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AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

WHAT'S NEW IN NATIVE TITLE

November 2017

1. Case Summaries

Henwood v Northern Territory of Australia [2017] FCAFC 182

27 November 2017, Application for Extension of Time and Leave to Appeal, Federal Court of Australia, Northern Territory, Jagot, Griffiths and Mortimer JJ

In this matter Jagot, Griffiths and Mortimer JJ granted an extension of time and leave to appeal the decision of the primary judge to dismiss nine native title applications for lack of prosecution with due diligence: see *Bulabul on behalf of the Kewulyi, Gunduburun and Barnubarnu Groups v Northern Territory of Australia* [2017] FCA 461. Their Honours dismissed the appeal.

The appeal raised important issues concerning the interaction between the power of the Court to dismiss an application where there has been a failure to prosecute the proceedings with due diligence and the operation of relevant provisions of the *Native Title Act 1993* (Cth) (NTA). In particular, those provisions relate to the right of the applicants to negotiate with respect to future acts under Subdiv P of Div 3 of Pt 2 of the NTA.

Initially there were 27 native title applications from the Northern Territory invited to show cause for why the proceedings should not be dismissed and nine of those applications were subsequently discontinued. The decision to dismiss the nine s 29

NTA polygon claims was on the basis that they were not prosecuted with due diligence by the Northern Land Council (NLC). The decision was not based on the merits of the claim and does not prevent future applications over the areas.

The appellants challenged the finding of the primary judge that the native title applicants would not suffer any prejudice from the dismissals. The Court was not satisfied that the appellants demonstrated any appealable error as per *House v the King (1936)* 55 CLR 499, as there were no future acts underway. The Full Court found at [31] that 'it is unarguable that the primary judge did not take into account the fact that dismissal of the applications would result in the appellants' loss of the right to negotiate. His Honour evaluated the weight and significance of that right in the particular circumstances of the case and by specific reference to the finding that it was unclear whether MacMines would be able to engage in the relevant exploration activities having regard to the [hydraulic fracturing of unconventional gas reservoirs (fracking)] moratorium. In view of the evidence below, it was reasonably open to the primary judge to make that finding.'

Their Honours also rejected the second, third and fourth grounds of appeal on the basis of a finding of no current activity and the fifth ground for appeal was dismissed on the basis that the appellant's had misunderstood the primary judge's reasons for judgment. For the six and seventh grounds of appeal, the appellant argued that the primary judge had failed to consider the significant lack of resources for the NLC to prosecute the claims but this was rejected. The eighth ground for appeal was that the primary judge concluded that the applications would most likely never be prosecuted. The appeal Court rejected the appellant's assertions that the judge had undertaken an irrelevant consideration as to the likelihood that the claims would ever be prosecuted. To succeed on these grounds the appellants would need to establish that the judge was prohibited from so considering which the Court found they had not done so.

The appellants also contended that the primary judge acted inconsistently with the order made in October 2016 to the effect that any respondent who wished to be heard at the hearing in March 2017 needed to file and serve a notice, and that if they did not the Court would assume that the party took a neutral stance on the issue of whether an application should be dismissed. The Full Court rejected this assertion.

For these reasons the nine appeals were dismissed and in the absence of any active respondents, no order was made as to costs.

Manado on behalf of the Bindunbur Native Title Claim Group v State of Western Australia [2017] FCA 1367

23 November 2017, Connection and Extinguishment, Federal Court of Australia, Western Australia, North J

In this matter, North J held that the Bindunbur and Jabirr Jabirr, but not the Goolarabooloo Native Title Claim Group, hold native title rights and interests across the mid-dampier Peninsula, Western Australia. The three applications filed in 2013 on behalf of the groups were heard together. The respondent parties were the State of Western Australia, the Commonwealth and the Shire of Broome.

The hearing program ran for 21 months from September 2015 to November 2017 and included on country evidence, closed gender-specific sessions, comprehensive written submissions and oral evidence and expert anthropological evidence.

The respective native title holding groups consist of the descendants, including by adoption, of apical ancestors who were members of a society comprised or included people who identified themselves as members of one or more of the following peoples: Jabirr Jabirr, Ngumbarl (Nyombal), Nyul Nyul or Nimanbur.

The evidence from the Bindunbur and Jabirr Jabirr Aboriginal witnesses, combined with expert evidence, demonstrated that rights and interests in land are held at the local level in family estates known as bur, burr or buru. This system of local land tenure had been documented historically and was captured in the expert evidence. At the sub-regional level the Bindunbur and Jabirr Jabirr applicants have rights and interests in land as members of language groups. In respect of the Jabirr Jabirr application area the language groups are Jabirr Jabirr and/or Ngumbarl. North of that area in the Bindunbur application area are people in the Nyul Nyul and Nimanbur language groups.

