AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

WHAT'S NEW IN NATIVE TITLE

JUNE 2017

1. Case Summaries

Doctor on behalf of the Bigambul people v State of Queensland [2017] FCA 716

23 June 2017, Consent Determination, Federal Court of Australia, Queensland, Reeves J

In this case Reeves J recognised the native title rights and interests of the Bigambul people over land and waters in Queensland. The respondent parties included the State of Queensland, the Goondiwindi Regional Council, and the Toowoomba Regional Council and others.

On 18 October 2016 the Court made orders by consent splitting the Bigambul native title determination proceeding into two parts – Bigambul Part A and Bigambul Part B. Bigambul Part B comprised six parcels of land that were affected by the Full Court appeal from the judgment in *Doyle and others on behalf of the Iman People #2 v State of Queensland* ('*Iman*') [2016] FCA 13. On 1 December 2016 the Court made a consent determination of native title in *Doctor on behalf of Bigambul People v State of Queensland* [2016] FCA 1447 (Bigambul Part A).

The Full Federal Court decision in *Iman* [2016] FCAFC 189 delivered on 21 December 2016 was that grants made by the State were valid previous exclusive possession acts under s 23B of the NTA, and as such any native title rights and interests held with respect to the land and waters affected by those grants had been

extinguished. As a consequence of the *Iman* decision the parties in Bigambul Part B agreed that native title has been extinguished over all of the land and waters in Part B save for a number of parcels comprising approximately 92,853 hectares and located within in the Kumburilla, Waar Waar and Boondandilla State Forests. On 24 May 2017 the parties filed an agreement with the Court containing a proposed determination of native title with respect to the relevant areas.

The same evidence considered in determining Bigambul Part A was relied upon in Bigambul Part B. Reeves J was satisfied that the identification of the native title claimants, and the extent of their native title rights and interests, required by s 225(a) and (b) NTA respectively, were properly articulated.

The non-exclusive rights and interests recognised include the right to access, camp, hunt, fish and gather resources, and conduct ceremonies and maintain places of importance and areas of significance within the determination area.

The Bigambul Native Title Aboriginal Corporation ICN No 8479 is the nominated prescribed body corporate for the determination area.

Murray on behalf of the Yilka Native Title Claimants v State of Western Australia (No 6) **[2017] FCA 703**

22 June 2017, Hearing on Form of Determination, Federal Court of Australia, Western Australia, McKerracher J

In this case, McKerracher J ordered the first respondent prepare a final minute of determination reflecting the reasons for judgment, which held that one determination should be made in respect of the determination area; with one PBC to hold native title on behalf of both the Yilka and Sullivan claimant groups.

In 2016 following a lengthy contested hearing McKerracher J held that both the Yilka claimants and the Sullivan claimants hold exclusive native title (subject to extinguishment) across the respective claim areas (*Murray on behalf of the Yilka Native Title Claimants v State of Western Australia (No 5)* [2016] FCA 752) (*Yilka No 5*). McKerracher J concluded that subject to confirming certain extinguishment matters, there would be a determination that native title exists in relation to the determination area claimed by each applicant.

Following that decision, mediation between the Yilka applicant and the Sullivan applicant (and other parties) occurred primarily concerning the form of the determination and whether one or two Prescribed Bodies Corporate (PBCs) would be appropriate.

The Sullivan applicant contended that the Court should order: (a) one determination describing the two separately authorised claim groups as common law native title holders and (b) that each group of common law holders have their native title held in trust by their respective PBC. The Sullivan applicant submitted that the traditional

laws and customs of the Western desert society did not necessitate that the Yilka and the Sullivan claim groups effectively merge for the purposes of the determination. The Sullivan applicant further submitted that there was no reason if two PBCs were created that the two corporations could not make arrangements to develop a single interface as was the case in *Lovett on behalf of the Gunditjmara v State of Victoria (No 5)* [2011] FCA 932 (*Lovett*). The Sullivan applicant argued that if s 225(a) of the NTA provides that a determination of native title is a determination of *'*who the persons, or each group of persons, holding the common or group rights comprising native title' are, then each group should also have their rights and interests comprising the native title held in trust by each group's respective PBC.

