

## What's New - December 2010

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### 1. Cases

#### **Lovett on behalf of the Gunditjmara People v State of Victoria (No 2) [2010] FCA 1283**

**15 November 2010**

**Federal Court of Australia, Melbourne**

**North J**

The Framlingham Aboriginal Trust had been a party to this application, but as a representative did not appear at the directions hearing of 15 November 2010, North J ordered that it cease to be a party to the application.

#### **Doyle on behalf of the Kalkadoon People #4 v State of Queensland (No 2) [2010] FCA 1398**

**8 December 2010**

**Federal Court of Australia, Brisbane**

**Collier J**

As they had not complied with a previous court order to indicate in writing whether they adopted the admissions of the State of Queensland, the Court ordered that Joseph Sandham Rogers, Italo Foschi, Elizabeth June Holt and Ernest William Arthur Holt cease to be parties to the proceedings.

#### **Nelson v Northern Territory of Australia [2010] FCA 1343**

**8 December 2010**

**Federal Court of Australia, Newhaven**

**Reeves J**

This was an application for a determination of native title over an area of 2,610 square kilometres in the Northern Territory. The native title holders are members of the Jipalpa-Winitjaru, Pikilyi, Yarrpilangu-Karrinyarra, Watakinpirri and Winparrku landholding groups.

The native title rights and interests possessed by the native title holders 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; the right to hunt, gather and fish on the land and waters; the right to take and use the natural resources of the land and waters; the right to take and use the natural water on or in the land; the right to light fires for domestic purposes, but not for the clearance of vegetation. They also include the right to access and to maintain and protect sites and places on or in the land and waters that are important under traditional laws and customs; the right to conduct and participate in the following activities on the land and waters; cultural activities; ceremonies; meetings; cultural practices relating to birth and death including burial rites; teaching the physical and spiritual attributes of sites and places on the land and waters that are important under traditional laws and customs including the power to regulate the presence of others at any of these activities on the land and waters, other than persons exercising a right conferred by or arising under a law of the Northern Territory of Australia or the Commonwealth of Australia in relation to the use of the land and waters. They include the right to make decisions about the use and enjoyment of the land and waters including traditional items made from the natural resources; the right to be accompanied on the land or waters by persons who, though not native title holders are: people who have rights in relation to the land and waters according to the traditional laws and customs acknowledged by the native title holders or people required by the native title holders to assist in, observe, or record traditional activities on the areas.

The native title rights and interests do not confer rights and interests to the native title holders to the exclusion of all others. The native title rights and interests are subject to and exercisable in accordance with federal laws, laws of the Northern Territory and the traditional laws and customs of the native title holders.

Other interests in the area include that of the Australian Wildlife Conservancy, the rights of Aboriginal people pursuant to the reservation established under the *Pastoral Land Act 1992* (NT) and by virtue of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), the rights of access by an employee, servant, agent or instrumentality of the Northern Territory or Commonwealth as required in the performance of statutory duties and the interests of persons to whom valid interests have been granted by the Crown pursuant to statute.

There are no native title rights and interests in minerals, petroleum or prescribed substances under the *Atomic Energy (Control of Materials) Act 1946* (Cth) or the *Atomic Energy Act 1953* (Cth).

The determination area covers 2,610 square kilometres of land in the central area of the Northern Territory that is held under a Perpetual Pastoral Lease called 'Newhaven'. Native title rights and interests are wholly extinguished in the homestead, house, sheds and other buildings, the airstrip, bores, turkey nests, squatters' tanks, constructed dams and other constructed stock watering points, stockyards and trapyards.

Based on the description of the steps taken in the materials filed and the fact that the parties all had competent legal representation, Reeves J was satisfied that the agreement reached between the parties was free and informed and further, that terms of the proposed orders were unambiguous and clear. He was satisfied that the native title rights and interests were capable of being recognised by the common law of Australia. The Court made the order to determine under the laws of Australia that native title exists according to the traditional laws and customs of the claimants' society and is held by the five landholding groups mentioned.

The native title holders had not yet nominated a prescribed body corporate to hold the native title on trust. An order was made that the operational commencement of the determination be delayed until a prescribed body corporate had been nominated and accepted by the Court.