Connection

In this case, a large number of the members of the Bindunbur, Jabirr Jabirr and Goolarabooloo claim groups, across a range of age, seniority, knowledge and experience, gave evidence. North J noted at [44] that even with the dispute between Bindunbur and Jabirr Jabirr, on one hand, and the Goolarabooloo, on the other (summarised below), the evidence was credible and consistent, and the case was largely resolved based on the evidence of the 44 Aboriginal witnesses.

An additional nine expert witnesses were called: primary anthropologists (Dr James Weiner, Mr Geoffrey Bagshaw, Ms Catherine Wohlan, Dr Fiona Skyring, Dr Janelle White, Professor Scott Cane), a historian, a heritage anthropologist and archaeologist (Dr Nicholas Green) and a professor of ethnography, specialising in discourse analysis (Professor Stephen Muecke). Professor Peter Sutton submitted evidence on behalf of the State of Western Australia.

The written reports of Mr Bagshaw, Dr Weiner, Dr White and Professor Sutton generally supported the conclusion that the Goolarabooloo applicants have not

acquired rights and interests in land under traditional laws and customs. That expert view also reflected the evidence of the Bindunbur and Jabirr Jabirr Aboriginal witnesses. Furthermore, it also reflected the evidence of most of the Goolarabooloo Aboriginal witnesses.

The written reports of Professor Cane, however, reflected the conclusion that the Goolarabooloo applicants have acquired rights and interests in land under traditional laws and customs. Professor Cane presented a model of land tenure not based on patrifilial family estates as argued by Professor Weiner, rather that the earlier ethnographic accounts suggested a broad and loose association of people indicative of a flexible territorial association of family in and around a few named places or a named area. The case of the Goolarabooloo applicants followed the approach articulated by Professor Cane in his written reports. Some of the foundations of Professor Cane's approach were not accepted by the Court.

It was common ground among all the parties that the Bindunbur and Jabirr Jabirr people have native title rights and interests, subject to questions of extinguishment, in the Bindunbur and Jabirr Jabirr application areas respectively.

The Goolarabooloo application

The Goolarabooloo application area is entirely within the Jabirr Jabirr claim area. The claim rests on the story of the arrival in part of the Jabirr Jabirr application area of Mr P Roe and his wife MP in about 1930. Mr P Roe was a Nyikina man and his wife was a Karijarri woman. The family of Mr P Roe hold the belief that he was given the role of custodian of the Goolarabooloo application area shortly after his arrival by the old people then living in the area. Mr P Roe acquired ritual and mythological knowledge and became a ritual leader in the Northern Tradition and a senior Law man. Mr P Roe and his wife MP had two daughters, Teresa and Margaret. Ms Teresa Roe is now a senior Law woman. She acquired rayi from around Bindingankun, Yellow River.

The Goolarabooloo applicants claimed native title rights and interests in several ways:

1. Descent from Mr P Roe;
2. By succession following the custodianship granted by the old people of the area to Mr P Roe;
3. The acquisition of ritual and mythological knowledge, first by Mr P Roe and then, in the present day, by his grandsons, Mr Phillip Roe, Mr Richard Hunter and Mr Daniel Roe; and
4. From the rayi connection of Ms Teresa Roe.

The latter two pathways do not create entitlements in all of the Goolarabooloo people or to the entirety of the Goolarabooloo application area.

Each of these pathways must be grounded in traditional laws and customs founded in the normative rules that existed before the assertion of sovereignty: *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*). The issue raised in this case was whether the rights and interests as claimed by the Goolarabooloo were acquired under the traditional laws and customs of the Jabirr Jabirr people at sovereignty.

His Honour found that the evidence shows that the land is held under traditional laws and customs at the local level in patrifilial family estates known as bur, burr or buru. Subject to the limited exceptions for child adoption and succession, rights in land are acquired under traditional laws and customs only by descent. The limited exception concerning succession applies only where the land holding group has died out but the evidence established that the Jabirr Jabirr had not died out at the time that Mr P Roe arrived in about 1930. He therefore did not acquire rights in land by succession at that time. Further, a person does not acquire rights or interests in land under the traditional laws and customs by reason of appointment or exercise of the role of custodian and, on a balance of probability rationale, the evidence did not establish that Mr Roe was appointed as a custodian, nor that he or his descendants would acquire rights and interests to the Goolarabooloo application area.

The Bindunbur and Jabirr Jabirr applicants, with whom the State and the Commonwealth agreed, denied that the applicable traditional laws and customs entitled the Goolarabooloo applicants to native title rights and interests.

There are specific issues on matters of descent, genealogical memory, succession and custodianship that arose in the case from the opposing positions of the Jabirr Jabirr and Bindunbur applicants, on one hand, and the Goolarabooloo applicants on the other hand.

Descent

The question raised in the dispute was ‘is descent the only way of acquiring rights and interests in land under the traditional laws and customs?’ North J relied primarily on the authenticity of the Aboriginal voice, in which all of the witnesses, male and female, senior and junior, Jabirr Jabirr, Nyul Nyul, and Nimanbur said that under traditional laws and customs, rights and interests in land can only be acquired by descent including by adoption.