McKerracher J stated that there can be more than one PBC in a single determination area (*Daniel v Western Australia* [2003] FCA 666). In *Lovett*, the Gunditjmara people resolved that the Gunditjmara PBC be the PBC for the purposes of the NTA and that it hold the native title of the Gunditjmara people in relation to the overlap area in trust with the Eastern Maar people who were also found to hold native title over the same area. The Eastern Maar people resolved to incorporate the Eastern Maar Corporation as their PBC. The Gunditjmara and the Eastern Maar peoples together resolved that the respective corporations would be the PBC in relation to each of their interests. In that case, North J held that s 56(2)(a) and s 57(2)(a) of the NTA allows for two PBCs.

McKerracher J noted that the form of the determination and whether there be one PBC or two (amongst other matters) was an issue within his Honour's discretion. His Honour noted that he had to deal with the most functional regulation of dealing in future between the two external parties.

His Honour said at [34]: 'Intra-indigenous issues are resolved between the common law holders in accordance with traditional law and custom, within the framework of the body corporate and the requirement of the *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth) and in accordance with agreed dispute resolution mechanisms.'

In *Yilka No 5* His Honour found that the Yilka claim and the Sullivan claim were in the nature of representative proceedings brought by the members of the claim groups for their respective rights and interests in reliance on their common membership of the Western Desert Cultural Bloc (WDCB) society (Yilka No 5 at [476] [494]-[495]). His Honour found that the Yilka and Sullivan claim groups 'native title [rights] in the determination area is indistinguishable and the evidence led by either applicant would have been sufficient to establish the existence of native title' at [37]. His Honour concluded that there is no need to refer to the separate claim groups in the determination.

The Yilka and Sullivan applications were pursued on the basis of the same traditional law and custom (at [45]). His Honour found that 'it would not be appropriate or necessary to state that the native title rights and interests of one applicant group are

independent of or additional to the rights and interests of the other' [at 48]. His Honour found that in this instance two PBCs was not appropriate otherwise non-native title parties would be required to negotiate twice with two different entities and such negotiations could lead to different outcomes.

His Honour ordered that a check of the status and currency of tenure be conducted prior to the determination and that the State, being the first respondent: prepare the final form of determination to reflect his reasons and the updated tenure information at [54]. The issue of costs was resolved as between the parties. His Honour concluded that it was time in his view that the two groups further developed this ability to work together and reach agreement.

Booth on behalf of the Kungardutyi Punthamara People v State of Queensland **[2017] FCA 638**

9 June 2017, Strike Out Application, Federal Court of Australia, Queensland, Jagot J

In this matter, Jagot J ordered: (1) Queensland South Native Title Services (QSNTS) and the Wongkumara People be joined as respondents to the proceeding pursuant to s 84(5) of the *Native Title Act 1993* (Cth) (NTA); (2) the application for a determination of native title be struck out pursuant to s 84C of the NTA; (3) the application for a determination of native title be summarily dismissed both as an abuse of process and (4) due to the applicants having no reasonable prospect of successfully prosecuting the proceeding within the meaning of s 31A(2) of the *Federal Court of Australia Act 1976 (Cth)*. Her Honour further ordered: (5) the applicants file and serve any written submissions and evidence in support as to why costs should not be ordered against them within fourteen days pursuant to s 85A of the NTA and (6) the applicants in QUD 52 of 2008 (the Wongkumara proceeding) and QSNTS, being respondents to this proceeding, file and serve and written submissions and evidence in reply in respect of costs within fourteen days.

Her Honour found that the application for a determination of native title did not comply with s 61 of the NTA because all of the applicants had not been authorised by all of the persons in the native title claim group and therefore the proceeding was liable to be struck out under s 84C(1) of the NTA. After considering the need for due prosecution of the application and the interests of justice in accordance with s 84D of the NTA, her Honour ordered that the defect in authorisation could not be permitted to continue.

The native title determination application on behalf of the Kungardutyi Punthamara People was filed on 4 November 2016. The respondents were the State of Queensland, and following an application by joinder granted by her Honour, Queensland South Native Title Services (QSNTS) and Clancy John McKellar and others behalf of the Wongkumara People.

The authorisation issue

Her Honour found that the Kungardutyi Punthamara application was not properly authorised by all members of the native title group in accordance with s 251B of the NTA and it did not meet the requirements of s 61(1). Her Honour found the notice for the meeting to authorise the Kungardutyi Punthamara application was incapable of resulting in authorisation from all of the persons who, according to traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed. Further, the notice was incapable of resulting in authorisation by a group that was likely to be representative of the views of the whole of the native title claim or being likely to provide all of the members of the native title claim group with a reasonable opportunity to decide whether to attend the meeting and participate in its deliberations. (See Reeves J *Burragubba on behalf of the Wangan and Jagalingou People v State of Queensland* [2017] FCA 373).

