

## What's New - JUNE 2010

1. Cases.....	1
2. Legislation & Policy.....	3
3. Indigenous Land Use Agreements .....	5
4. Native Title Determinations .....	5
5. Public Notices .....	5
6. Native Title in the News .....	6
7. Native Title Publications .....	6
8. Conferences .....	6
9. Training and Professional Development Opportunities.....	7

### 1. Cases

#### ***Edwards v Santos Limited [2010] FCAFC 64***

(4 June 2010)

Full Federal Court of Australia  
Stone, Greenwood and Jagot JJ

The Full Federal Court (Stone, Greenwood and Jagot JJ) dismissed the application for leave to appeal a decision of the primary Judge (see Native Title Newsletter Nov/Dec 6/2009 for summary of this case). Edwards and others sought leave to appeal the decision which dismissed their application for an injunction to prevent the granting of petroleum leases over their native title claim area.

The decision was affirmed by the Full Federal Court which did not allow leave to appeal, for what it considered amounted to an 'advisory opinion'. Edwards and others were native title claimants, and therefore did not yet have a legal or equitable interest to be protected. The order for Edwards and others to pay costs was also affirmed.

#### ***Huddleston v Aboriginal Land Commissioner [2010] FCAFC 66***

(8 June 2010)

Full Federal Court of Australia  
Keane CJ, Spender and Barker JJ

The Full Federal Court (Keane CJ, Spender and Barker JJ) on 8 June 2010 overturned a decision of the Aboriginal Land Commissioner to dispose of the Huddleston land claim in the Northern Territory. The Commissioner had disposed of the claim as the claimants had not provided further information relating to their application within a six month period as requested pursuant to s 67A(7) of the *Aboriginal Land Rights (NT) Act 1976*.

The Northern Land Council (NLC) challenged this determination on behalf of the applicants, claiming a failure to accord procedural fairness in reaching the decision. The Commissioner emphasised that an extension was possible if satisfied that a genuine effort was being made to provide the information requested. The Principal Legal Officer of the NLC conceded that the Commissioner's requests had been mislaid by staff, however argued that the information requested was extensive and that NLCs legal and anthropological branches were working at capacity in resolving other outstanding claims.

Although the Court held that the Commissioner was entitled to take the view that he was not provided with a sufficient basis to grant an appropriate extension, the common law duty to act fairly and accord procedural fairness prevailed. Therefore the Court rendered the Commissioner's decision to dispose of the claim invalid and of no effect. Further, due to its active support of the Commissioner, the second respondent, the Government of the Northern Territory, was ordered to pay costs.

***Murray on behalf of the Yilka Native Title Claimants v State of Western Australia [2010] FCA 595***

(11 June 2010)

Federal Court of Australia, Western Australian District Registry  
McKerracher J

A number of parties gave notice that they wished to join the proceeding but the applicant claimed that the notices were deficient and shouldn't be accepted. The applicant considered that, as the notices made no reference to a claim to hold native title, they did not trigger the operation of s 84(3)(a)(ii) of the *Native Title Act 1993* (Cth) which allows affected persons to become parties to a native title claim.

Justice McKerracher found that despite the inadequate notices, the parties wishing to join should be permitted to clarify the content of the notices they had provided through further evidence and submissions.

In relation to those parties that had provided further submissions, McKerracher J found that it would be too severe not to allow them to join the proceeding, as the further evidence provided by those parties suggested they ought to be joined. However, he considered that those who had not filed further clarificatory material should not be a party to the proceeding but, if they wished to, would have 21 days to apply through s 84(5) of the *Native Title Act 1993* (Cth), which allows the Federal Court to join parties to proceedings.

He ordered that the parties resubmit the notices with greater clarity so that later in the matter, there wouldn't be a need to rely on affidavit material.

***Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625***

(18 June 2010)

Federal Court of Australia, Brisbane Registry  
Dowsett J

For case note of *Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625*, please see May/June 2010 edition of the Native Title Newsletter (03/2010).

***Gangalidda and Garawa Peoples v State of Queensland and Gangalidda and Garawa People v State of Queensland #2 [2010] FCA 646***

(23 June 2010)

Federal Court of Australia, Burketown Registry  
Spender J

Justice Spender heard these two consent determinations together and recognised the native title rights of the Gangalidda and Garawa people over 5,810 sq km of land approximately 650 km west of Cairns. This determination included exclusive native title rights over approximately one third of the land and non-exclusive rights over the other two thirds (made up of predominantly pastoral leases).