**Roberts v State of Western Australia [2010] FCA 1483**  
**9 December 2010**  
**Federal Court of Australia, Perth**  
**North J**

The Kariyarra people had divergent views as to which families formed part of their native title claim group. Both the applicant party and the State suggested that a Court expert be appointed to attempt to resolve the uncertainty in this case.

Justice North was satisfied that the case was of sufficient importance that the Court should devote its resources to funding the reasonable costs of an independent anthropological expert. He ordered that before 31 January 2011, the native title claim group and the State meet to attempt to agree on a suitably qualified and experienced anthropologist to be appointed as a Court expert. He ordered that both parties report on any agreement reached by 14 February 2011. If agreement could not be reached, he ordered that by 14 February 2011 both parties file and serve the curriculum vitae of an anthropologist that the party believed the Court should engage. The matter was re-listed for 21 February 2011.

**Doctor on behalf of the Bigambul People v State of Queensland [2010] FCA 1406**  
**15 December 2010**  
**Federal Court of Australia, Brisbane**  
**Collier J**

An ILUA had been negotiated between the Queensland Government and the Bigambul native title claim group. All of the members of the applicant for the claim group had signed the agreement, except for one individual.

A claim group meeting was scheduled for 5 June 2010 to allow the group the opportunity to consider what should be done (if anything) in order to properly execute the ILUA. A decision was made at the meeting to replace the previous applicant with a new, proposed applicant.

A notice of motion was brought, seeking orders to replace the previous applicant with the proposed applicant who had been authorised at the claim group meeting. Those individuals who had been members of the previous applicant, but who, after the meeting, did not form part of the proposed applicant opposed the notice of motion.

Justice Collier considered the contentions of those members but did not uphold them. He found that the authorisation meeting was properly conducted, that the authorisation had not been corrupted by the will of the individuals who wanted to replace the previous applicant, that those who attended the authorisation meeting were claim group members and therefore authorised to vote on resolutions and further, that those who attended were representative of the claim group.

Justice Collier stated that the evidence was clear that the resolutions at the claim group meeting were passed with significant majorities and that the will of the Bigambul People as expressed at the meeting was to replace the previous applicant with the proposed applicant. An order was made to replace the applicant.

**Roe v State of Western Australia [2010] FCA 1436**  
**17 December 2010**  
**Federal Court of Australia, Perth**  
**Gilmour J**

The Court had previously upheld a claim of legal professional privilege asserted by the Kimberley Land Council (KLC) in relation to a connection report associated with the applicant's native title claim. The applicant called for the connection report to be published, claiming that the legal professional privilege had been waived because it had been used by Ms Rubinich, a consultant anthropologist for the KLC, in the formulation of her opinions expressed in her affidavit evidence.

Justice Gilmour found that Ms Rubinich had not used the report to formulate opinions expressed in her affidavit; rather that those opinions were based on materials in the affidavits that she had identified. He considered that she had used the report as a 'convenient reference' to enable her to locate relevant secondary sources. He found that Ms Rubinich had not disregarded or contravened the Court's guidelines for expert witnesses when preparing her affidavit by not mentioning the report in those affidavits.

Justice Gilmour upheld the KLC's claim for client privilege.

**Murray on behalf of the Yilka Native Title Claimants v State of Western Australia (No 3) [2010] FCA 1455**  
**21 December 2010**  
**Federal Court of Australia, Perth**  
**McKerracher J**

In this hearing, McKerracher J considered the future timetabling of this application. He outlined a number of key dates and conditions for the filing of draft reports, written submissions and future hearing dates.

**Ashwin on behalf of the Wutha People v State of Western Australia (No 2) [2010] FCA 1472**  
**23 December 2010**  
**Federal Court of Australia, Perth**  
**Siopis J**

The State of Western Australia sought an order striking out the Wutha people's native title determination application on the basis that the application had not been properly authorised and was bound to fail. The State claimed that Lindgren J's decision in *Harrington Smith on behalf of the Wongatha People v State of Western Australia (No 9) (2007) 238 ALR 1 (Wongatha)*, where he found that in respect of the area of overlap, the Wutha claim was not authorised and dismissed it meant that the case was now bound to fail.