Her Honour further observed that it is necessary for a notice of a meeting for the purpose of authorising a native title claim to provide enough information to make potential members of the group aware of their potential membership.

Her Honour found that the Kungardutyi Punthamara people are part only of a wider regional society that includes the descendants of a number of ancestors identified in the Wongkumara application. At [34], her Honour stated that the 'Prevailing orthodoxy is that a mere sub set of the persons who, according to their traditional laws and customs, hold the common or group rights and interest comprising the particular native title claimed cannot authorise the making of a native title claim because they cannot by definition comprise all such persons'. See *Risk v National Native Title Tribunal* [2010] FCA 1589 at [29]-[30].

Her Honour also observed that it may be accepted that a part or a sub-set of a traditional society or community may be able to establish that the relevant part or sub-set has rights and interests possessed in relation to an area of land under the traditional laws and customs observed by a larger society (*Aplin on behalf of the Waanyi Peoples v Queensland* (2004) 207 ALR 539), but that this was not the position of the Kungardutyi Punthamara applicants. Her Honour found that the defect in authorisation in the Kungardutyi Punthamara application involved a matter of substance not of form and it would be contrary to the interests of justice to allow the application to proceed.

The abuse of process issue

Her Honour found that the Kungardutyi Punthamara application sought to re-litigate an issue already determined in earlier proceedings and that in itself constitutes an abuse of process. Jagot J characterised the application as vexatious and oppressive to QSNTS and the Wongkumara applicants.

No reasonable prospects for success

Section 31A(2) of the *Federal Court of Australia Act 1976* (Cth) requires a practical judgment by the Federal Court as to whether the applicant has more than a fanciful prospect of success. Her Honour concluded that the Kungardutyi Punthamara had no reasonable prospects of success because the application was not authorised as required and it was not in the interests of justice for the proceedings to be heard despite the lack of proper authorisation. Her Honour ordered that the application had no reasonable prospects of success because it involves an abuse of process which ought not to be permitted.

Ngan Aak-Kunch Aboriginal Corporation RNTBC v Glencore Bauxite Resources Pty Ltd (No 2) FCA 646

7 June 2017, Application for Costs, Federal Court of Australia, Queensland, Reeves J

In this matter, Reeves J ordered that the Ngan Aak-Kunch Aboriginal Corporation RNTBC pay the second respondent's costs of and incidental to the proceeding to be taxed or agreed. The respondents to the application were Glencore Bauxite Resources Pty Ltd, the State of Queensland and the National Native Title Tribunal.

Reeves J ordered the parties to file submissions on the question of costs after the Ngan Aak-Kunch Aboriginal Corporation RNTBC's originating application (which sought to have the application of the expedited procedure to the grant of a mineral development licence to Glencore Bauxite Resources Pty Ltd overturned) was dismissed in [2017] FCA 265 (*Ngan (No 1)*. Glencore, the first respondent, did not seek an order for costs and did not file any submissions. The State of Queensland as the second respondents filed submissions in which it sought an order that Ngan Aak-Kunch Aboriginal Corporation RNTBC pay its costs of and incidental to the proceeding. The State of Queensland argued that Ngan Aak-Kunch Aboriginal Corporation RNTBC had been wholly unsuccessful in the proceeding and that therefore the usual rule should apply that costs follow the event. In particular, it submitted that proceedings under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) are not proceedings to which s 85 of the *Native Title Act 1993* (Cth) (NTA) applies. It further submitted that Ngan Aak-Kunch Aboriginal Corporation RNTBC's application did not raise any issue of public importance about the construction of s 237 of the NTA and nor were there any special circumstances that would justify departure from the usual rule.

Ngan Aak-Kunch opposed the State's application for costs and submitted that the spirit of s 85A of the NTA should apply in this matter. Ngan Aak-Kunch submitted that its application raised a 'key question about whether the variation of conditions of a mineral development licence under the *Mineral Resources Act 1989 QLD* attracted the right to negotiate process in Part 2, Division 3, Subdivision P of the NTA, and

therefore that its application raised a matter of construction of the NTA despite the Court deciding against its application.

Reeves J rejected this argument and found that there is no basis for applying s 85A NTA in this matter. Accordingly His Honour ordered that Ngan Aak-Kunch pay the second respondent's costs of and incidental to this proceeding to be taxed or agreed.

2. Legislation

Commonwealth

Native Title Amendment (Indigenous Land Use Agreements) Act 2017

Status: The bill was assented to on 22 June 2017.

