

## What's New - May 2011

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### 1. Cases

#### **Bullen v State of Western Australia (No 2) [2010] FCA 1206**

**Perth Registry**

**Siopsis J**

**29 September 2010**

This was an application by the native title party for the legal costs of an earlier matter in which they had been successful. Section 85A of the *Native Title Act 1993* (NTA) provides that parties to proceedings bear their own costs, unless the Court orders otherwise. The Court noted the decision in *Lardil Peoples v Queensland* (2001) 108 FCR 453 which was that s. 85A NTA only applies to applications for a native title determination. The parties agreed that their original matter was not in that category, thus s. 85A would technically not apply. So, the applicants argued that they should be awarded costs as the successful party, as *Edwards v Santos Limited (No 2)* [2010] FCA 238 (*Edwards*). However, the Court preferred the argument of the respondents, including the state of Western Australia, that 'the spirit of s 85A' should apply here. This approach follows *Murray v Registrar of the National Native Title Tribunal* [2003] FCA 45, in which the Court used its discretion under the *Federal Court of Australia Act 1976* (Cth) to rule in the spirit of s. 85A because the original matter was chiefly concerned with the NTA. The application for costs was unsuccessful, and each party bore their own costs.

#### **Kngwarrey on behalf of the members of the Irrkwal, Irrmarn, Ntewerrek, Aharreng, Arrty/Amatyerr and Areyn Landholding Groups v Northern Territory of Australia [2011] FCA 428**

**Place heard: Ooratippra**

**Reeves J**

**5 May 2011**

The Irrkwal, Irrmarn, Ntewerrek, Aharreng, Arrty/Amatyerr and Areyn landholding groups' exclusive possession of native title to their country within Ooratippra Perpetual Pastoral Lease, north east of Alice Springs, was determined by consent. The rights of Ooratippra Aboriginal Corporation within the determination area were found not to extinguish native title as their perpetual pastoral lease is only partly inconsistent with the continued enjoyment of native title rights. The rights of Irretety Aboriginal Corporation to freehold possession of 10 hectares of the determination area, where Irretety Community is located, is settled by the Irretety ILUA of 2003, and native title rights are not extinguished by the grant of freehold. Another pastoral lease in the determined area also affects the continuing enjoyment of native title rights on the lease area, but does not extinguish native title. The Court, somewhat reluctantly, agreed to make this determination although no PBC had yet been nominated, but noted that the matter will come before a registrar if no PBC is nominated within 12 months. His honour described the Ooratippra country and the traditional beliefs of the native title holders in his published reasons.

#### **Lennon on behalf of the Antakirinja Matu-Yankunytjatjara Native Title Claim Group v The State of South Australia [2011] FCA 474**

**Adelaide Registry**

**Mansfield J**

**11 May 2011**

The Antakirinja Matu-Yankunytjatjara people's native title, first claimed in 1995, was determined by consent, including both non-exclusive and exclusive possession areas. Antakirinja Matu-Yankunytjatajara Aboriginal Corporation is the PBC. They compromised with the state on the question of whether native title rights and interests in Tallaringa Conservation Park are suppressed for as long as those areas remain vested in the

Crown under the *National Parks and Wildlife Act 1972*, or other state legislation. They agreed, however, that the non-extinguishment principle applies because the land was vested. There are also areas where extinguishment of native title "must be disregarded" including Aboriginal Lands Trust land, and tenure held by the Coober Pedy Aboriginal Housing Society Inc. The determination area includes Aboriginal-held pastoral leases at Mabel Creek, Mount Clarence and Mount Willoughby. Schedule 7 lists current or potential ILUAs in the determination area including agreements for minerals exploration, individual pastoral agreements, and ILUAs referred to as 'Tallaringa ILUA', 'Whole of Claim ILUA' and 'Breakaways ILUA', and 'Coober Pedy ILUA'. His Honour described the evidence that had proved this claim. The native title holders were represented by private solicitors.

