

What's New March 2010

1. Cases	1
2. Legislation	4
3. Indigenous Land Use Agreements	5
4. Native Title Determinations	5
5. Public Notices	5
6. Registered Native Title Bodies Corporate	6
7. Native Title in the News	6
8. Native Title Publications	6
9. Native Title Broadcasts	6
10. Funding Opportunities	7
11. Conferences	7
12. Training and Professional Development Opportunities	8

1. Cases

***Edwards v Santos Limited* [2009] FCA 1532** (18 December 2009)

Logan J

Federal Court of Australia, Brisbane

The applicants, on behalf of the Wongkumara people, were 'registered native title claimants' over land in south-west Queensland and north-west New South Wales. There had not yet been a determination as to native title in that area.

The first and third respondents (Santos Ltd and Delhi Petroleum Pty Ltd) held an authority to prospect (under the *Petroleum Act 1923* (Qld)) in an area that included part of the claim area. The applicants sought to prevent the respondents seeking a petroleum lease on the basis that this was an impermissible future act.

Justice Logan found that, as the claimants did not hold native title at that time, they were effectively asking for an advisory opinion as to the outcome that would eventuate should native title be found to exist and the petroleum lease be sought by the respondents. His Honour considered that he was bound by *The Lardil People v Queensland* (2001) 108 FCR 298, which confirms the definition of 'future act' in s 223 of the *Native Title Act* as an act that 'affects' native title, not an act which, if native title existed, *might* affect it. He found that this application therefore had a hypothetical nature and that giving an advisory opinion was antithetical to the exercise of federal jurisdiction as this matter did not, in itself, constitute a 'matter'. Therefore the applicants' 'mere status' as registered native title claimants did not give them standing to claim any of the relief sought.

His Honour dismissed the application. The question of costs was not addressed, but scheduled for a later hearing.

***Edwards v Santos Limited* [2010] FCA 34** (4 February 2010)

Collier J

Federal Court of Australia, Brisbane

The applicants sought leave to appeal the dismissal of their claim (see above *Edwards v Santos* [2009] FCA 1532) before a Full Court.

Justice Collier considered that the submissions supporting the applicants' case held some potential merit, that the original judgment had resulted in important consequences for the parties and that the case raised issues of public importance. Her Honour found that the application involved issues that were suitable for consideration by the Full Court.

Justice Collier referred the application for leave to appeal to a Full Court of the Federal Court of Australia. The application for leave to appeal would be heard concurrently with or immediately before the appeal (subject to any contrary direction of the Full Court).

Edwards v Santos Limited (No 2) [2010] FCA 238 (17 March 2010)

Logan J

Federal Court of Australia, Brisbane

This proceeding concerned the awarding of costs in relation to the decision made in *Edwards v Santos Limited* [2009] FCA 1532 (see above). Logan J found that s 85A of the *Native Title Act 1993* (Cth) was inapplicable, relying on *The Lardil Peoples v Queensland* (2001) 108 FCR 453.

His Honour found that although the applicants' motivation in bringing the case was to resolve a negotiation dispute and there is a public importance in considering whether persons in the applicants' position have standing, this public interest is not greater than that of the respondents to be able to conduct their business without the burden of costs and unnecessary litigation. Neither was he convinced that it was appropriate for the 'spirit' of s 85A to be taken into account (as some Federal Court Judges have been) and therefore found that discretion as to costs should be exercised in the usual way.

Justice Logan ordered that the applicants pay the first and third respondents' (Santos Ltd and Delhi Petroleum Pty Ltd) costs of and incidental to the application, including the summary judgment.

Sampi on behalf of the Bardi and Jawi People v State of Western Australia [2010] FCAFC 26

(18 March 2010)

**Full Federal Court of Australia, Melbourne (via video link to Perth)
North & Mansfield JJ**

The Full Federal Court found in favour of the Bardi and Jawi people in their appeal against the state of Western Australia. The successful native title claim concerns the Dampier Peninsula, the islands in the Buccaneer Archipelago and surrounding offshore areas in the Kimberley region, Western Australia. The decision marks a significant win for the Bardi and Jawi people 15 years after they initiated their native title claim.