Stated purpose: An Act to amend the *Native Title Act 1993* (Cth) to respond to the Federal Court's decision in *McGlade v Native Title Registrar* [2017] FCAFC 10 by: confirming the legal status and enforceability of agreements which have been registered by the Native Title Registrar on the Register of Indigenous Land Use Agreements without the signature of all members of a registered native title claimant (RNTC); enable the registration of agreements which have been made but have not yet been registered; and ensure that area Indigenous Land Use Agreements can be registered without requiring every member of the RNTC to be a party to the agreement.

Native title implications: The legislation amends the *Native Title Act 1993* (Cth) to restore the validity of previously registered Area Indigenous Land Use Agreements that were invalidated by the Full Federal Court decision in *McGlade*.

For further information please see the Second Reading Speech.

States and Territories

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

3. Native Title Determinations

In June 2017, the NNTT website listed 1 native title determination.

Short Name (NNTT)	Case Name	Date (NNTT)	State	Outcome	Legal Process	Type	RNTBC/ PBC
Bigambul People Part B	Doctor on behalf of the Bigambul people v State of Queensland [2017] FCA 716, 23 June 2017	23/06/2017	WA	Native title exists in the entire determination area	Consent	Claimant	Bigambul Native Title Aboriginal Corporation

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 29 June 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	26	3
Queensland	81	0
South Australia	15	1
Tasmania	0	0

State/Territory	RNTBCs	No. of successful (& conditional) claimant determinations for which RNTBC to be advised
Victoria	4	0
Western Australia	41	1
NATIONAL TOTAL	**173**	**5**

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 29 June 2017.

5. Indigenous Land Use Agreements

In June 2017, 1 ILUAs were registered with the National Native Title Tribunal.

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
22/06/2017	Waanyi-Burke Shire Council (Gregory Solar Farm Project ILUA)	QI2017/003	Body Corporate	QLD	Government

For more information about ILUAs, see the NNTT website and the ATNS Database.

6. Future Acts Determinations

In June 2017, 7 Future Acts Determinations were handed down.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
19/06/2017	St Ives Gold Mining Company Pty Ltd and John Walter Graham & Ors on behalf of the Ngadju People and Western Australia	WF2016/0012	WA	Future act may be done subject to conditions	Ngadju contended that the grant of the proposed lease will have a significant effect on their way of life, culture and traditions, having regard to the cumulative effect of successive grants of mining interests in the St Ives area. SIGM argued that the impact of other grants outside the land and waters concerned is irrelevant and the evidence suggests the effect on Ngadju's way of life, culture and traditions would be negligible. The State submitted that any effects will be mitigated by the relevant regulatory regime. Member McNamara decided the grant of the proposed lease may be done subject to the conditions set out in Annexure A of the decision.
14/06/2017	Rona Charles and Others on behalf of Mount Jowlaenga Polygon #2 and Sheffield Resources Ltd and Western Australia	WF2016/0014	WA	Future act may be done	Sheffield Resrouces Ltd sought a determination that proposed mining lease M04/459 may be granted. Member McNamara found that there was nothing in the material that shows contemporary use of the area by Mount Jowlaenga claimants. Member McNamara found that access to the area has been, and continues to be, very limited due to the pastoral activities taking place there. The Member was satisfied that Mount Jowlaenga would still have access to areas within the proposed mining lease, albeit somewhat reduced. Member McNamara found it unlikely the grant of the mine will affect Mount Jowlaenga's way of life, culture and traditions and was satisfied that the grant of the proposed mining lease is likely to have some positive impacts on Mount Jowlaenga's development of social, cultural and economic structures. The Member concluded that the future act may be done.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
06/06/2017	Kevin Allen and Others (Njamal) and Sorrento Resources Pty Ltd and Western Australia	WO2015/0886 WO2016/0481	WA	The future act is an act attracting the expedited procedure	Njamal contended that they carry out community and social activities on the licence areas and submitted that the licences are 'rich in a number of different types of bush tucker and bush medicines', which means the area is used 'intensively and frequently for community and social activities.' Member Shurven concluded that there was insufficient evidence before her to establish Njamal undertake social or community activities on the licences to an extent that they may be substantially interfered with by Sorrento Resources' activities. Consequently she determined that the grant of exploration licence E45/4681 to Sorrento Resources is an act attracting the expedited procedure.
02/06/2017	Kevin Allen and Others (Njamal) and Exterra Resource Limited and Western Australia	WO2016/0942	WA	The future act is an act attracting the expedited procedure	Njamal lodged an objection to the expedited procedure as the exploration licence is wholly overlapped by the Njamal claim group's native title claim. Njamal contended that they carry out community and social activities on the licence areas. Member Shurven determined that the future act is able to coexist with community activities and therefore that the act is an act attracting the expedited procedure.
01/06/2017	Kevin Allen and Others (Njamal) v Wrasse Resources Pty Ltd and Western Australia	WO216/0482	WA	The future act is an act attracting the expedited procedure	Njamal lodged an objection to the expedited procedure as the exploration licence is wholly overlapped by the Njamal claim group's native title claim. Njamal contended that they carry out community and social activities on the licence areas and submitted that the licences are 'rich in a number of different types of bush tucker and bush medicines', which means the area is used 'intensively and frequently for community and social activities.' Member Shurven determined that the future act is able to coexist with community activities and therefore that the act is an act attracting the expedited procedure.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
01/06/2017	Kevin Allen and Others (Njamal) and Exterra Resource Limited and Western Australia	W2016/0936	WA	Objection to expedited procedure dismissed	The area of the proposed licence is wholly overlapped by the Njamal claim group's native title claim. Neither contentions nor evidence were received from the Njamal claim group by 16 May 2017. On 17 May 2017, the State wrote to the Tribunal and all parties requesting the objection be dismissed because the Njamal claim group had failed, within a reasonable time, to proceed with the objection or comply with the Tribunal's directions. In the circumstances, the Member determined that the Njamal claim group was given sufficient opportunity to comply with directions set by the Tribunal, and it would be unfair to prejudice the other parties with further delays. The objection application against exploration licence E45/4790 was dismissed, according to s 148(b) of the *Native Title Act 1993* (Cth).
01/06/2017	Teddy Allen and Others (Njamal People #10) and Cullen Exploration Pty Ltd and Western Australia	WO2016/0203	WA	The future act is an act attracting the expedited procedure	Njamal contended that the grant of the licence, would allow Cullen Exploration to access and use its vehicles and other machinery on the area and would impact Njamal's ability to access the licence and conduct community and social activities there. Member Shurven found there was insufficient evidence to establish Njamal undertake social or community activities on the licence areas to such an extent or in such a manner that they may be interfered with by activities of the explorer. Member Shurven determined that the grant of exploration licence E45/4626 to Cullen Exploration Pty Ltd is an act attracting the expedited procedure.

