

What's New - November 2010

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1. Cases

Atkinson on behalf of the Gunai/Kurnai People v State of Victoria (No 6) [2010] FCA 1036
Atkinson on behalf of the Gunai/Kurnai People v State of Victoria (No 5) [2010] FCA 1035
16 September 2010
Federal Court of Australia, Melbourne
North J

Letters from the Sporting Shooters Association and Mr Clive Sydney Hammett informed the Court that, contrary to their previous applications, neither party wished to be joined as a respondent to the proceedings any longer. Justice North dismissed the original applications that those parties be made respondents to this proceeding.

Mangarrayi Aboriginal Land Trust v Banibi Pty Limited [2010] FCA 1195
3 November 2010
Federal Court of Australia, Adelaide via video link with Darwin and Melbourne
Mansfield J

This proceeding concerned a disagreement between the Northern Land Council (NLC) and Banibi Pty Ltd (Banibi), a company whose shares were held by Mangarrayi Aboriginal Corporation (MAC). The disagreement concerned a Pastoral Land Use Agreement made in 2004 and varied in 2006 and 2008. Banibi saw the agreement as void but continued to occupy the pastoral station it covered. As the NLC considered that Banibi has repudiated the agreement, it gave notice of termination in 2010.

Justice Mansfield ordered that Banibi's first notice of motion; that MAC be joined as a respondent, was refused, as it was not supported by adequate evidence and MAC's status was not an impediment to progressing the proceeding.

In the second notice of motion, Banibi pleaded that ss. 19(6) and 5(2) of the *Land Rights (Northern Territory) Act 1976* (NT) were invalid because they purported to permit compulsory acquisition of property otherwise than on just terms, contrary to s. 51(xxxi) of the Constitution and that therefore the NLC could not rely on those sections to maintain the validity of the 2008 agreement. Justice Mansfield allowed this notice of motion but required that an amended defence be filed by 5 November which would provide proper particulars in relation to several matters that he considered had not been properly addressed.

Certain paragraphs of the defence were not allowed but Banibi had leave to file a cross claim or a supplementary amended defence raising those general matters. The NLC also had leave to file an amended reply by 11 November 2010.

The application was listed for hearing on 15 November and costs were reserved.

Allen, in the matter of North East Wiradjuri Co Limited (Administrators Appointed) [2010] FCA 1248
5 November 2010
Federal Court of Australia, Sydney
Jacobson J

Bill Allen, Ester Cutmore and Robert Bugg applied for an interlocutory order appointing David Shannon and Bruce Gleeson as receivers and managers of the third plaintiff, North Eastern Wiradjuri Company Limited (NEWCO) and the defendant, North Eastern Wiradjuri Community Fund (NEWCF).

NEWCO and NEWCF are companies that were established to deal with payments received from native title properties. A dispute arose between two groups of shareholders of the two companies which resulted in a deadlock between them and an inability to conduct company affairs. Justice Jacobson considered that this deadlock was sufficient to justify the appointment of receivers. He found that it was just and convenient to appoint receivers to oversee the affairs of both companies and to supervise the receipt and safekeeping of moneys coming in while the ultimate dispute pended, as this would preserve the assets of both companies.

Naghir People #1 v State of Queensland [2010] FCA 1265
17 November 2010
Federal Court of Australia, Brisbane
Greenwood J

Mr Phillip Mills applied on behalf of the Nagilgaul people to adjourn a mediation of the claims and contentions of the Nagilgaul people, the Mualgal people and the interests of the Billy family, scheduled for 17 and 18 November on Thursday Island in the Torres Strait.

The adjournment was necessary as two senior members of the Nagilgaul people had died earlier that week. The traditional laws and customs of the Nagilgaul people provide that the three individuals who were planning to travel to Thursday Island to participate in meetings should not do so until after the funerals of the deceased. There was some concern from the Torres Strait Regional Authority as Mr Mills had earlier advised that he wished to adjourn the meeting due to a meeting in Canberra he planned to attend on that date.

Justice Greenwood found that the proper course of action (despite the significant cost of the organisation of the meeting) was to adjourn the mediation, noting the importance of honouring and respecting the traditional laws and customs of the Nagilgaul people and as a matter of respect and dignity shown to the deceased. The Mualgal people and Torres Strait Regional Authority accept that adjourning the mediation in these circumstances is the correct approach.

Mr Phillip Mills was required to provide an affidavit stating whether he engaged in any air travel or meetings in Canberra and whether he participated in any meetings with Commonwealth Government employees in other places during the period in which he first became aware of the deaths and the date of the funeral of each person.

The costs incidental to the adjournment were reserved for later determination.

Cheedy v State of Western Australia [2010] FCA 1305
25 November 2010
Federal Court of Australia, Perth
Gilmour J

The appellant sought orders that the judgment in *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2010] FCA 690 and two determinations of the National Native Title Tribunal (NNTT) (which were the subject of that judgment) be stayed, pending the outcome of the appeal to the Full Court of the Federal Court of Australia.

The order made by the Primary Judge was that the appeal be dismissed. As such an order is not executory; Gilmour J found that it was incapable of being stayed.

