

NTRU Project Report

NTRU Publications

S Burnside, '[Negotiation in Good Faith under the Native Title Act: A Critical Analysis](#)', *Land, Rights, Laws: Issues of Native Title*, vol.4, no.3, 2009.

K Guest, '[The Promise of Comprehensive Native Title Settlements: The Burrup, MG-Ord and Wimmera Agreements](#)', AIATSIS Research Discussion Paper No. 27, 2009.

What's New

Legislative Reforms

[Aboriginal Land Rights Amendment Bill 2009 \(NSW\)](#)

[Fisheries Management Amendment Bill 2009 \(NSW\)](#)

[Major Transport Projects Facilitation Act 2009 \(Vic\)](#)

[Native Title Amendment Act 2009 \(Cth\)](#)

[Native Title Amendment Bill \(No. 2\) 2009](#)

Recent Cases

[Champion v State of Western Australia \[2009\] FCA 1141](#)

The applicant sought, under section 641A of the Native Title Act 1993 (Cth), to amend their native title claim. The amendments sought would substantially reduce the application area. The judge was satisfied that (a) the applicant had sufficient authorisation from the native title claim group for the application and (b) that the application should not be deferred as was suggested by an applicant in an overlapping application.

Coalpac Pty Ltd/State of New South Wales/North Eastern Wiradjuri People of the Bathurst, Lithgow, Mudgee area, [2009] NNTTA 133 (19 October 2009)

This case concerned granting of a proposed mining lease to Coalpac Pty Ltd by the NSW Government. In response to a section 29 *Native Title Act 1993* (Cth) (NTA) notice, a native title claim was registered by the North Eastern Wiradjuri People who subsequently gained status to negotiate under the right to negotiate provisions of the NTA. The negotiations did not progress as the native title party split into two factions. There were four key issues to be resolved. First, it was held that the Tribunal should not reopen the issue of whether Coalpac had negotiated in good faith. Second, further evidence could not be presented by a representative of the native title party. Third, it was decided that the proceedings should not be stayed to allow an application to replace the native title applicants. Fourth, the requirements of procedural fairness had been satisfied.

Coalpac Pty Ltd/State of New South Wales/North Eastern Wiradjuri People of the Bathurst, Lithgow, Mudgee area, [2009] NNTTA 137

This case concerns the same parties and set of facts as the case described above. In this case the Tribunal held that the mining lease to Coalpac Pty Ltd could be granted. Deputy President Sumner stated that it was regrettable that the native title party did not provide evidence to the inquiry due to the split, especially because the mining will seriously disrupt the capacity of the native title party to enjoyment of any native title rights and interest which may have existed.

Combined Gunggandji People v State of Queensland [2009] FCA 979

In this case a non-claimant party claimed entitlements over a part of the claim area in the Combined Gunggandji People native title application. The claim area lies to the south of Cairns, borders Mission Bay and includes the Yarrabah township. It is vested in the Council under a deed of grant in trust. The non-claimant party (Mr Ludwick) argued that he was entitled to a lease under section 361A or a licence to occupy under section 452A of the *Land Act 1962* (Qld). Justice Dowsett held that Mr Ludwick was entitled to a lease. He did not, however, determine whether Mr Ludwick was also entitled to a

licence and the effect of the lease on native title but rather indicated he would hear further submissions.

Cox & Ors v FMG Pilbara Pty Ltd & Ors [\[2009\] HCATrans 277](#)

The High Court refused an application for special leave to appeal from the full Federal Court decision of FMG Pilbara Pty Ltd v Cox [2009] FCAFC 49.

Dale v State of Western Australia [\[2009\] FCA 1201](#)

In this case the State of Western Australia sought orders in relation to the native title application of the Wong-Goo-TT-OO People. The State sought dismissal of the application pursuant to O 20 r 4 of the *Federal Court Rules* on the basis that no reasonable cause of action is disclosed, or alternatively sought dismissal of the application in respect of the townsites of Karratha, Point Samson and Wickham. The State argued that the Wong-Goo-TT-OO People were estopped (issue estoppel) from asserting that they formed a society that existed continuously since sovereignty because of the findings of Nicholson J in *Daniel v State of Western Australia* [2003] FCA 666. Nicholson J held that the Wong-Goo-TT-OO was not and had not been a society for the purposes of native title.

Justice McKerracher found that the doctrine of issue estoppel applied in this case. Broadly, an issue estoppel is created in relation to any issue of fact or law that is legally indispensable to a prior decision involving the same parties. He held that the Wong-Goo-TT-OO People were estopped, and as a consequence, the State's motion was to be allowed and the Wong-Goo-TT-OO's substantive application was dismissed.