A Goolarabooloo witness, a senior Bardi and law man, also gave evidence that said descent was the only way of acquiring rights in land. Other Goolarabooloo witnesses acknowledged that descent was a way of acquiring rights to land.

Within the expert evidence, Dr Weiner argued that the contemporary adaptation of the older patrifiliation is family estate groups that are not strictly recruited along the male line; however recruitment to one’s father’s estate is still normative. Mr Bagshaw’s evidence supported this position. Both Dr Weiner and Mr Bagshaw concluded that additional factors, such as marriage, co-residence, place of birth and/or spiritual connection were not sufficient conditions for membership to the

group. Therefore, for a person to validly identify with a particular language group and its territorial domain in that area, they must be a recognised descendent of at least one of the individuals who was identified.

North J concluded that that the traditional laws and customs of the Bindunbur and Jabirr Jabirr peoples prescribe that the only way of acquiring rights and interests in land, subject to the child adoption and succession exceptions, was and continues to be by descent.

Genealogical memory

North J considered whether the traditional laws and customs require descent back to time immemorial or only to remembered recent ancestors.

The Bindunbur and Jabirr Jabirr applicants claimed that the traditional laws and customs prescribed that rights and interests in land could only be acquired by descent where the descent was back to time immemorial. On that basis the Goolarabooloo applicants did not acquire rights in the land of the Goolarabooloo application area because they could not trace their ancestry back to people from the area beyond Mr P Roe. The Goolarabooloo applicants contended that shallow genealogical descent was sufficient. Professor Cane supported this view and argued that the requirement for descent is based on a shallow generational memory: 'people remember back to their grandparents and perhaps their great-grandparents. It is that memory that defines the line of descent. It also defines the limit of the necessary descent' [295]. Professor Cane made an argument he has applied to the Western Desert: 'social and territorial organisation had to accommodate the extreme and changing nature of the Dampier Peninsula environment and that a more formal regime of patrilineal descent based on deep ancestral memory was too rigid to achieve the flexibility necessary for long-term survival in that marginal, changeable environment and was effectively sidelined by other, multiple, forms of individual connection giving rise to rights and interests in land' [297].

The State argued that this was a remembered historical ancestral connection but not a philosophy of perpetual descent from the beginning of time.

North J did not accept the climatic evidence was certain enough to drive the model proposed by Professor Cane and that the Binbunbur and Jabirr Jabirr applicants established that the laws and customs of the society of the application areas provide for the acquisition of rights and interests in land only by descent and from ancestors back to time immemorial (with exception to adoption).

North J held that the Goolarabooloo applicants have not acquired rights or interests in the Goolarabooloo application area on the basis of the traditional laws or customs concerning descent.

Succession

His Honour considered the traditional laws and customs concerning succession. Bindunbur and Jabirr Jabirr applicants filed contentions in identical terms that

succession occurs in the local area of a formerly neighbouring or closely related nearby local group, when a local group becomes extinct. They argued that the Goolarabooloo applicants did not acquire rights and interests in land by succession because they were not a neighbouring or closely related local group, and the Jabirr Jabirr were not extinct when Mr P Roe came to the Goolarabooloo application area in about 1930.

The Goolarabooloo applicants, supported by Professor Cane, contended that Mr P Roe 'acquired native title rights and interests in the Goolarabooloo application area from Jabirr Jabirr and Ngumbarl people through a process of succession commencing in the 1930s when those persons became so reduced in numbers that they were no longer able to independently hold the mythical or ritual knowledge of the area or maintain responsibility for the places, areas and things of mythological or ritual significance in the area' [306]. Whereas, they argued, Mr Roe was able to look after country and the law in that area.

The witnesses explained that the land cannot be 'given away' when people are still there. The Goolarabooloo witnesses also gave evidence about the inalienability of land and the conference of experts all agreed that land was inalienable and could not be treated as a chattel to be given away.

The evidence established that under traditional laws and customs, country is inalienable and cannot be given away. Succession only applies to a neighbouring group if the original group is extinct.

Custodianship

The question arose about whether rights and interests in land could be acquired by custodianship. The recurring theme in the evidence of the Bindunbur and Jabirr Jabirr Aboriginal witnesses was that custodianship did not confer rights or interests in land. The Goolarabooloo witnesses explained that they considered Mr Roe a caretaker and that he acquired rights through this system, but were ambiguous about whether this became a transferable system of rights through descent.

Professor Cane argued that rights and interests can be acquired by succession and that Mr Roe was the regent in this process for the Goolarabooloo situation. He then went on to say that the evidence suggests succession takes a long time and is a process that is unlikely to be realised in the lifetime of the original successor – as the 'regent' will always be remembered as from somewhere else. His children and their children will not be so labelled. They will, in the new and established circumstance (created by the initial succession) be 'from country' as a consequence of inheritance and other traditional mechanisms of association.

