

WHAT'S NEW IN NATIVE TITLE

APRIL 2017

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1. Case Summaries

Burragubba on behalf of the Wangan and Jagalingou People v State of Queensland **[2017] FCA 373**

11 April 2017, Application to Replace Applicants, Federal Court of Australia, Queensland, Reeves J

In this matter, Reeves J dismissed an application seeking to remove applicants of the Wangan and Jagalingou (W&J) peoples native title claim and replace them with other individuals. The respondent to the application was the State of Queensland. The native title claim covers approximately 30,277 square kilometres of land on the western edge of central Queensland, including the site proposed for the development of Adani Mining Pty Ltd's (Adani) Carmichael Coal Mine.

On 19 March 2016, certain members of the W&J claim group held a meeting, purporting to remove and replace four individuals of the existing W&J applicant. The meeting was notified by newspaper advertisements and by a notice that was posted on 11 March 2016 to those members of the W&J claim group, who were members of the Wangan and Jagalingou Traditional Owners Aboriginal Corporation at the time. The resolution to remove and replace the four members of the existing W&J applicant passed at that meeting. The replacement applicant relied upon the resolution to submit that the four members of the

existing W&J applicant were no longer authorised by the W&J claim group to make the application and to deal with the matters arising in relation to it.

Reeves J found that although the meeting had been headed as an ‘authorisation meeting’, it was in actuality a meeting of those members of the W&J claim group who held the same concerns as those calling the meeting in relation to the Indigenous Land Use Agreement (ILUA) negotiations with Adani. His Honour noted that there was no mention in the notice of the meeting of members having concerns relating to the primary function of an authorised applicant under the [Native Title Act 1993 \(Cth\)](#) (NTA). Reeves J considered that the notice was predominantly to do with the ILUA negotiations and the concerns of members of the W&J claim group about the continuation of those negotiations. As such the notice was not a notice directed to all members of the W&J claim group notifying them that an authorisation meeting had been convened to consider the authority of its authorised applicant for the purposes of s66B and s251B of the NTA.

Reeves J held that the meeting as conducted could not be a fair representation of the views of the whole of the W&J claim group concerning the membership of the W&J applicant. His Honour ruled that the application to replace the applicants did not meet the requirement of conditions 3 (s 66B(1)(a)(iii)) and 5 (s 66B(1)(b)) of French’s test set out in [Daniels v Western Australia](#).

[Agius v State of South Australia \(No 4\)](#) [2017] FCA 361

7 April, Application for Extension of Trial Timetable, Federal Court of Australia, South Australia, Mortimer J

In this matter, Mortimer J refused an application made on behalf of the Kaurna people native title claim group for an extension of time to delay the commencement of the connection hearing listed by White J in [Agius v State of South Australia \(No 3\)](#) [2016] FCA 1416 for April 2018. The respondent parties included: the Commonwealth of Australia, the State of South Australia, South Australian Native Title Services, fishing licence holders and water licence holders, Local Government entities, Epic Energy and the Corporation of the Town of Walkerville.

The application for a determination of native title filed by the Kaurna people in October 2000 was amended in July 2001. The claim represents the last ‘capital city’ claim covering heavily populated areas of South Australia, including Adelaide, extending from south of Rapid Bay to Redhill in the north. The eastern boundary of the claim area includes the Adelaide Hills, Clare Valley and Barossa wine regions, while the western boundary includes the coastal region from metropolitan Adelaide to Port Wakefield.

In November 2016, White J made orders and directions preparing the matter for a six week trial on connection evidence in April 2018. In March 2017, the applicant applied to vacate the trial dates and alter the timetable and sought to have the trial commencing one year later, for a period of twelve rather than six weeks. The application to vacate the hearing date was based upon the burden of work the applicant submitted was necessary to prepare

for the trial. The applicant submitted that the capacity to do that work was dependent upon the success of a funding application. Mortimer J considered without funding the applicant would undertake little or no preparation for the trial.

Background

In 2004, the State informed the Court that Indigenous Land Use Agreement (ILUA) negotiations were positive. Sample tenure documents were exchanged between the State and the applicant in 2004 and 2005 so that the applicant could consider whether to accept the extent of proposed extinguishment by the State. Unresolved tenure issues in 2008, saw Mansfield J refer the claim to the National Native Title Tribunal (the Tribunal) so as to identify those parts of the claim area in which native title rights may be extinguished. In early 2009, the Tribunal reported that almost 93% of the claim area was subject to total extinguishment of native title, a little over 3% was subject to partial extinguishment, less than 1% was not extinguished and that the tenure status of just over 3% of the claim area could not be accurately determined.