The primary judge, Justice French in 2005,¹ recognised the interests of the Bardi people but not the Jawi people as his Honour considered the two groups were distinct societies at the time of colonisation. He held further that the remaining Jawi people had been absorbed by the Bardi society. As a result the claim to Jawi territory, in particular, offshore areas failed.

The appeal centred on two issues, firstly the conclusion reached by French J that the Bardi and Jawi people did not form a single society at sovereignty and secondly the rejected claim to rights and interests in offshore areas.

The appeal required consideration of the High Court decision of *Yorta Yorta*² and its application in subsequent cases. In particular, the Federal Court considered whether 'the rights and interest must originate in a normative system of traditional law and custom which existed at the time of the acquisition of sovereignty.'³

One or Two societies

On Appeal Justices North & Mansfield held that the primary judge had erred in failing to draw the inference from the evidence that the Bardi and Jawi people formed a single society at sovereignty.⁴

The decision in *Yorta Yorta* was considered and the central issue was whether the group acknowledged the same body of laws and customs relating to rights in interests in land and waters. The evidence given in the first and second trials by the majority of Aboriginal witnesses and the report by anthropologist Geoffrey

¹ *Sampi v State of Western Australia* [2005] FCA 777.

² *Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.

As a result the full Federal Court held that the primary judge should not have excluded the country of the Jawi people from the determination, representing a long-awaited success for the Bardi and Jawi peoples.

³ *Sampi on behalf of the Bardi and Jawi People v State of Western Australia* [2010] FCAFC 26 at 15.

⁴ The third judge, Branson J retired and the parties consented to North and Mansfield JJ as the remaining judges constituting the Full Court.

Bagshaw were considered sufficient to confirm the unity of the Bardi and Jawi belief systems and system of law.

Specifically the Court held that the difference in language dialect, distinct territories and the existence of self-referents did not displace the notion that the Bardi and Jawi were one society or not inextricably linked by those normative rules which existed at sovereignty. Their Honours also confirmed that Aboriginal testimony is of the highest importance in the court's determination of native title.

Offshore areas

The Full Federal Court affirmed the tentative (not final) view of French J and held that the land and waters north east of the Dampier Peninsula were part of the Bardi and Jawi people's land.

The Court also removed the onerous proviso placed on the native title interests recognised in the intertidal zone, limiting the interests in water to seaward of the mean low water mark and to reefs within that area that are exposed or not covered by more than two metres of water. The Court commented that it has not been practice to impose temporal limitations of this nature in native title determinations and held in favour of the Bardi and Jawi people, lifting the limitations on the ground they were not envisaged by the Act.

The seaward extension of the existence of native title was expanded on appeal. Revisiting the evidence provided in the first and second trials, it was established that since sovereignty it has been customary for the Bardi and Jawi people to use the sea around the coast of the Dampier Peninsula for hunting, fishing and travelling. The evidence therefore supported the right to access, use and take resources of the sea from these areas thereby expanding the seaward boundary.

The Bardi and Jawi people were also successful in their appeal to gain the right to care for, maintain and protect offshore areas including 'Alarm Shoals' (raised seabed in the offshore area) and 'Lalariny' (rock feature in offshore area). The Court reversed the primary judge's decision, and recognised native title rights to exclude people from entering these areas. The responsibility to protect areas of spiritual significance includes the right to ensure people do not go there. Likewise with respect to Islets in the offshore areas, it was held that land above the high water mark in offshore areas should not be treated differently from such areas on the mainland.

Cross appeal

The West Australian Fishing Industries Council supported by the Commonwealth lodged a cross appeal to limit the native title rights to non-commercial fishing. The primary judge's decision not to impose a limitation, on the grounds that there is no settled practice established, was affirmed on appeal.

