurora website](#).

Native Title Research Scholarship Program

The purpose of the program is to increase the retention rate and skills of anthropology and research staff in NTRBs and NTSPs (jointly referred to as NTRBs). Scholarships are available to research staff with at least two years experience working in an NTRB.

The scholarships will support NTRB staff to undertake post-graduate study at the Masters or PhD level, in a field relating to native title with a focus on anthropology and history. Other related disciplines may be supported, subject to approval. The scholarships are for full-time study only, with a maximum funding period of one year for a Masters by coursework, two years for a Masters by research and four years for a PhD.

Following the completion of their studies, scholarship recipients commit to work in an NTRB or in the native title system in a research role for a period of two years (in the case of a Masters Program) or three years (in the case of a PhD).

Applications:

Applications for the 2011 Native Title Research Scholarship Program will **open at 9am AEDST on Monday 4th October 2010** and will close at 5pm AEDST on Friday 29th October 2010. Candidates must apply online at the Aurora website

For more information contact Kim Barlin at: kim.barlin@auroraproject.com.au or on (02) 9469 8113

For further information:

Download the flyer: http://www.auroraproject.com.au/Links/2010_Native_Title_Research_Scholarship.pdf