In March 2011, the State and the applicant agreed to identify issues in agreement and in disagreement. By draft minutes of order filed in October 2011, the parties informed the Court that the matter would be progressed once the applicant received funding. In June 2012, a case management conference was convened to identify tenure issues including extinguishment. The solicitor for the applicant, Mr Campbell, informed the Court that the applicant wished to audit the State's mapping system and the applicant sought further details of the State's tenure mapping system. A few months later, a communication to the Court indicated the applicant was seeking funding to engage an expert to assess the State's tenure mapping system.

In early 2015, the tenure mapping issue was referred to the Tribunal, which made a portal of the mapping available to the parties a few months later. In June 2015, the applicant advised the Court that it agreed that 98% of the area was extinguished, however the applicant pressed the issue of funding to conduct an 'audit'. Mr Campbell indicated that he would not look at the portal until he received funding. The applicant was ordered to provide their position in relation to extinguishment by 1 September 2015. The applicant did not comply with that order, but instead filed a memorandum on 2 September 2015, which sought to further adjourn the issue of extinguishment until funding was provided for an 'audit' of the mapping systems.

In March 2016, White J ordered the applicant to commission a connection report and inform the State and the City of Adelaide with detailed particulars, of the aspects of the tenure maps relating to the City of Adelaide provided by the State which they considered to be inaccurate by 31 August 2016. On that date, Mr Campbell provided an affidavit outlining that the applicant had not commissioned a connection report as the \$20,000 in funding it had received from South Australian Native Title Services was insufficient.

In March 2017, the matter came before Mortimer J. A case management hearing was held at that time to ascertain the extent to which the parties had progressed with White J's orders. Prior to that hearing, Mr Campbell filed an affidavit deposing the steps taken since

11 November 2016 to secure further funding for the applicant to prepare for the trial. An application for special funding for \$3.8 million had been made to South Australian Native Title Services.

Mortimer J placed the matter on the priority list of native title applications in the South Australia District Registry, on the basis that it was listed for the trial. Her Honour expected that priority status would weigh in favour of the funding being granted. The funding decision was due to be made in May 2017.

Reasoning

Mortimer J noted that ‘determining where to draw lines in case management processes is not an exact science’, but is guided by the overarching purpose in s 37M(1) of the [Federal Court Act of Australia Act 1976 \(Cth\)](#), which is the facilitation of the just resolution of disputes according to law and as quickly, inexpensively, and efficiently as possible. The Court must do its best to reach a conclusion that is consistent with the overarching objective, while ensuring the active parties have a reasonable opportunity to present their respective cases. Her Honour clarified that the latter requirement is not co-extensive with any party’s insistence that it should be able to present a case in whatever way it chooses or on any timetable it proposes.

Mortimer J outlined the relevant authorities on the interrelationship between case management, judicial power and assertions of lack of funding, holding that they tend firmly against the application to delay the trial. In [Levinge & Ors v Queensland \[2012\] FCA 1321](#), Reeves J stated that the Court has generally been reluctant to accept a lack of funding, or representation by a party, as a sufficient reason to delay a trial of native title proceedings. His Honour also considered that the Court cannot allow the policies of the Executive Government in relation to the allocation of funding for native title claims to paralyse its processes once its jurisdiction has been properly invoked, at [18]-[19].

Mortimer J observed that the history of the proceeding demonstrates the way the applicant’s claim, and the processes of the Court, have been driven by actual or anticipated funding decisions. Her Honour considered that to be ‘a wholly inappropriate approach to administration of this Court’s responsibilities under the [Native Title Act](#) in particular, but more generally in terms of its functions in the administration of justice’ at [160].

Mortimer J considered that the present application was an attempt by the applicant to re-agitate the timetable they had unsuccessfully proposed before White J. Her Honour stated that this was a wholly inappropriate approach; once the Court has determined the issue, ‘and in the absence of significant changes in circumstances not previously brought to the Court’s attention, parties should, and are expected to, comply with the orders made’ at [121].