***Strickland v State of Western Australia [2010] FCA 272* (23 March 2010)**

Federal Court of Australia, Perth
McKerracher J

Justice McKerracher of the Federal Court dismissed the application of Majorie May Strickland and Anne Joyce Nudding 23 March 2010. The reason for the dismissal was that the applicants did not amend their submission following their rejected application to the Native Title Register.

As part of amendments to the Native Title Act 1993 (Cth), his Honour referred to the explanatory memorandum of the Act wherein it is noted that poor quality claims constitute a burden on the native title system and therefore greater emphasis must be placed on ensuring only high quality claims are considered. Therefore the case was dismissed as no evidence or indication was provided that the application would be amended in a way that would lead to a different conclusion.

Ashwin on behalf of the Wutha People v State of Western Australia [2010] FCA 206 (11 March 2010)
Federal Court of Australia, Perth
Siopsis J

An area in the north-west goldfields of Western Australia was the site of overlapping native title claims. These claims had been made by the Wongatha People, the Yugunga People and the Wutha People.

In the Wongatha Peoples' native title determination, *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, Lindgren J found that the persons comprising the Wutha applicant were not authorised to make the application as required by s 61 of the *Native Title Act 1993* (Cth).

The applicant on behalf of the Yugunga-Nya People brought an application seeking orders under s 84D(1) of the *Native Title Act* requiring the Wutha applicant to produce evidence of authorisation. They were concerned they would have to prepare for and participate in a lengthy and expensive Wutha trial that would have been unnecessary if the Court then found that the applicant was not authorised. The Wutha applicant, however, argued that the Court should allow its application to go to trial notwithstanding the defect in authorisation found by Lindgren J.

Siopsis J rejected the Wutha applicant's application, concluding that the defect in authorisation found by Lindgren J was a factor that weighed strongly against the Court using s 84D(4) to permit the matter to proceed to trial despite the defects. His Honour found that in the interests of justice, the question of authorisation should be determined as a preliminary matter, before trial. He found that, in the interests of the matter being determined fairly, the applicants should have the opportunity to advance any evidence they wished to rely on and illustrate that the application is lawfully authorised.

Siopsis J ordered that the Wuthu applicant file and serve further evidence to satisfy the statutory requirements that they are authorised to bring to the native title determination application.

2. Legislation

Native Title (Prescribed Bodies Corporate) Amendment Regulations 2010

The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) is drafting the Native Title (Prescribed Bodies Corporate) Amendment Regulations 2010 under the *Native Title Act 1993* (the 'Act') which are designed to 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')**.

The amendment regulations will be a legislative instrument for the purposes of the *Legislative Instruments Act 2003* and will be required to be registered on the Federal Register of Legislative Instruments established and maintained under that Act. It is intended that the amendment regulations will commence on the day after they are registered.

The consultation draft of the amendment regulations and explanatory statement can be accessed via the links below:

- [Consultation draft](#)
- [Explanatory Statement](#)

FaHCSIA are undertaking an 8 week consultation with submissions due by **30 April 2010**.

Wild Rivers (Environmental Management) Bill 2010 (Cth)

The Wild Rivers (Environmental Management) Bill 2010 (Cth) was tabled in the House of Representatives on 8 February 2010. The private member's bill is described as 'an act to protect the interests of Aboriginal traditional owners in the management, development and use of native title land situated in wild river areas, and for related purposes'. [The Bill is available for download at ComLaw](#)

A Public hearing was held in Canberra on 20 March 2010. [Transcript of the hearing can be downloaded here \(PDF 243KB\)](#) another public hearing will take place on the 13 April 2010 in Cairns.