Their rights in relation to the area of exclusive native title land are the right to possession, occupation, use and enjoyment of that area to the exclusion of all others.

Their rights in relation to the area of non-exclusive rights are: the right to access, to be present on and to traverse the area; to hunt, fish and gather on the area for personal, domestic and non-commercial communal purposes; to take and use natural resources from the area for personal, domestic and non-commercial communal purposes; to camp on the area but not to reside permanently or to erect permanent structures or fixtures; to light fires on the area for domestic purposes including cooking but not for the purposes of hunting or clearing vegetation; to conduct religious and spiritual activities and ceremonies on the area; to be buried on, and bury Native Title Holders on the area; to maintain places and areas of importance or significance to the Native Title Holders under their traditional laws and customs and protect those places and areas by lawful means from physical harm and to share or exchange natural resources from the area for personal, domestic and non-commercial communal purposes.

In relation to water, the Gangalidda and Garawa people have non-exclusive rights to hunt and fish in and on and gather from the water and take, use and enjoy the water for personal, domestic and non-commercial communal purposes.

Being satisfied that a determination in the terms agreed by the parties would be within the power of the Court and that it was appropriate for the Court to do so, Spender J was able to make the consent determination.

**QGC Pty Ltd v Bygrave [2010] FCA 659  
(23 June 2010)  
Federal Court of Australia, Brisbane Registry  
Reeves J**

QGC Pty Ltd intended to develop a liquefied natural gas project on land that was included in the Iman #2 native title claim. To do so, they negotiated an ILUA over the area with the claimant group. One native title claimant, however, refused to sign and QGC attempted to have the agreement registered nonetheless. Queensland South Native Title Services (QSNTS) applied to be made party to this proceeding.

QGC argued that QSNTS did not have sufficient interest in the case as they were in the same position as any other representative body in Australia and comparatively, held no greater interest in the case. Conversely, QSNTS submitted that they held sufficient interest in the case as they are the representative body responsible for the area that was the subject of the agreement, which gives them a number of relevant responsibilities including facilitation, dispute resolution and agreement-making functions.

Justice Reeves found that as the *Native Title Act 1993* (Cth) requires the relevant representative body to perform certain functions in such circumstances; QSNTS had a 'direct and demonstrable' interest in the proceedings.

QGC also submitted that if QSNTS were joined as a party, a conflict of interest would arise for Mr Hardie (the solicitor on the record in the Iman #2 claim). They suggested that in acting as an agent to QSNTS, he would breach his duty of loyalty to the Iman #2 claimants.

Justice Reeves surmised that Mr Hardie could hold concurrent fiduciary duties and that there was no actual or perceived conflict of interest between the duties Mr Hardie owed to the Iman people as his client and the duties he owed to QSNTS as an agent of the organisation. In light of the absence of the conflict of interest and QSNTS's direct interest in the case, Reeves J ordered that QSNTS be made party to the proceedings.

## **2. Legislation & Policy**

### **COMMONWEALTH LEGISLATION**

The following regulations commenced on 1 July 2010:

***Native Title (Tribunal) Amendment Regulations 2010 (No. 1) (Cth)***

These regulations amend the *Native Title (Tribunal) Regulations 1993* (Cth) to increase the application fee in the Native Title Tribunal.

**This Legislative Instrument and Explanatory Statement can be accessed via Comlaw  
<http://www.comlaw.gov.au/>**

**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 the 'Leading Practice Agreements: Maximising Outcomes from Native Title Benefits Discussion Paper' on 3 July 2010 for public consultation on a possible group of reforms to promote leading practice in native title agreements and the governance of native title payments.

The key measure on which the Federal Government is consulting is a proposed new independent statutory function to receive future act and development related native title agreements, and assess some agreements to see if they are sustainable and reflect best practice agreement principles. The Government is also consulting on a range of related governance measures and complementary measures to streamline future acts processes. It is also consulting on an amendment to clarify the meaning of 'in good faith' under the right to negotiate provisions.