7. Publications

University of Western Australia

Crosscurrents: Law and Society in a Native Title Claim to Land and Sea

This book by Katie Glaskin traces the path of a native title claim in the Kimberley region of Western Australia – Sampi v State of Western Australia – from its inception to resolution, contextualising the claim in the web of historical events that shaped the claim's beginnings, its intersection with evolving case law, and the labyrinth of legal process, evidence and argument that ultimately shaped its end.

For further information, please visit the UWA Publishing 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.

9. Events

Centre for Social Impact, University of Western Australia

Social Impact Festival 2017

The Social Impact Festival is a platform for cutting-edge knowledge and ideas, for celebrating those initiatives creating positive social change in Australia and abroad, and for generating and sharing insights needed to address complex social problems.

A number of events on Friday 21 July are native title focused, including 'Indigenous Land and Economic Empowerment 25 Years After Mabo'; 'Optimising Native Title Asset Management Structures'; 'From Mabo to the Uluru Statement from the Heart Panel Discussion' and 'Destination Native Title: What is the price of the journey?'.

Date: 18-28 July 2017

Location: Various, Perth WA

For more information and to register for events, please visit the festival website.

World Indigenous Peoples Conference on Education

The conference attracts highly regarded Indigenous education experts, practitioners, and scholars. As a result, WIPCE is the largest and most diverse Indigenous education venue in the world. The conference continues to lead the discussion on contemporary movements in education that support Indigenous worldviews.

Date: 24-28 July 2017

Location: Toronto, Canada

For further information, please visit the conference website.

Australian Anthropological Society (AAS), Association of Social Anthropologists (ASA) and Association of Anthropologists of Aotearo/New Zealand (ASAANZ)

AAS / ASA / ASAANZ Conference 2017 - Shifting Shapes

Three anthropology associations (AAS, ASA and ASAANZ) are collaborating to put on an international conference in December 2017, bringing together anthropologists and members from across Australia, New Zealand, the UK and Commonwealth and beyond.

Date: 11-15 December 2017

Location: University of Adelaide

The call for papers closes 24 July 2017. For more information, please visit the conference 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.