Whereas Professor Sutton argued that by comparing this case of argued succession with elsewhere in Australia, the Goolarabooloo situation does not include regular features of incorporation or succession, such as adopting the local estates, language and totems. Whereas the Goolarabooloo claim area includes parts of Ngumbarl and Jabirr Jabirr – different to the older estate areas.

North J considered the evidence on whether Mr Roe was a custodian; however since it was established that custodianship does not confer rights and interests in land, that evidence is not included in this summary.

The Court concluded that custodianship was a recent idea for witnesses without a clear explanation of the traditional laws and customs that relate to the case presented for custodianship by the Goolarabooloo witnesses and Professor Cane. Furthermore, the evidence was consistent and clear that if country were given to a person to look after, that person would not, under traditional laws and customs, acquire rights and interests in land. Subject to the exceptions not presently material, descent was the only way rights and interests to land could be acquired.

Rayi connection

The Goolarabooloo applicants pleaded that the traditional laws and customs acknowledged and observed by the members of the regional society include a rule that rights and interests may be possessed by a member of the regional society in relation to a particular area of land or waters where that person is connected to the area by rayi.

Broadly stated, rayi can be understood as a spiritual phenomenon that can lead to a personal attachment to a particular place or animal. This understanding was supported by the Bindunbur and Jabirr Jabirr witnesses. In the conference of experts, all the experts apart from Professor Cane, agreed with the proposition that a rayi connection not in a person's own local area or language territory is limited to a personal connection to the place that gives rise to an expectation that members of the local or language owning group on whose country the place is located will not refuse the person access to visit and otherwise maintain the personal connection to the particular place.

The Goolarabooloo applicants responded to the Bindunbur and Jabirr Jabirr applicants' primary argument by comparing the situation of a rayi connection holder to a complete stranger to the country in question. Whereas the latter needs express permission or a licence from the descent-based owners to access country, the evidence was that a rayi connection holder was not subject to control or licence.

This raises the question of whether rayi rights and interests, in the sense of being reciprocal status rights were native title rights. In *Akiba v Queensland* [2010] FCA 643 (*Akiba*), 'tebud' relationships – a form of customary trading – gave rise to reciprocal rights and interests that were sanctioned by traditional law and custom. However, in *Western Australia v Ward* [2002] HCA 28, the primary judge found that these rights were not rights and interests in land and waters – native title rights – they are rights in relation to persons. They are ultimately regulated by the relationship between the broader rights holding descent group and the individual, not the individual to land. This was upheld in *Akiba* with status based 'tebud' rights.

North J reached the conclusion that the rayi connection confers a relational right contingent on the core rights holders by descent; therefore not native title rights and not determinative in this matter.

Spiritual/mythical knowledge and rights

The Goolaraboolloo applicants' case was that a person who holds mythical or ritual knowledge and experience of an area and is responsible for places, areas and things of a mythological or ritual significance in the area holds rights and interests in that area.

The Goolaraboolloo contentions specified the song cycle path along the coast of the Goolaraboolloo application area from near Bindingankun to Willie Creek as an area for which men initiated in the Northern Tradition have a responsibility to look after, care for, protect and maintain. The Goolaraboolloo senior male witnesses primarily speak for, make decisions about matters affecting, and are primarily responsible for looking after, caring for, protecting and maintaining the song cycle path and claim native title rights via the laws and customs that provide the framework for law bosses.

However, the Bindunbur and Jabirr Jabirr applicants maintained that under their traditional laws and customs ritual leaders and people with mythical knowledge or responsibilities do not acquire rights or interests in land as a result of that status. Rights and interests in land are acquired, subject to the exceptions previously discussed, by descent alone. More specifically, being a senior law boss involves acting with others who have authority for that area and earning the respect and support of others, but it does not make one an owner for that area.

Mr Bagshaw argued that ritual rights are the collective property of all those persons that subscribe to it and senior law bosses act in a supervisory and instructional way in respect of ritual performances. Furthermore, such a role is limited in geographical scope and performed under the authority of the rights holders by descent.

Professor Cane ultimately argued that religious or ceremonial rights are 'of paramount importance, over and above, in my opinion, quotidian rights acquired through descent' [572].

North J concluded that:

- Under traditional laws and customs, law status does not confer native title rights in land.
- Law men and women are highly regarded for the knowledge of the Law and care for specific places.
- People may seek advice in relation to those specific areas from law bosses and law bosses act collectively in giving such advice.
- Authority is limited to the Law grounds and other sacred places. It does not extend to the whole of the application areas.
- The estate holders have the final say.

- The evidence of the Goolarabooloo witnesses did not support the pleaded case – it concerned what law men are required to do rather than whether they hold rights to land.