**Maldorky Iron Pty Ltd v South Australia Native title Services [2011] SAERDC 16**

**Adelaide**

**Judge Costello**

**20 May 2011**

This case considers the alternative future act process under the *Mining Act 1996* (SA). The mining company applied for summary determination allowing mining on native title land, on the basis that it had given notice as required, and there was no party holding or claiming native title over that area after two months. The SA Environment, Resources and Development Court (ERD Court) considered section 63K2 of the *Mining Act*, which prohibits a native title agreement for mining to be made if the company does not hold, and is not an applicant for, a production tenement, or if there is no registered native title holder. The ERD Court agreed with South Australian Native Title Services (SANTS), that the company had not triggered the notice and negotiation process, as it had given notice of an *intention* to apply for mining leases, rather than notice of an application already *made*. So, when the company gave notice of its intention, it did not trigger the process under Part 9B, and it was not entitled to a summary determination.

SANTS also argued that the company was in breach of the *Mining Act* by carrying out drilling and associated 'mining operations' on the land under a mere exploration authority. The parties disagreed as to whether the company's actions made it a 'proponent' under the Mining Act, but the Court found that these arguments were not directly relevant to the proceeding. The ERD Court noted that the *Mining Act* provisions were enacted to administer rights under the Native Title Act 1993 (Cth) (NTA), and can therefore be interpreted by the ERD Court with some reference to the NTA.

The following case summaries will be available in the June edition of What's New:

- **Hill on behalf of the Yirendali People Core Country Claim v State of Queensland [2011] FCA 472**
- **Starkey v State of South Australia [2011] FCA 456**
- **Roberts v Northern Territory of Australia [2011] FCA 243**
- **Roberts v Northern Territory of Australia [2011] FCA 242**
- **Barunqa v State of Western Australia [2011] FCA 518**

## **2. Legislation**

### **Carbon Credits (Carbon Farming Initiative) Bill 2011**

This legislation is part of a package of three bills to establish the Carbon Farming Initiative. The bill provides for: the types of abatement projects eligible for Australian carbon credit units (ACCUs); requirements for recognition as an offsets entity; eligibility for offsets projects; **participation by holders of Aboriginal and Torres Strait Islander land**; characteristics of methodology determinations; permanence arrangements for sequestration projects; reporting requirements for offsets projects; a framework for auditing offset reports; the issue and exchange of ACCUs; monitoring and enforcement powers; merits review of decisions; the establishment and functions of the Domestic Offsets Integrity Committee and the Carbon Credits Administrator; and the publication of information and the treatment of confidential information.

The Bill was introduced and read a first time on 24 April 2011. On 25 March 2011 the Senate jointly referred the Australian National Registry of Emissions Units Bill 2011 and the Carbon Credits (Carbon Farming Initiative) Bill 2011 and the Carbon Credits (Consequential Amendments) Bill 2011 for inquiry and report. Submissions closed on 8 April 2011. The inquiry has received **72 public submissions**. **Public hearings and**

transcripts are also available for viewing. The [interim report](#) was released on 20 May 2011. The [final report](#) was released on 27 May 2011.

### Methodologies under consideration

The Domestic Offsets Integrity Committee is currently considering the following proposed Carbon Farming Initiative methodologies. Public comments on the proposed methodologies are invited for a period of 30 days from publication. For more information on the methodologies visit the [climatechange.gov.au](http://climatechange.gov.au) website.

Proponent	Title	Eligible Activity	Status
Department of Climate Change and Energy Efficiency	<a href="#">Savanna burning</a>	Avoided emissions from savanna burning	Open for consultation Deadline for public comments <b>30 June 2011</b>
Department of Climate Change and Energy Efficiency	<a href="#">Capture and combustion of landfill gas</a>	Avoided emissions from legacy waste deposited in landfill	Open for consultation Deadline for public comments <b>30 June 2011</b>
Northwest Carbon Pty Ltd	<a href="#">Management of large feral herbivores (camels) in the Australian rangelands</a>	Avoided emissions from feral animals	Open for consultation Deadline for public comments <b>30 June 2011</b>