Public consultation sessions on the possible reforms will be conducted in the following locations:

Location	Date & Time	Details
Brisbane	12 July 2010 2pm – 4 pm	Mayflower Room, Christie Conference Centre, Level 1, 320 Adelaide Street Brisbane
Sydney	13 July 2010 10am – 12pm	Platform 10 Conference Centre, Level 10, 1 Lawson Square, Redfern Sydney
Adelaide	14 July 2010 10am – 12pm	David Spence Room, Adelaide Town Hall, 128 King William St, Adelaide
Melbourne	15 July 2010, 2pm – 4pm	Graduate House, Melbourne University 220 Leicester St, Carlton
Canberra	20 July 2010, 2pm – 4 pm	Juliana House Conference Room Ground Floor, Bowes Street, Woden
Darwin	21 July 2010 3pm – 5pm	FaHCSIA State Office, Level 5 Jacana House, 39-41 Woods Street Darwin
Perth	23 July 2010 9:30am – 1pm	Green Room, Hotel Ibis Perth, 334 Murray St, Perth

Submissions close at 5pm on 5 August 2010.

For further information click on the links below:

- [Consultation on possible governance and future acts reforms](#)
- [Discussion paper: Leading practice agreements: maximising outcomes from native title benefits](#)

## Consultation Paper:

### Native Title, Indigenous Economic Development and Tax

#### Summary

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

#### Making a submission

Interested parties are invited to comment on the consultation paper. While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

#### Closing date for submissions:

The deadline for submissions on the recently released Treasury consultation paper "Native Title, Indigenous Economic Development and Tax", which was previously due on 2 July 2010, has also been extended to 5pm on 5 August 2010.

- Click here to download the [consultation paper](#) (PDF) 342kb
- Visit [www.treasury.gov.au](http://www.treasury.gov.au) for more information.

### 3. Indigenous Land Use Agreements

- 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](#).

### 4. Native Title Determinations

- 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.

### 5. 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](#).

## 6. 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.

## 7. Native Title Publications

### AIATSIS Publications:

- T Bauman (ed), *Dilemmas in applied native title anthropology in Australia*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2010.
- L Strelein (ed), *Dialogue about land justice: papers from the National Native Title Conference*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2010.

### Journal Articles:

- R Ye, 'Torrens and customary land tenure: a case study of the *Land Titles Registration Act 2008* of Samoa', *Victoria University of Wellington Law Review*, Vol. 40, No. 4, 2010, pp. 827-861.
- S Young, 'Tides of history and jurisprudential gulfs: native title proof and the Noongar Western Australia claim', *The Indigenous Law Journal at the University of Toronto Faculty of Law*, Vol. 8, Issue 1, 2010, pp. 95-120.
- K McNeil, 'Reconciliation and third-party interests: *Tsilhqot'in Nation v British Columbia*', *The Indigenous Law Journal at the University of Toronto Faculty of Law*, Vol. 8, Issue 1, 2010, pp. 7-25.

### Papers:

- G Neate and D O'Dea, *The functions of the National Native Title Tribunal*, Paper delivered to the *Legalwise Native Title Seminar* on 28 May 2010 by Graeme Neate and 4 June 2010 by Daniel O'Dea.

### Speeches:

- Hon J Macklin MP, *Harnessing opportunities for future generations of Indigenous Australians*, National Native Title Conference 2010, Canberra, 2010.

## 8. 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.

This AAS Conference 2010 details are as follows:

**Date:** September 22-24

**Location:** Deakin University, Waterfront Campus, Geelong, Victoria

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

**Contact:** Rohan Bastin

## 9. 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.

### **Postgraduate Research Grant:**

Members of the Ronald and Catherine Berndt Research Foundation Committee have announced the second round of applications for a Postgraduate Research Grant Award.

Funds of up to \$8,000 per application will be awarded to a selection of applicants who successfully address grant criteria. The applicant will be enrolled in anthropology and/or a cognate discipline at an Australian university, and the work must contribute to the Berndt Collection, and/or support anthropological research and Australian Aboriginal Studies more broadly.

Information about the Award and an Application Form can be found at [http://www.berndt.uwa.edu.au/generic.lasso?token\\_value+foundation](http://www.berndt.uwa.edu.au/generic.lasso?token_value+foundation)

Applications are to be submitted by 31 August 2010. Successful applicants will be announced on 31 October 2010.