Lacedpede Islands and surrounding seas

There was a dispute between the Bindunbur applicants and the State as to whether native title exists in relation to the Lacepede Islands and the surrounding seas which is dealt with in section 13 of the reasons for judgment. The Lacepede Islands are a collection of four small islands (West Island, Middle Island, Sandy Island and East Island) located north-west of the Dampier Peninsula in the Indian Ocean.

The Bindunbur applicants contended that the evidence established that the Jabirr Jabirr and Nyul Nyul had an historical and continuing connection with the Lacepede Islands. The State argued that the evidence did not establish such a connection; rather that the connection probably arose after or as a result of white settlement. The State relied on what it argued were inconsistencies in the evidence as to the way, and the time at which, the islands were accessed. However the weight of the evidence still established that the Bindunbur and Jabirr Jabirr people accessed the Lacepede Islands by rafts for hunting turtles and turtle eggs.

The other issue was whether, as the State contended, the evidence demonstrated that any rights and interests in the Lacepede Islands are held by the Jabirr Jabirr and/or Nyul Nyul together with the Bardi. Most of the witnesses saw the Bardi as sharing in the use of the islands. But it is not clear that these witnesses were referring to the Bardi holding rights and interests in the islands as owners.

North J considered that the evidence established on the balance of probabilities that the Jabirr Jabirr and Nyul Nyul people have native title rights and interests in the Lacepede Islands.

Language groups as land holding groups

There was a dispute between the Bindunbur and Jabirr Jabirr applicants on the one hand, and the State on the other, as to whether the determination should identify land holders by reference to language groups.

The Commonwealth adopted the position of the State regarding the identification of the land holding groups by reference to language. The main arguments of the Bindunbur applicants were that the allocation of land among the Jabirr Jabirr, Nyul Nyul, and Nimanbur people within the Bindunbur application area is an intra-mural issue, that the boundaries proposed do not accord with the evidence, that the people of the area have numerous interconnecting relationships not reflected in the proposed order, and that the allocation of people to country would freeze interests for all time in a rigid way which does not reflect the laws and customs of the people.

The primary point made by the State is that the evidence demonstrated that people identified with areas within the Bindunbur application area by reference to language group. Thus, for instance, a Nimanbur person would claim rights in Nimanbur country

but would not claim rights in Nyul Nyul or Jabirr Jabirr country. In response, the Bindunbur applicants contended that the native title rights and interests determined by the Court would be held in accordance with traditional laws and customs, and the application of those laws and customs would prevent any such confusion or uncertainty.

North J determined that the State's position should be accepted. The determination should specify the land holding areas by reference to language identity.

Extinguishment

Section 212, NTA

The State argued that the purpose of s 212(2) of the NTA is to ensure that existing public access to areas of recreation such as beaches and waterways could continue even if that continued access impaired the unfettered exercise of native title rights and interests. The applicants contended that if the construction of s 212(2) proposed by the State is correct and the section does not deal with existing rights but rather with activities and practices, then the section is not concerned with interests as defined by s 253 of the NTA and the activities and practices should not be included in the determination as other interests.

North J said in view of the width of the definition of other interests in s 253 of the NTA, the public access referred to in s 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) is likely to have been intended to fall within the definition. Further, the purpose of s 225(c) of the NTA is to require identification of the interests which must coexist with the native title interests and thereby to allow notification to those concerned of the relationship between the two sets of interests so that people may regulate their conduct accordingly. Therefore, leave was granted for the parties to attempt a greater degree to identify the geographical areas of the public access locations.

Location of intertidal zone

The State sought a form of determination which lists the areas of unallocated Crown land within the intertidal zone in which no exclusive native title rights and interests exist. The applicants opposed the proposal, submitting that the determination should state that the high water mark is the boundary between the relevant unallocated Crown lots and the intertidal zone. If the need arises for the boundary to be fixed with certainty for some particular purpose in the future, that can be attended to at the time.

Two considerations arose from the difference between the parties. The first is that the high water mark location will vary from time to time due to tide fluctuation. The second is whether the proposed fixed high water mark is in accordance with the common law definition. The evidence did not establish that the high water mark used for the determination proposed by the State reflects the common law definition of high water mark. Therefore it does not correctly mark the location of the intertidal

zone. This issue was left open for further evidence, potential agreement between the parties, or, if not, adjudication by the Court.

Pastoral leases – valid future acts?

There are three existing pastoral leases in the application area, namely, Mount Jowlaenga (N050161), Kilto (N050224) and Country Downs (N050014), each of which commenced on 1 July 2005. Each of the pastoral leases were preceded by former leases which ended on 30 June 2015. It is common ground that the existing pastoral leases are other interests within the meaning of s 225(c) of the NTA and should be so recorded in the determination.