In relation to the applicant’s failed application for discovery, considered by the applicant to support a year-long extension, Mortimer J held at [173] that the Court is not obliged to acquiesce to the manner in which a party chooses to conduct its case in violation of the Court’s statutory responsibilities, and in violation of its own responsibilities under s 37N. The Court is not required to do so when a party repeatedly raises a lack of funding but and

exercises very little restraint, or focus, in the way that the public monies the party has received are spent. Her Honour considered that the applicant's case was in a 'parlous state of preparedness' as a result, lacking in proper focus on the key components of connection hearings being claimant evidence and an anthropological report. Her Honour considered that there was sufficient evidence available to file preliminary connection evidence to progress the claim, including the presence of an anthropologist that has had close working relationship and knowledge of the claim since its inception. Mortimer J noted the flexibility of the Court's processes in relation to witnesses and experts, which would provide the anthropologists an opportunity to develop and refine their opinions after the filing of the initial connection report further tended against vacating the hearing.

To increase the likelihood of the applicant producing a meaningful report on connection, Mortimer J varied White J's orders to provide an extension for the filing of the applicant's expert evidence. The remainder of the application to vary the earlier orders was refused.

***Bloomfield on behalf of the members of the Akerte, Atwele, Irrelerre, Ulpmerre and Warrtharre Landholding Groups v Northern Territory of Australia* [2017] FCA 335**

6 April 2017, Consent Determination, Federal Court of Australia, Northern Territory, Griffiths J

In this matter, Griffiths J recognised the native title rights and interests of the Akerte, Atwele, Irrelerre, Ulpmerre and Warrtharre landholding groups to five estate areas associated with the groups, incorporating 2754 square kilometres of Perpetual Pastoral Lease No. 989 in the Mt Riddock locality of the central region of the Northern Territory. The respondent parties were Steven Cadzow as trustee of the Steven Cadzow family trust, Australian Abrasive Minerals Pty Ltd and the Northern Territory Government.

The application was filed in September 2015. Griffiths J made the orders requested in accordance with the agreement between the parties. The non-exclusive rights and interests recognised by the Court include rights to access and live on the land; hunt, gather, fish and take the natural resources of the land and waters; to protect sites and places of significance; and to conduct ceremonies and cultural activities on the determination area.

The Tywele Aboriginal Corporation is the nominated prescribed body corporate.

Penangk on behalf of the members of the Kwaty and Tywerl Landholding Groups v Northern Territory of Australia [2017] FCA 336; Ngwarray on behalf of the members of the Alhankerr, Atwel/Alkwepetye, Ilkewarn, Kwaty, Mpweringkee, Ntyerllkem/Urapentye and Tywerl Landholding Groups v Northern Territory of Australia [2017] FCA 337

5 April 2017, Consent Determinations, Federal Court of Australia, Northern Territory, Griffiths J

In these matters, Griffiths J recognised the native title rights and interests of the Kwaty and Tywerl (NTD20/2007) and the Alhankerr, Atwel/Alkwepetye, Ilkewarn, Kwaty, Mpweringke, Ntyerllkem/Urapentye and Tywerl (NTD8/2014) landholding groups to estate areas associated with those groups. The respondent party to the two applications was the Northern Territory Government.

In December 2007, a native title determination application known as the ‘First Aileron Claim’ was filed on behalf of the Kwaty and Tywerl landholding groups over an area of 82 square kilometres of the Aileron Pastoral Lease and 128 square kilometres of Pine Hill West in the Northern Territory. The ‘Second Aileron Claim’ was lodged in March 2014 on behalf of the Alhankerr, Atwel/Alkwepetye, Ilkewarn, Kwaty, Mpweringke, Ntyerllkem/Urapentye and Tywerl landholding groups. That claim covers 3997 square kilometres excluded from the First Aileron Claim, 84 hectares of Anna’s Reservoir Conservation Reserve, 2 hectares of Ryan Well Historical Reserve and 3 square kilometres of Crown Lease Term 1877. In September 2015, it was ordered by consent that the two matters, NTD 20/2007 and NTD8/2014, be heard together.

The non-exclusive rights and interests recognised by the Court include rights to access and live on the land; hunt, gather, fish and take the natural resources of the land and waters; to protect sites and places of significance; and to conduct ceremonies and cultural activities on the determination area.

The Kwaty Aboriginal Corporation was nominated as the prescribed body corporate for the NTD20/2007 application, and the Irretyepwenty Ywentent Pwert Aboriginal Corporation for NTD8/2014.