Justice Siopis found that, first, Lindgren J's decision was binding only in respect of what it decided: that in relation to the land comprising the overlap with the Wongatha claim, the Wutha claim was dismissed. He found that he was therefore not bound to follow that decision.

Second, he considered that Lindgren J was, based on his findings at that time, bound to dismiss the Wutha claim in so far as it related to overlap of land, however, since the introduction of s. 84D into the *Native Title Act 1993* (Cth) (after the Wongatha decision), the Court is now allowed the discretion to determine whether a defect is conclusive to the fate of that determination and the Court was not bound to reach the same result. The State's application was therefore dismissed.

Justice Siopis stated that he would hear the parties on directions for the trial of whether the Wutha claim is lawfully authorised.

## 2. Legislation

### **Aboriginal Land and Torres Strait Islander Land and Other Legislation Amendment Bill 2010 (Qld)**

According to the State of Queensland, the objectives of the Aboriginal Land and Torres Strait Islander Land Amendment Bill 2010 (the Bill) are to:

- amend the *Aboriginal Land Act 1991* (ALA) and the *Torres Strait Islander Land Act 1991* (TSILA) (the Acts) to:
  - recognise the rights of Aboriginal traditional owners at Seisia, Bamaga and Hammond Island which are Torres Strait Islander Deeds of Grant in Trust (DOGIT) established on traditional Aboriginal land, and ensure that the Torres Strait Islander communities established on these lands can continue to prosper.
  - reduce the number of organisations that need to be established in a community by providing for land to be granted under the Acts to bodies registered under the Australian Government's *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSIA), rather than create new land trusts under the Acts.
  - improve the governance of existing land trusts established under the Acts.
  - improve how the Acts align with, and interact with, the Commonwealth *Native Title Act 1993* (NTA).
  - ensure that community development can proceed efficiently in communities following the grant of land under the Acts.
- amend the *Local Government (Aboriginal Lands) Act 1978* (LGALA) to:
  - clarify, simplify and update the legislative framework applying to Aurukun and Mornington Shires under the LG(AL)A so that it aligns with and does not unnecessarily duplicate similar legislation applicable to all other Local Governments generally or to Indigenous Local Governments specifically.
- amend the *Nature Conservation Act 1992* to:
  - provide for the revocation of national parks (Cape York Peninsula Aboriginal land).

The Bill is available for download from:

<http://www.legislation.qld.gov.au/Bills/53PDF/2010/AbLTSIOLAmB10.pdf>

The Explanatory Notes are available for download from:

<http://www.legislation.qld.gov.au/Bills/53PDF/2010/AbLTSIOLAmB10Exp.pdf>

### **Native Title Amendment Act (No. 1) 2010**

The Act commenced on 16 December 2010 after receiving assent on 15 December 2010. According to the Attorney-General's Department website, this Act creates 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. The new process provides for consultation with native title parties about the delivery of housing and infrastructure, and ensures native title is not extinguished by these projects. It also provides for compensation where native title is affected. By facilitating the construction of housing and infrastructure in Indigenous communities, these reforms are intended to assist the Government's Closing the Gap agenda. The Act can be downloaded from:

<http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/all/search/731C9AA6BF0E7D3ACA2577FF0002D6C7?OpenDocument>

### **Native Title (Notices) Amendment Determination 2010 (No. 1) Legislative Instrument - F2010L03001**

The Native Title (Notices) Amendment Determination 2010 (No.1) commenced at the same time as the *Native Title Amendment Act (No. 1) 2010* (Cth). The Amendment Determination amends the Native Title (Notices) Determination 1998 to set out how notice must be given for acts that are covered by the new process established by the *Native Title Amendment Act (No. 1) 2010* (Cth). The Determination can be downloaded from:

<http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/all/search/71736B8C610765FBCA2577D7007A28CB?OpenDocument>

## **3. Policy**

### **Submissions: Consultation Paper - Native Title, Indigenous Economic Development and Tax**

The Treasury received thirty-three submissions in response to the Consultation paper entitled 'Native Title, Indigenous Economic Development and Tax'. Thirty-two of these are public submissions and one is confidential. The public submissions are available for download from:

<http://www.treasury.gov.au/contentitem.asp?NavId=066&ContentID=1916>

### **Submissions: Discussion Paper - Leading Practice Agreements: Maximising Outcomes from Native Title Benefits.**

The Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs released a Discussion paper entitled 'Leading Practice Agreements: Maximising Outcomes from Native Title Benefits' on 3 July 2010. The Australian Government sought written submissions from interested parties and the general public on the Discussion paper. Submissions closed on 30 November 2010 and are still to be made available for public viewing.