The applicants contended that each of the existing pastoral leases were not valid future acts because the renewals created a larger proprietary interest in the land and waters than was created by each of the former pastoral leaseson the basis of temporality. North J considered at [667] that 'the term of a lease is not the proprietary interest. The term has the effect of prescribing how long the proprietary interest will last. The proprietary interest is the right in the land, not the length of time for which it lasts.' His Honour found that each of the temporal aspects of the renewal was shorter than the temporal aspect of the former leases. If the temporal aspect is part of the proprietary interest, then comparing the former leases with the renewals demonstrates that the renewals have a lesser, not greater, temporal aspect than the former leases; therefore the applicants arguments were not sustained.

Section 47B(1)(c)

Section 47B(2) of the NTA provides that, in certain circumstances, any prior extinguishment of native title rights and interests on unallocated Crown land (UCL) by the creation of any interest, must be disregarded. One of the conditions for the operation of the section is that, when the application for a determination of native title was made, one or more members of the native title claim group 'occupied the area'.

After oral evidence by the Bindunbur and Jabirr Jabirr applicants, the Court found that the applicants did establish evidence of occupation for: UCLs 78, 138, 140, 141, 143, 147, 148, 150, 151, and 152, UCL 139, and UCL 14; however the applicants did not establish occupation of UCL48 and UCL 2.

Broome Shire Council and extinguishment

In the written submissions filed by the Shire a large number of works mainly connected with the Broome-Cape Leveque Road were said to have extinguished native title. By agreements made between the parties, the number of works in issue was narrowed very considerably. In the end the Shire argued that five pits, two bores, two camps and a grader parking area on roads in the application areas extinguished native title; however their evidence did not establish that the other works listed above had extinguished native title.

Also, the Shire contended that the right of any person to use the ungazetted roads should be included in the determination as an 'other interest', within the meaning of s

253 of the NTA, pursuant to the requirement in s 225(c) of the NTA. The applicants opposed a reference to any public right to use the ungazetted roads because the roads were not established by any statutory process or at common law, and hence, there is no public right of use. The applicant's argument was accepted.

North J ordered that that the parties file and serve proposed orders and a draft determination reflecting these reasons for judgment and noted the opportunity for the parties to apply to the Court for the determination of any of the matters referred to in [628], [645], [656], [670] and [734] which are not agreed between the parties.

Akiba on behalf of the Torres Strait Regional Seas Claim v State of Queensland [2017] FCA 1336

15 November 2017, Practice and Procedure, Federal Court of Australia, Queensland, Mortimer J

In this matter, Mortimer J refused an interlocutory application made by the Torres Strait Regional Authority (TSRA) to change the venue for the hearing of a case management hearing from Thursday Island to Mer Island.

This proceeding related to Part B of the Torres Strait Regional Sea Claim. Part A was determined by Finn J in *Akiba v Queensland (No 3)* [2010] FCA 643. Finn J separated the claim into Parts A and B, as the waters covered by Part B overlapped with the native title claims filed by the Kaurareg and Gudang Yadhaykenu Peoples, which have since been discontinued.

The remaining living applicant, Mr Leo Akiba was authorised to represent only the Top Western Islands in the claim: Saibai, Boigu and Dauan. In the proceeding, Mr Akiba filed an affidavit stating that he is not authorised to speak for the Part B Sea Claim and despite the High Court making final orders in August 2013 no application pursuant to s 66B of the *Native Title Act 1993* (Cth) has been made.

In 2014 Gilkerson Legal was retained by the applicant to replace Peter Krebs, TSRA Principal Legal Officer. The TSRA engaged anthropologists for Part B of the Sea Claim and overlapping areas. In mid-2017 TSRA retained Just Us Lawyers as its legal representatives and a change of lawyer form was filed by them in relation to QUD6040/2001. In June 2017 Just Us Lawyers advised Gilkerson Legal that it had retained Professor David Trigger as an anthropologist.

Four years have passed since the conclusion of Part A and more than 16 years since the claim was lodged. Mortimer J advised the parties in September 2017 that the Court would hold a case management hearing involving all seven of the Torres Strait Island claims in the Magistrates Court on Thursday Island for some considerable expense. No objection was made by the TSRA at this time.

The interlocutory application was filed by Just Us Lawyers on behalf of the TSRA in the Part B Sea Claim, in which the TSRA is named as an Indigenous respondent

party. Her Honour was not persuaded at [55] that that 'is an accurate description to use in relation to a federal statutory authority.'

Her Honour observed at [58] that: 'the confused and inconsistent identification of which lawyer is filing material and on whose behalf, reflects what might appear to be some conflict of interest issues, or at the very least, a worrying confusion in roles as between lawyers within the TSRA and lawyers outside it.'

The interlocutory application sought new orders listing the case management conference for Mer rather than Thursday Island for cultural reasons but no cogent or substantive reasons were alluded to in the Court's assessment that could sufficiently warrant the change of venue.

An important but separate issue raised by the interlocutory application is whether the TSRA and their legal representatives in this claim have actual or potential conflict of interest in the proceedings, as the TSRA propose to be both an active respondent to the native title claim through external lawyers and to be by its employee solicitor, the legal representative for the applicant. The Court found that before any further steps can be taken in the proceeding these conflict of interest issues must be resolved.