Submissions received by the Committee are available for viewing and download here:
http://www.aph.gov.au/Senate/Committee/legcon_ctte/wildrivers/submissions.htm

3. Indigenous Land Use Agreements

As of 15 March 2010, Registered ILUAs can be searched, and copies of extracts from particular ILUAs, attachments, and maps, can now be viewed online and downloaded from the NNTT website. Previously, it was possible to search a log of registered ILUAs, but if people required more than basic information about a particular ILUA, they had to approach the Tribunal personally to obtain it. Tribunal Registrar Stephanie Fryer-Smith said "The ability to search and view the Register online is a great step forward as it permits people who are seeking information about a particular ILUA, or ILUAs generally, to access that information at their own convenience."

- 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. 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

Books:

- L Godden and M Tehan (eds.), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures*, Routledge-Cavendish, Melbourne, 2010.

Papers:

- *Indigenous cultural and natural resource management and the emerging role of the Working on Country program*, CAEPR Working Paper 65/2010, Canberra: Centre for Aboriginal Economic Policy Research, 2010.

Toolkits:

- G Gibson and C O'Faircheallaigh, *IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements*, 2010.

See the IBA Community Toolkit website for more details: <http://www.ibacommunitytoolkit.ca/>

Guides:

A summary of future act decisions made by the Tribunal and Federal Court under the right to negotiate provisions of the Native Title Act 1993 (Cth). The online version of the guide is updated periodically to include significant decisions as they are made. **The updated version is available for download from the NNTT website** (As at 28 February 2010).

9. Native Title Broadcasts

Native Title on Television:

'Talking Stick: Native Title', *Message Stick*, Australian Broadcasting Commission, Screened 7 March 2010

Guests include: Graeme Neate, President of the National Native Title Tribunal, Monica Morgan, Yorta Yorta spokeswoman and Elder, Yorta Yorta Nation and, Kim Hill, Chief Executive Officer of the Northern Land Council

Visit <http://www.abc.net.au/tv/messagestick/stories/s2837732.htm> to view the show online or to read the transcript.

10. Funding Opportunities

Indigenous Protected Areas

Funding for Indigenous Protected Areas has been boosted to \$50 million over five years through the Caring for our Country initiative. The first instalment of that funding has already hit the ground, with the Government announcing more than \$24 million to expand the work of Australia's declared Indigenous Protected Areas and help develop new ones. Full details are outlined in the [Indigenous Protected Area funding summaries](#).

See the links below for further details:

- [Read the guidelines on how to apply for 2010-11 IPAs funding under Caring for our Country.](#)
- [Download a Caring for our Country IPA funding application form](#)

Funding proposals can be submitted for:

- Establishing IPAs on [Indigenous-owned lands](#); or
- Establishing cooperative management arrangements over existing [State and Territory government-managed protected areas](#).

Proposals must be **submitted by Thursday 15 April 2010**.

11. Conferences

Native Title Conference 2010 – People, Place, Power

1–3 June, National Convention Centre, Canberra

The annual National Native Title Conference is the largest Indigenous policy conference in Australia and is a flagship event for the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS).

This year, the Native Title Conference will be co-convened by the National Native Title Council and hosted by the Ngunnawal peoples, the traditional owners of the Canberra area.

The conference themes *People, Place, Power* reflect the significance of holding the event in Canberra, Australia's capital, where major legal and policy decisions about native title have been made. This year the conference will address the following themes:

People

- the legacy of native title for future generations
- land justice and social and emotional wellbeing
- human rights and racial discrimination
- women and native title.

Place

- governing native title land - roles and responsibilities of PBCs
- land, water, heritage, country
- environment, conservation and joint management
- housing, tenure and community development.

Power

- the national policy framework and proposed National Partnership Agreement
- economic development and native title payments
- broader land settlements and native title agreements
- reforms to the Native Title Act.

For more information visit:

<http://www.aiatsis.gov.au/ntru/nativetitleconference/conf2010/conf2010.html>

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:

Date: September 22-24

Location: Deakin University, Waterfront Campus, Geelong, Victoria

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

Contact: Rohan Bastin

12. 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.