## **4. Indigenous Land Use Agreements**

- In December 2010, **5** ILUAs were registered with the National Native Title Tribunal.
  - All 5 of these ILUAs were registered in Queensland and they were all Area Agreements (AA).
- 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 December 2010, **2** native title determinations were handed down.

- The **Newhaven, NT Portion 2406 Determination** took place in the Northern Territory on 8 December 2010. Native title was deemed to exist in parts of the determination area and it was a consent determination. However this determination is conditional as the native title holders had not yet nominated a prescribed body corporate to hold the native title on trust. An order was made that the operational commencement of the determination be delayed until a prescribed body corporate had been nominated and accepted by the Court.
- The **Waanyi Peoples Determination** took place in Queensland on 9 December 2010. Native title was deemed to exist in the entire determination area and it is deemed to be a consent determination. However, this determination is conditional upon the registration of an agreement on the Register of Indigenous Land Use Agreements.
- The **Native Title Research Unit** maintains a **Determinations Summary** which provides hyperlinks to determination information on the Austlii, NNTT and ATNS websites.
- See also 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. 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](#).

## 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:

J Hunt & D Campbell, *Community Development in Central Australia: Broadening the Benefits from Land Use Agreements*, Centre for Aboriginal Economic Policy Research, Topical Issue 7 / 2010, December 2010.

- This paper discusses the variety of community development projects that the Community Development Unit at CLC is undertaking with traditional owners, and the challenges it is facing as it tries to utilise community development principles in its projects. It indicates some of the issues that may need to be considered in policy which seeks to assist native title holders gain optimum benefit from their ILUAs. In particular, the paper will demonstrate that the priorities of Indigenous people to live on outstations and to sustain cultural activities may conflict with government views as to how to 'optimise benefits' from ILUAs. The article can be downloaded from:  
<http://caepr.anu.edu.au/Publications/topical/2010T17.php>

### Reports:

#### Browse LNG Precinct Strategic Assessment Report (SAR)

- The Department of State Development on behalf of the State of Western Australia proposes to develop the Browse LNG Precinct as a common user facility to process natural gas from the Browse Basin gas fields, near James Price Point, approximately 60 kilometres north of Broome, on the West Kimberley coast of Western Australia. A Strategic Assessment Report on the proposed precinct has been prepared by the Department of State Development in accordance with Western Australian Government procedures and Terms of Reference agreed between the State and the Commonwealth. The Strategic Assessment Report describes the proposal, examines the likely environmental and social effects and the proposed environmental management procedures associated with the proposed development. The Strategic Assessment Report is released for 12 weeks public review commencing on Monday 13 December 2010 (Summary provided by NNTT). The report can be downloaded from: <http://www.dsd.wa.gov.au/8249.aspx>

#### Kimberley Land Council – Indigenous Impacts Report

- The Kimberley Land Council has released a six-volume Indigenous Impacts Report that identifies what is needed to achieve responsible development of natural gas resources off the Kimberley Coast. The Indigenous Impacts Report examines the likely effects of LNG development in one of the most comprehensive studies of its type undertaken in Australia, funded by the Government of

Western Australia and prepared under the direction of the KLC and Traditional Owners for James Price Point. Volume 1 of the Report provides an overview of the remaining five volumes and consolidates all of their recommendations. Volume 2 looks at the issue of Traditional Owner consent and Indigenous community consultations. Volume 3, the most extensive part of the Report, examines the economic and social impacts of LNG development. Volume 4 examines impacts on heritage; Volume 5 provides an archaeological site survey of James Price Point; Volume 6 is an ethnobiological report that focuses on Indigenous environmental values (Summary provided by NNTT). The report can be downloaded from: <http://klc.org.au/2010/12/09/james-price-point-indigenous-impacts-report-released/>