### Native Title Amendment (Reform) Bill 2011

On 12 May 2011 the Senate referred the Native Title Amendment (Reform) Bill 2011 for inquiry and report. The Bill amends the Native Title Act 1993 to effect reforms that address two key areas for native title claimants: the barriers claimants face in making the case for a determination of native title rights and interests; and procedural issues relating to the future act regime. These measures include: the application of the principles of the United Nations Declaration on the Rights of Indigenous Peoples to decision-making; heritage protection; the application of the non-extinguishment principle to the compulsory acquisition of land; the right to negotiate to apply to offshore areas; good faith negotiations; profit sharing and royalties in arbitration; enabling extinguishment to be disregarded; burden of proof; the definition of 'traditional'; and commercial rights and interests. Submissions should be received by 29 July 2011. The reporting date is 20 September 2011.

- [Text of Bill](#)
- [Explanatory Memorandum](#)
- [Further Inquiry information](#)

### 3. Indigenous Land Use Agreements

- In May 2011, 3 ILUA were registered with the National Native Title Tribunal (NNTT). See table below for more details.
- The [Native Title Research Unit](#) maintains an [ILUA Summary](#) which provides hyperlinks to information on the NNTT and ATNS websites.
- For more information about ILUAs, see the [NNTT Website: ILUAs](#)
- Further information about specific ILUAs is available in the [Agreements, Treaties and Negotiated Settlements \(ATNS\) Database](#).

Date	NNTT File No.	Name	Type	State	Subject Matter
12/05/2011	<a href="#">QI2010/034</a>	Mandandanji People and QGC Pty Limited ILUA	AA	QLD	Pipeline
16/05/2011	<a href="#">QI2010/039</a>	Darumbal Marmor ILUA	AA	QLD	Mining
16/05/2011	<a href="#">QI2010/038</a>	Darumbal Stony Creek ILUA	AA	QLD	Access Pipeline Energy

#### 4. Native Title Determinations

- In May 2011, **10** native title determinations were handed down. See table below for further details.
- The **Native Title Research Unit** maintains a **Determinations Summary** which provides hyperlinks to determination information on the Austlii, NNTT and ATNS websites.
- Also see the **NNTT Website: Determinations**
- The **Agreements, Treaties and Negotiated Settlements (ATNS) Database** provides information about native title consent determinations and some litigated determinations.

Date	Short Name	Case Name	State	Outcome	Legal Process
5/05/2011	<a href="#">Ooratippra</a>	<a href="#">Kngwarrey on behalf of the members of the Irrkwal, Irrmarn, Ntewerrek, Aharreng, Arrty/Amatyerr and Areyn Landholding Groups v Northern Territory of Australia [2011] FCA 428</a>	NT	Native title exists in parts of the determination area	Consent determination (conditional)
11/05/2011	<a href="#">Antakirinja Matu-Yankunytjatjara</a>	<a href="#">Lennon on behalf of the Antakirinja Matu-Yankunytjatjara Native Title Claim Group v The State of South Australia [2011] FCA 474</a>	SA	Native title exists in parts of the determination area	Consent determination
23/05/2011	<a href="#">Uunguu Part A</a>	<a href="#">Goonack v State of Western Australia [2011] FCA 516</a>	WA	Native title exists in parts of the determination area	Consent determination
26/05/2011	<a href="#">Dambimangari</a>	<a href="#">Barunga v State of Western Australia [2011] FCA 518</a>	WA	Native title exists in parts of the determination area	Consent determination
31/05/2011	<a href="#">Spirit Hills Pastoral Lease No.2</a>	Carlton v Northern Territory of Australia [2011] FCA 576	NT	Native title exists in parts of the determination area	Consent determination
31/05/2011	<a href="#">Auvergne Pastoral Lease</a>	Long v Northern Territory of Australia [2011] FCA 571	NT	Native title exists in parts of the determination area	Consent determination
31/05/2011	<a href="#">Rosewood Pastoral Lease</a>	Rosewood v Northern Territory of Australia [2011] FCA 572	NT	Native title exists in parts of the determination area	Consent determination
31/05/2011	<a href="#">Newry Pastoral Lease</a>	Button Jones v Northern Territory of Australia [2011] FCA 573	NT	Native title exists in parts of the determination area	Consent determination
31/05/2011	<a href="#">Bullo River Pastoral Lease</a>	Paddy v Northern Territory of Australia [2010] FCA 574	NT	Native title exists in parts of the determination area	Consent determination
31/05/2011	<a href="#">Legune Pastoral Lease</a>	Simon v Northern Territory of Australia [2011] FCA 575	NT	Native title exists in parts of the determination area	Consent determination