Gandangara Local Aboriginal Land Council v Minister for Lands [\[2009\] FCA 1136](#)

The Gandangara Local Aboriginal Land Council (GLALC) sought a declaration that there was no native title in a parcel of freehold land held by the GLALC. The land is located in the county of Cumberland in NSW. It was transferred to the GLALC under the *Aboriginal Land Rights Act 1983* (NSW). The GLALC sought the determination in order to undertake dealings with the land. Given that the application was unopposed and it was within the court's power to make the declaration, the declaration was made.

Holborow v State of Western Australia [\[2009\] FCA 1200](#)

The State of Western Australia sought two orders in relation to a native title claim. First, it sought an order that the Yaburara/Mardudhunera native title determination application be dismissed over the townsites of Karratha and Dampier under O 20 r 4 of the *Federal Court Rules* (FCR) on the basis that no reasonable cause of action was disclosed. Second, it argued that the application regarding Dampier did not comply with s 61A(2) of the *Native Title Act 1993 (Cth)* (NTA). Justice McKerracher granted the orders sought and dismissed the application. A motion for joinder of parties by the Ngarluma People was adjourned.

Jabiru Metals Ltd v Lynch [\[2009\] WASC 238](#)

In this case the issue was whether the situation arising in the case was fundamentally different from the situation contemplated by the contracts initially signed between Jabiru Metals and the native title claimants. In particular, did payments due to native title claimants under a mining agreement still need to be made after the native title claims had been dismissed? The court confirmed that the contracts had been terminated due to frustration. If payments were due as a result of accrued rights, these would be made voluntarily.

Kowanyama People v State of Queensland [\[2009\] FCA 1192](#)

The Kowanyama People were granted an order for a consent determination determining native title rights and interests in their land and waters. The orders related to land and waters on the western side of Cape York Peninsula bounded in the north by the Coleman River, in the south by the Rutland Plains pastoral lease, in the east by the Mitchell-Alice Rivers National Park and in the west by the Gulf of Carpentaria together with coastal land bounded in the north by the southern bank of the Coleman River, in the south to a point south of the Staaten River and in the east to a line generally following the high water mark, and in the west to a line in the waters of the Gulf of Carpentaria which approximates a water depth to which a grown Kowanyama person can wade at low tide.

In relation to part of the Determination Area exclusive rights to possession, occupation, use and enjoyment were recognised. In relation to other parts, the Kowanyama People were recognised as having non-exclusive rights to be present on, light fires, take, use, share and exchange

Traditional Natural Resources for non-commercial, cultural, spiritual, personal, domestic or communal purpose and maintain places of importance and areas of significance. Non-exclusive rights to use water were also recognised in particular, rights to hunt and fish in or on, and take and use, water for non-commercial cultural, spiritual, personal, domestic or communal purposes.

Nuoorilma Clan of the Gamilaroy Aboriginal People v NSW Minister for Land & Water Conservation [\[2009\] FCA 1043](#)

In this case the native title claimants sought an extension of time to file a number of documents required under a previous court order. The judge was not satisfied that the extension should be granted because of the history of non-compliance with court orders and the resulting delay, expense and other prejudice to the respondent.

Waanyi People v State of Queensland [\[2009\] FCA 1179](#)

The main issue in this case related to whether evidence could be adduced from a meeting of a native title claim group. The purpose of the meeting was to decide whether the descendants of a particular individual were entitled to be included in the claim group. The meeting came to the decision that they were not. In terms of admissible evidence, Justice Dowsett held that the meeting was privileged under section 126A of the *Native Title Act 1993* (Cth). He did not accept arguments that the evidence could be adduced through section 131 of the *Evidence Act 1995* (Cth).

Reports

Australian Human Rights Commission, “[Our future in our hands](#)” – Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples, Australian Human Rights Commission, 2009.

The report outlines a proposed model for a new national representative body for Aboriginal and Torres Strait Islander peoples, which was designed and developed from 12 months of intensive consultations with Indigenous peoples.

Attorney-General’s Department, ‘[A Strategic Framework for Access to Justice in the Federal Civil Justice System](#)’, Report by the Access to Justice Taskforce Attorney-General’s Department, 2009.

The Access to Justice Taskforce was established to conduct a comprehensive examination of the federal civil justice system with a view to developing a more strategic approach to access to justice issues. The report is the result of that examination.

Chapter 3 discusses the ‘supply of justice’ – essentially the availability of solutions for the resolution of disputes. Native title is discussed within the context of types of disputes that are suited to particular forms of dispute resolution.

Native Title Publications

J Altman and D Martin (eds), *Power, culture, economy: Indigenous Australians and mining*, ANU E Press, Canberra, 2009.