Her Honour in conclusion made the following observations at [168]: 'The Court will not shut its eyes to this reality in the forthcoming case management hearing on Thursday Island, and it is disappointing to see the attitude taken by the TSRA through its external legal representatives on this matter. The people who will be at the now inevitable authorisation meeting should be involved, at least through some of their representatives, in the forthcoming case management hearing. For the TSRA to proceed as though they should not participate in this process is extraordinary. Indeed, it is contrary to the premise which appeared to underlie the interlocutory application that I have refused-namely the critical need to involve the people whose country is at issue in the native title claim. The Court continues to expect the TSRA to facilitate the attendance of all of those RNTBC Chairs, or their representatives, who wish to attend the Thursday Island case management hearing.'

Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia (No 2) **[2017] FCA 1299**

13 November 2017, Native Title Determination, Federal Court of Australia, Western Australia, Rares J

In this matter, Rares J recognised the native title rights and interests of the Yindjibarndi people to the area outlined in *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia* [2017] FCA 803 (the principal reasons) and summarised in the What's New in Native Title - July 2017.

The respondent parties included the State of Western Australia, FMG, Yamatji Marlpa Aboriginal Corporation and the Todd respondents. The other interests in the determination area include reserves, pastoral leases, water licences and mining

tenements. The Yindjibarndi Ngurra Aboriginal Corporation is the nominated prescribed body corporate.

The rights and interest recognised in the non-exclusive areas include rights to access, take and use resources, engage in ritual and ceremony and protect and care for sites and objects of significance. In the exclusive areas, the Yindjibarndi people have the right to possession, occupation, use and enjoyment to the exclusion of all others.

In July 2017 Rares J ordered the parties to consult, agree and prepare a draft determination of native title for the Court to make under s 225 of the *Native Title Act 1993* (Cth) (NTA). Two matters remained in dispute:

1. Whether, as Fortescue Metals Group (FMG) contended, the areas of the determination to which ss 47A and 47B NTA apply include exclusive possession or not (the FMG note issue)
2. In what form a declaration should be made in respect of the Todd respondents' unsuccessful claim to be recognised as Yindjibarndi (the Todd declaration issue).

The FMG note issue

FMG argued that it was appropriate to include the note in order to identify what would have been the native title rights and interests in the area comprising the land and waters covered by the Reserve and UCLs affected by the six exploration licences, had it not been found that ss 47A(2) and 47B(2) of the Act applied to that area. FMG submitted that there could be occasions where a third party needed to know what the native title rights and interests were before and after a determination. The Yindjibarndi and the State opposed the inclusion of the note in the final determination.

Rares J rejected FMG's argument as untenable as it ignored the wording of ss 47A(2) and 47A(2) that require that any extinguishment of the native title rights and interests in land and waters to which either section applies 'must be disregarded' for 'all purposes under this Act.' His Honour relied on *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 and *Banjima People v Western Australia (No 2)* [2015] FCAFC 171 in which it was determined that the natural and ordinary meaning of 'to pay no attention' or 'disregard' was the correct understanding of s 47B(2). Rares stated at [8]-[9] that 'the Court does not create any new rights when making a final determination of native title under s 225 of the Act including when it specifies, in such a determination, the legal consequences for which ss 47A(2) or 47B(2) provide. While a determination made under s 225 of the Act may be seen as a new development, it is not itself creative of any new rights or interests. Rather the determination recognises what has not been extinguished in accordance with the Act and so confirms the existing rights and interests in the land and waters.'

The Todd declaration issue

Rares J held in the principal reasons that the Todd respondents are not Yindjibarndi people. The Todd respondents argued that their position should be reflected in a declaration in the determination that 'Phyllis Harris (Todd), Lindsay Todd and Margaret Todd are not Yindjibarndi People.'

They contended that such a declaration would avoid inconsistency with Nicholson J's finding in *Daniel v State of Western Australia* [2003] FCA 666 at [509] that the Hicks family (of which the Todd respondents formed part) had Yindjibarndi ancestry and potential unfairness for persons who were not parties to the proceeding.

The determination will include the declaration that:

Phyllis Harris (neé Todd), Lindsay Todd and Margaret Todd and their living family members:

a) have an apical ancestor, Winningbung, who was not a Yindjibarndi;
b) do not have a Yindjibarndi parent and are not Yindjibarndi.

2. Legislation

Commonwealth

Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill 2017

Status: Introduced and second reading moved on 15 November 2017

Stated purpose: The Bill subjects Commonwealth litigants to enforceable model litigant obligations. It amends the *Judiciary Act 1903* (Cth) to require the Attorney General to oblige Commonwealth litigants to act as model litigants, in line with current practice. It amends the *Ombudsman Act 1976* (Cth) to establish a process by which the Commonwealth Ombudsman can investigate complaints regarding contraventions of these obligations, and requires the Ombudsman to include details of these complaints in annual reports. It empowers a court to order a stay of proceedings and, if it is satisfied of a contravention, to make any order it considers appropriate.