2. Legislation

There were no current Bills before the Federal, state or territory parliaments, or relevant previous Bills that received Royal Assent or were passed or presented during the period 1-30 April 2017.

3. Native Title Determinations

In April 2017, the NNTT website listed four native title determinations.

Short Name (NNTT)	Case Name	Date (NNTT)	State	Outcome	Legal Process	Type	RNTBC/ PBC
Aileron Pasotral lease	Ngwarray on behalf of the members of the Alhankerr, Atwel/Alkwepetye, Ilkewarn, Kwaty, Mpweringke, Ntyerlkem/Urapentye and Tywerl Landholding Groups v Northern Territory of Australia	5/4/2017	NT	Native title exists in parts of the determination area	Consent	Claimant	Irretyepwenty Ywentent Pwert Aboriginal Corporation
Aileron (Nolan's Bore)	Penangk on behalf of the members of the Kwaty and Tywerl Landholding Groups v Northern Territory of Australia	5/4/2017	NT	Native title exists in parts of the determination area	Consent	Claimant	Kwaty Aboriginal Corporation
Mt Riddock Pasotral lease	Bloomfield on behalf of the members of the Akerte, Atwele, Irrelerre, Ulpmerre and Warrtharee Landholding Groups v Northern Territory of Australia	6/4/2017	NT	Native Title exists in parts of the determination area	Consent	Claimant	Tywele Aboriginal Corporation
Tjiwarl AND Tjiwarl #2	Keith Narrier & Ors and State of Western Australia & Ors AND Edwin John Beaman & Ors and State of Western Australia	27/4/2017	WA	Native Title exists in the entire determination area	Litigated	Claimant	Registered

4. Registered Native Title Bodies Corporate & Prescribed Bodies Corporate

The [Native Title Research Unit](#) within AIATSIS maintains a [RNTBC summary document](#) which provides details about RNTBCs and PBCs in each state/territory including the RNTBC name, RNTBC type (agent or trustee) and relevant native title determination information. The statistics for RNTBCs as of 10 March 2017 can be found in the table below.

Information on RNTBCs and PBCs including training and support, news and events, research and publications and external links can be found at nativetitle.org.au. For a detailed summary of individual RNTBCs and PBCs see [PBC Profiles](#).

Additional information about RNTBCs and PBCs can be accessed through hyperlinks to corporation information on the [Office of the Registrar of Indigenous Corporations \(ORIC\) website](#); case law on the [Austlii website](#); and native title determination information on the

[NNTT](#) and [ATNS](#) websites.

State/Territory	RNTBCs	No. of successful (& conditional) claimant determinations for which RNTBC to be advised
Australian Capital Territory	0	0
New South Wales	6	0
Northern Territory	22	2
Queensland	80	2
South Australia	15	1
Tasmania	0	0
Victoria	4	0
Western Australia	39	2
NATIONAL TOTAL	166	7

Note some RNTBCs relate to more than one native title determination and some determinations result in more than one RNTBC. Where a RNTBC operates for more than one determination it is only counted once, as it is one organisation.

Source: <http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx> and Registered Determinations of Native Title and RNTBCs as at 10 March 2017.

5. Indigenous Land Use Agreements

In April 2017, 2 ILUAs were registered with the National Native Title Tribunal.

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
4/4/2017	Kurungal and Christmas Creek ILUA	WI2017/008	Body corporate	WA	Pastoral, Access
19/4/2017	Dieri Geokinetics ILUA	SI2017/001	Body corporate	SA	Petroleum

For more information about ILUAs, see the [NNTT website](#) and the [ATNS Database](#).