Justice Gilmour did not consider that staying the NNTT's orders was apt since the determinations were permissive in nature and did not require that any positive action be taken. He found that a more appropriate

course of action in this case would have been for the appellant to approach the Court for orders restraining the respondent from taking steps to obtain mining leases (permitted by the NNTT's determinations). He also considered that any power to stay the determinations under s. 170(2) of the *Native Title Act 1993* (Cth), if this were possible, lay with the Primary Judge because it was before him that the appeals of those determinations, referred to by the NTA, were brought.

The motions were dismissed.

2. Legislation

Commonwealth:

Native Title Amendment Bill (No. 1) 2010

Summary:

Amends the *Native Title Act 1993* to: ensure that representative Aboriginal or Torres Strait Islander bodies and certain native title claimants may comment or request to be consulted about proposed housing and other services for indigenous communities which may affect native title; apply the principle of non-extinguishment to the proposals; provide for compensation for any acquisition of property; and provide for a 10-year sunset period.

Click here to see more information:

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs767%22>

Wild Rivers (Environmental Management) Bill 2010

Summary:

Ensures that the development or use of native title land in a wild river area cannot be regulated under the *Wild Rivers Act 2005* (Qld) without the agreement of the land owner

Click here to see more information:

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4467%22>

Queensland:

Aboriginal Land and Torres Strait Islander Land and Other Legislation Amendment Bill 2010

Click here to download a PDF version of the Bill:

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

Click here to download a PDF version of the Explanatory Notes:

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

3. Policy

South Australia

Public consultation opens on Aboriginal Lands Trust Review

The Minister for Aboriginal Affairs and Reconciliation, the Hon Grace Portolesi MP, has released the Consultation Paper for the review of the Aboriginal Lands Trust Act 1966. The Consultation Paper sets out the South Australian Government's proposals for a new Aboriginal Lands Trust Act. Consultations on the Paper will commence on 15 November 2010 and the public consultation period closes on the 31st January 2011. To download further information click on the following links:

The Consultation Paper:

http://www.aboriginalaffairs.sa.gov.au/resources/ALTA_REVIEW_CONSULTATION_PAPER.pdf

The official media release:

http://www.aboriginalaffairs.sa.gov.au/resources/ALTA_Media_Release_NOV_2010.pdf

The consultation presentation:

http://www.aboriginalaffairs.sa.gov.au/resources/ALT_consultation_presentation.pdf

The consultation schedule:

http://www.aboriginalaffairs.sa.gov.au/resources/ALTA_2nd_Round_Consultation_Schedule.pdf

3. Indigenous Land Use Agreements

- In November 2010, **7** ILUAs were registered with the National Native Title Tribunal.
 - **6** ILUAs were registered in Queensland. They were all Area Agreements (AA).
 - **1** ILUA was registered in Western Australia. It was a Body Corporate Agreement (BCA)
 - **There were also 8 ILUAs removed from the NNTT register as they have expired.**
- 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

- In November 2010, **1** native title determination was handed down (the **Ngurrara Part A** determination) in Western Australia. It was a consent determination and native title was deemed to exist 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.

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:

R Morgan and H Wilmot, *Written proof: the appropriation of genealogical records in contemporary Arrernte society*, Land, Rights, Laws: Issues of Native Title, Vol 4. Issue Paper 5, 2010.

Articles:

M Durette, A comparative approach to Indigenous legal rights to freshwater: key lessons for Australia from the United States, Canada and New Zealand, *Environmental and Planning Law Journal*, Vol. 27, No. 4, 2010, pp. 296-315.

D Howard-Wagner & A Maguire, 'The holy grail' or 'the good, the bad and the ugly'? a qualitative exploration of the ILUAs agreement making process and the relationship between ILUAs and native title, *Australian Indigenous Law Review*, Vol. 14, No. 1, 2010, pp. 71-85.

J Hunt, *Looking After Country in New South Wales: Two Case Studies of Socioeconomic Benefits for Aboriginal People*, CAEPR Working Paper 75, 2010. Download at:
<http://caepr.anu.edu.au/Publications/WP/2010WP75.php>

C Ross and B Merner, *Traditional Owner Settlement Bill 2010*, [Victorian] *Parliamentary Library Research Service, Research Brief*, Number 13, August 2010.

U Secher, The concept of 'operational inconsistency' in Australia: implications for native title: the common law and statutory positions. Part 1, *Australian Property Law Journal*, Vol. 18, No. 2, 2010, pp. 150-184

U Secher, The concept of 'operational inconsistency' in Australia: implications for native title: the common law and statutory positions. Part 2, *Australian Property Law Journal*, Vol. 18, No. 3, 2010, pp. 218-244.

R Webb & M McKenna, Proving continuity in community: reviewing implications of the *Sampi/Bardi* 2010 decision, *Native Title News*, Vol. 9, Iss. 9, 2010, pp. 145-150.

Books:

L Godden and M Tehan (eds), *Comparative perspectives on communal lands and individual ownership: sustainable futures*, Abingdon, Oxon, [England]; New York, NY : Routledge, 2010.

R. J. Miller, J Ruru, L Behrendt and T Lindberg, *Discovering indigenous lands: the doctrine of discovery in the English colonies*, Oxford: Oxford University Press, 2010.

8. 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](#).