Model litigant obligations include not relying on unnecessarily technical arguments, to keep costs to a minimum and to avoid delay.

Native title implications: The Commonwealth is often a party or intervener to native title litigation and enforcing model litigant obligations will make litigation fairer and more efficient for native title parties.

For further information please see the Second Reading speeches.

3. Native Title Determinations

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

Short Name (NNTT)	Case Name	Date (NNTT)	State	Outcome	Legal Process	Type	RNTBC/ PBC
Yindjibarndi #1	Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v Western Australia (No 2)	13/11/2017	WA	Native title exists in the entire determination area	Litigated	Claimant	Yindjibarndi Ngurra Aboriginal Corporation

4. Registered Native Title Bodies Corporate & Prescribed Bodies Corporate

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	2
Queensland	82	0
South Australia	15	0
Tasmania	0	0
Victoria	4	0
Western Australia	45	1
NATIONAL TOTAL	**178**	**3**

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 November 2017, 3 ILUAs were registered with the National Native Title Tribunal.

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
20/11/2017	Mabuiag Torres Strait Primary Health Care Centre & Staff Accommodation ILUA	QI2017/010	Body Corporate	Qld	Infrastructure, Residential
3/11/2017	FMG - Palyku Land Access ILUA	WI2017/004	Area Agreement	WA	Access, Co-management
3/11/2017	Ergon Energy and Ankamuthi People ILUA	QI2017/007	Area Agreement	Qld	Energy, Access, Development, Infrastructure

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

6. Future Act Determinations

In November 2017, 2 Future Act Determinations were handed down.

Date	Parties	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
28/11/2017	Michael Ross & Others on behalf of the Cape York United Number 1 Claim and Rio Tinto Exploration Pty Ltd and Queensland	QO2017/0020 QO2017/0021	Qld	Objection – Dismissed	The Cape York Land Council advised that were not able to receive further instructions and were not be in a position to provide any further information in support of the objections. Member McNamara considered that the claimants had sufficient opportunity to comply with directions and had not requested an extension of time. The objection application was dismissed pursuant to s 148(b) of the *Native Title Act 1993 (Cth)* (NTA).
3/11/2017	Kevin Allen & Others on behalf of Njamal and Baracus Pty Ltd and Western Australia	WO2017/0033	WA	Objection – Dismissed	In response to the State's application to dismiss the objection, Njamal requested and were granted an extension to comply with directions, on the basis of intending to work with Baracus toward resolving the objection by agreement. The claimants did not comply with further directions, and the objection was dismissed pursuant to s 148(b) NTA.

7. Publications

Attorney General's Department

Reforms to the Native Title Act 1993 (Cth)

On 29 November 2017 the Attorney General and Minister for Indigenous Affairs released an options paper – *Reforms to the Native Title Act 1993* (Cth). The paper is available on the Attorney-General's Department website. Submissions on the options paper will be accepted until **Thursday 25 January 2018**. Submissions can be emailed to native.title@ag.gov.au or posted to:

Native Title Unit
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

If you have any questions about the reforms process or the options included in the paper, please contact the Native Title Unit at native.title@ag.gov.au or (02) 6141 3615.

Yamatji Marlpa Aboriginal Corporation

YMAC News

The November edition (Issue 34) of YMAC News is now available.

North Queensland Land Council

Message Stick

The December edition of *Message Stick* is now available.

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. Early submissions will be given preference in the case of review and publication process.

For more information, visit the journal page of the AIATSIS website.

Indigenous Business Australia (IBA)

IBA Investment Partnerships: call for expression of interest

IBA invites expression of interest for co-investment in commercial opportunities. For more information see the IBA Investment Partnership web page.

Submissions close on 28 February 2018.

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 corporation's rule book and other aspects of good corporate governance.

For further information on training courses, visit the ORIC website.

9. Events

AIATSIS

National Native Title Conference 2018

In 2018 the annual National Native Title Conference will be convened by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and the Kimberley Land Council (KLC), hosted by the Yawuru people on their traditional lands in Broome, Western Australia.

Date: 5-7 June 2018

Location: Cable Beach Resort, Broome WA

Call for papers and registrations will open soon. For more information, visit the AIATSIS website.

NTRB Legal Workshop 2018

Native Title Representative Body and Service Provider (NTRB) lawyers are at the forefront of native title law, policy and practice. This workshop provides a space for NTRB lawyers to share and develop their knowledge of contemporary native title legal issues.

In 2018, AIATSIS will partner with the Jumbunna Institute for Indigenous Education and Research at the University of Technology Sydney to offer unique professional development and networking opportunities.

Date: 21-22 February 2018

Location: University of Technology Sydney, NSW

For more information or to register, 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.