6. Future Acts Determinations

In April 2017, four Future Acts Determinations were handed down.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
11/4/2017	<u>Peggy Patrick & Others on behalf of Yurriyangem Taam and Western Australia and Prenti Exploration Pty Ltd</u>	WO2016/0340	Western Australia	Objection - Dismissed	Member Shurven did not receive any contentions from the claim group as to why the objection to the expedited procedure application should not be dismissed, nor was a request for extension of time made in order to comply with directions. Ms Shurven considered the group had been given sufficient opportunity to comply with directions set by the Tribunal, and it would be unfair to prejudice the other parties with further delays.
11/4/2017	<u>Connie Jugarie & Others on behalf of Ngarrawanji and Western Australia and Prenti Exploration Pty Ltd</u>	WO2016/0339	Western Australia	Objection - Dismissed	Member Shurven did not receive any contentions from the claim group as to why the objection to the expedited procedure application should not be dismissed, nor was a request for extension of time made in order to comply with directions. Ms Shurven considered the group had been given sufficient opportunity to comply with directions set by the Tribunal, and it would be unfair to prejudice the other parties with further delays.
12/4/2017	<u>IS (name withheld for cultural reasons) & Others on behalf of Wajarri Yamatji and William Robert Lambert and Western Australia</u>	WO2016/0446	Western Australia	Objection - Dismissed	Member Shurven did not receive any contentions from the claim group as to why the objection to the expedited procedure application should not be dismissed, nor was a request for extension of time made in order to comply with directions. Ms Shurven considered the group had been given sufficient opportunity to comply with directions set by the Tribunal, and it would be unfair to prejudice the other parties with further delays.
12/4/2017	<u>IS (name withheld for cultural reasons) & Others on behalf of Wajarri Yamatji and Boadicea Resources Ltd and Western Australia</u>	WO2016/0868	Western Australia	Objection - Dismissed	Member Shurven did not receive any contentions from the claim group as to why the objection to the expedited procedure application should not be dismissed, nor was a request for extension of time made in order to comply with directions. Ms Shurven considered the group had been given sufficient opportunity to comply with directions set by the Tribunal, and it would be unfair to prejudice the other parties with further delays.

7. Publications

Central Land Council

Land Rights News Central Australia

The April 2017 edition of the Land Rights News is now available.

To view or download, [please visit the CLC website](#).

Kimberley Land Council

Newsletter

The April edition of KLC's newsletter is now available.

To view or download, [please visit the KLC website](#).

National Native Title Tribunal (NNTT)

25 Years of Native Title Recognition

The NNTT has announced the 25th Anniversary of the recognition of native title with the launch of <http://www.nativetitle25.gov.au/>. The website provides stories, images and videos discussing native title over the last 25 years and the benefits it has supported.

National Native Title Tribunal (NNTT)

Native Title Vision

The NNTT has announced the launch of Native Title Vision (NTV). NTV is the improved online visualisation, mapping and query tool, for all geospatial native title needs.

To view NTV, [visit the NNTT website](#).

8. Training and Professional Development Opportunities

AIATSIS

Australian Aboriginal Studies

Australian Aboriginal Studies (AAS) is inviting papers for coming issues. AAS is a quality multidisciplinary journal that exemplifies the vision where the world's Indigenous knowledge and cultures are recognised, respected and valued. Send your manuscript to the Editor by emailing aasjournal@aiatsis.gov.au.

For more information, [visit the journal page of the AIATSIS website](#).

ORIC

ORIC provides a range of training for Aboriginal and Torres Strait Islander corporations about the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act), the corporations rule book and other aspects of good corporate governance. For further information on training courses, [visit the ORIC website](#).

The Cairns Institute – James Cook University

Native Title Workshop for Mid-Career Anthropologists

Facilitated by the Cairns Institute (JCU) and the Centre for Native Title Anthropology (ANU), this workshop aims to enhance attendee's professional skills in the native title arena. The workshop will cover data management, communication strategies and writing skills, PBC management and governance, and developing skills for engaging with legal culture.

Generous scholarship grants, including fee waiver, food and accommodation for the 5 days are available to mid-career anthropologists on application. Places are strictly limited.

Date: 18-22 September 2017

Location: James Cook University, Cairns

For more information or to pre-register your interest, please email Jennifer.gabriel@jcu.edu.au.

9. Events

AIATSIS

National Native Title Conference 2017 – Our land is our birth right: MABO25 & Beyond

Registrations are now open for the 2017 National Native Title Conference to be held on the traditional lands of the Guambilbarra Wulgurukaba people, in Townsville, Queensland. Co-convened by AIATSIS and the North Queensland Land Council, this year's program will celebrate 25 years since the High Court of Australia's momentous *Mabo* decision.

Date: 5-7 June 2017

Location: Townsville Entertainment Centre, Townsville Qld.

Applications are now open for Aboriginal and Torres Strait Islander peoples' who would like to attend the National Native Title Conference 2017. To complete a sponsored delegate application, register, or for more information, [please visit the AIATSIS website](#).

The Native Title Research Unit produces monthly publications to keep you informed on the latest developments in native title throughout Australia. You can [subscribe to NTRU publications online](#), [follow @AIATSIS on Twitter](#) or ['Like' AIATSIS on Facebook](#).