#### 5. Registered Native Title Bodies Corporate

The **Native Title Research Unit** maintains a **Registered Native Title Bodies Corporate Summary document** which provides details about RNTBCs in each state/territory including the RNTBC name, RNTBC type (agent or trustee) and relevant native title determination information. Additional information about the RNTBC 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.

#### 6. Public Notices

The *Native Title Act 1993* (Cth) requires that native title parties and the public must be notified of:

- proposed grants of mining leases and claims;
- proposed grants of exploration tenements;
- proposed addition of excluded land in exploration permits;
- proposed grant of authority to prospect; and
- proposed mineral development licences.

The public notice must occur in both:

- a newspaper that circulates generally throughout the area to which the notification relates
- a relevant special interest publication that:
  - caters mainly or exclusively for the interests of Aboriginal peoples or Torres Strait Islanders;
  - is published at least once a month; and
  - circulates in the geographical area of the proposed activities.

To access the most recent public notices visit the [NNTT website](#) or the [Koori Mail website](#).

## 7. Native Title in the News

The [Native Title Research Unit](#) publishes [Native Title in the News](#) which contains summaries of newspaper articles and media releases relevant to native title.

## 8. Native Title Publications

### Native Title Research Unit Publications:

- M Burns, '[Challenging the assumptions of positivism: an analysis of the concept of society in Sampi on behalf of the Bardi and Jawi People v Western Australia \[2010\] and Bodney v Bennell \[2008\] \[May 2011\]](#)', *Land, Rights, Laws: Issues of Native Title*, Issues Paper Vol. 4, No. 7), Native Title Research Unit, AIATSIS, Canberra, May 2011.
- D Martin, T Bauman and J Neale, '[Challenges for Australian native title anthropology: practise beyond the proof of connection](#)', Discussion Paper 29, Native Title Research Unit, AIATSIS, Canberra, May 2011.
- J Weir, '[Karajarri: A West Kimberley experience in managing native title](#)', Discussion Paper 30, Native Title Research Unit, AIATSIS, Canberra, May 2011.

### Other Native Title Publications:

- South Australian Native Title Services - [Aboriginal Way](#) - May 2011 [PDF 3.2 Mb]
- Paul R. Smith, 'Queensland's planning law: a lost opportunity to deliver justice to native title holders - or is it?', *Queensland Environmental Practice Reporter*, Vol. 16 Issue 73, 2011, pp. 127-135.

## 9. Native Title Media Releases

### NTRB/NTSP Media Releases:

- Goldfields Land and Sea Council: [Rangelands Reform](#) – 5 May 2011
- Kimberley Land Council - [Traditional Owners Consent to James Price Point Agreements](#) - 6 May 2011
- Yamatji Marlpa Aboriginal Corporation - [Pilbara groups reach agreement with Rio Tinto](#) - 3 June 2011
- National Native Title Council - [Indigenous Business and Procurement](#) - 25 May 2011

### Attorney-General Media Releases:

- [Antakirinja Matu-Yankunytjatjara native title recognition](#) - 11 May 2011
- [Wanjina-Wunggurr Unguu native title recognition](#) - 23 May 2011
- [Wanjina-Wunggurr Dambimangari native title recognition](#) - 27 May 2011
- [Native Title Anthropologist Grant recipients announced](#) - 3 June 2011
- [Major native title agreement for the Pilbara region](#) - 3 June 2011

## 10. Training and Professional Development Opportunities

See the [Aurora Project: 2011 Program Calendar](#) for information about [Learning and Development Opportunities](#) for staff of native title representative bodies and native title service providers.