J Baxter and M Trebilcock, ‘“Formalizing” land tenure in First Nations: Evaluating the case for reserve tenure reform’, *The Indigenous Law Journal*, vol.7, no.2, 2009, pp.45-122.

B Cleworth, G Kapterian and P S Gillies, ‘[Gove: Forgotten catalyst for native title or are we just where we started? Native title and the mining industry issues in Australia from Gove to the present day](#)’, *Macquarie University Law Working Paper Series*, no.2008-7, 2008.

CJ French, '[Perspectives on Court Annexed Alternative Dispute Resolution](#)', Law Council of Australia – Multi-Door Symposium, Canberra, 27 July 2009.

E Gerrard, 'Victorian native title settlement framework', *Australian Resources and Energy Law Journal*, vol.28, no.2, 2009, pp 140-145.

E Gerrard, 'A new beginning? Victoria's native title settlement framework', *Indigenous Law Bulletin*, vol.7, no.13, 2009, pp 16-20.

S Jackson and J Altman, 'Indigenous rights and water policy: perspectives from tropical northern Australia', *Australian Indigenous Law Review*, vol.13, no.1, 2008, pp 27-48.

M McLoughlin and M Sinclair, 'Wild rivers, conservation and Indigenous rights: an impossible balance?', *Indigenous Law Bulletin*, vol.7, no.13, 2009, pp 3-6.

K O'Bryan, 'Issues in natural resource management: inland water resources: implications of native title and the future of Indigenous control and management of inland waters', *E Law: Murdoch University Electronic Journal of Law*, vol.14, no.2, 2007, pp.280-327.

Native title in the News

National

16-Sep-09 AU Laws aim to speed native title claims Native title claims are expected to be processed more efficiently under new laws passed by Federal Government. The amendments to the *Native Title Act 1993* give the Federal Court the power to manage the mediation of claims. The Court will be able to more forcefully pull into line reluctant parties if a matter becomes deadlocked. *Northern Territory News*, (Darwin NT, 16 September 2009), 6. *Cairns Post*, (Cairns QLD, 15 September 2009), 10.

New South Wales

03-Sep-09 NSW Githabul divided over use of native title land After fighting to stop the Repco Rally,

Githabul custodian Doug Williams will now perform a welcome ceremony at the event's launch. Mr Williams said that there is no official agreement in existence between the rally organisers and the Githabul people for the use of the land which is subject to a native title claim. *Northern Star*, (Lismore NSW, 3 September 2009), 5. *Daily News Tweed Heads*, (Tweed Heads NSW, 1 September 2009), 2.

05-Sep-09 NSW Mines get the all clear Barrick's Cowl Gold Mine has successfully appealed a New South Wales Land and Environment Court decision which had prevented the mine from being extended and modifications to its operations. Wiradjuri Elder and CEO of the Wiradjuri Condobolin Corporation Percy Knight welcomed the appeal court ruling. He said that their native title agreement with the Cowl Gold Mine is delivering real benefits to the Wiradjuri community. *Forbes Advocate*, (Forbes NSW, 5 September 2009), 3. *Daily Advertiser*, (Wagga Wagga NSW, 4 September 2009), 1. *Daily Advertiser*, (Wagga Wagga NSW, 10 October 2009), 28.

01-Oct-09 NSW Native title delays SA's Four Mile mine Australia's fifth uranium mine has been delayed because of a hitch in a native title agreement. The scheduled commissioning has been delayed until April next year or beyond. Primary Industry Resources SA (PIRSA) has requested more information about the native title agreement covering the mine area, about 550km north of Adelaide. *National Indigenous Times*, (Malua Bay NSW, 1 October 2009), 12.

28-Oct-09 NSW Native title agreement Dirk Hartog Island, the site of the first recorded European landing on Australian soil, will become a national park after a native title agreement was struck between local Indigenous communities and the West Australian Government. Environment Minister Donna Faragher said yesterday that making almost the entire 63,000ha of island into a national park would allow the Malgana people to engage in its ongoing management and conservation. *Newcastle Herald*, (Newcastle NSW, 28 October 2009), 20. *Courier Mail*, (Brisbane QLD, 28 October 2009), 18. *Age*, (Melbourne VIC, 28 October 2009), 10. *Advertiser*, (Adelaide, 28 October 2009), 24. *Bendigo Advertiser*, (Bendigo VIC, 28 October 2009), 15. *Kalgoorlie Miner*, (Kalgoorlie WA, 28 October 2009), 4.

Northern Territory

30-Oct-09 NT New Indigenous housing deals The State Government is negotiating 40-years leases with Indigenous land holders to improve the roll-out of the Commonwealth's Indigenous housing program. The