#### **Administration of Funding Agreements with Regional and Remote Indigenous Organisations / Report by the Commonwealth Ombudsman**

- Indigenous organisations working in regional and remote areas face unique challenges, particularly when their funding is largely derived from government grant programs. Complex grant requirements and a failure to adequately support Indigenous organisations to meet reporting requirements increase the risk that these organisations will fail, even where the programs are being delivered successfully. A focus on delivering services efficiently whilst simplifying and reducing the burden of administrative and reporting requirements is needed. This report explores some of these challenges and outlines five principles for better administration by government agencies of funding agreements with regional and remote Indigenous organisations (Summary provided by NNTT). This report can be downloaded from:  
[http://www.ombudsman.gov.au/files/office\\_for\\_the\\_arts\\_dpmmc\\_admin\\_of\\_funding\\_agreements.pdf](http://www.ombudsman.gov.au/files/office_for_the_arts_dpmmc_admin_of_funding_agreements.pdf)

#### **Annual Highlights Report for Queensland's Discrete Indigenous Communities July 2009 – June 2010**

- This report evidences the Queensland Government's ongoing commitment to closing the gap between the life outcomes and opportunities experienced by Aboriginal and Torres Strait Islander Queenslanders and non-Indigenous Queenslanders. It is the first *Annual Highlights Report for Queensland's Discrete Indigenous Communities July 2009 – June 2010* and provides information on achievements in Queensland's discrete Indigenous communities. It incorporates the *Quarterly report on key indicators in Queensland's discrete Indigenous communities for April – June 2010* and significantly, for the first time, provides a detailed trend analysis of data on key indicators over the years since this data has been collected (Summary provided by NNTT). The report can be downloaded from:  
<http://www.parliament.qld.gov.au/view/legislativeAssembly/tableOffice/documents/TabledPapers/2010/5310T3779.pdf>

## **9. Seminars**

Marruwa Indigenous Consultancy presents its research results on the Tindale Map and other more recent sources of descriptions of Aboriginal lands in NSW and Victoria.

When: Monday January 24, 2011

Venue: Hayden Allen Tank, Australian National University campus, Canberra

Registration Fees per seat:

- Aboriginal Organisation - \$120
- General Public - \$290
- Government - \$310
- Private Corporate - \$310
- Non-Government - \$190

For further information regarding registration, contact Keith Kemp at:

Mobile: 0458 547 050

Email: [kkemp@marruwa.com](mailto:kkemp@marruwa.com)

## 10. Training and Professional Development Opportunities

### **ANU Centre for Native Title Anthropology – 10-week Writing Fellowships**

The ANU Centre for Native Title Anthropology (CNTA) is seeking applications from native title anthropologists interested in undertaking 10-week Writing Fellowships. This opportunity is provided through the Australian Government Attorney-General's Department Native Title Anthropologist Grants Program announced in 2010.

The CNTA Writing Fellowships are an opportunity for early-career and consultant anthropologists to develop research expertise and to make a unique contribution to native title anthropology. The Writing Fellowships will be available for any consecutive 10-week period between 8th March and 30 September 2011. Successful candidates will receive a stipend for the duration of the Fellowship, and will be eligible to receive up to \$2,500 for travel and accommodation expenses in order to support temporary relocation to Canberra. Office space, computer and email services, and full access to online library resources will be provided.

The CNTA Writing Fellows will receive academic mentoring from members of the RHSA academic staff with experience in native title anthropology, and their positions will be supervised by Professor Nicolas Peterson. For further information about the CNTA Writing Fellowships, or to discuss the application process, please contact Professor Nicolas Peterson on (02) 6125 4727. Applications close Monday 31st January, 2011.

For further training and professional development opportunities [see the Aurora Project: 2011 Program Calendar](#) (PDF 100Kb) for information about [Learning and Development Opportunities](#) for staff of native title representative bodies and native title service providers. [Applications are now open for Aurora's NTRB Training Programs.](#)