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Cases

Worimi (aka Gary Dates) v Worimi Local Aboriginal Land Council [2010] FCAFC 3 (FCAFC: Moore, Mansfield & Perram JJ)

This case was an appeal from a non-claimant application under the *Native Title Act 1993* (Cth) for an approved determination of native title. At first instance the Worimi Aboriginal Land Council applied for a declaration that no native title existed in land at Boat Harbour in New South Wales. The Land Council lodged a non-claimant application that the land was not of cultural significance to Aboriginal people in the area.

The appellant gave notice that he wished to be party to the application and was joined as a respondent, claiming native title interests in the land. The appellant had also filed two claimant applications in relation to the land which were both struck out. On 18 December 2008, the primary judge found that no native title existed in the land.

The appeal was heard by the Full Court of the Federal Court of Australia. The court upheld the findings of the trial judge that on the evidence, there was no ongoing connection between the native title rights and interests that existed pre-sovereignty. They considered the following appeal grounds:

1. The appellant suggested that based on s 61 of the Native Title Act, the onus was on the respondent to establish the nature of pre-sovereignty native title rights and interest relating to that area of land and then 'deconstruct' to show the current rights in the land, in order to prove a lack of continuity that native title no longer exists. The court agreed with the trial judge that it would only be necessary for a non-claimant applicant to prove this in certain circumstances, but not in every case. It was not necessary in this case.
2. the appellant suggested that the trial judge erred in the weight she gave to the appellant's evidence in her assessment of the evidence in finding that the necessary contemporary connection with the land did not exist. The Full Court there was sufficient evidence to support the conclusion of the trial judge, that the appellant's evidence did not have sufficient substance to cast doubt on other evidence that had been accepted.
3. the Full Court found that the trial judge's words had been misconceived and confirmed that while in the absence of a claimant application, the court is entitled to be satisfied that when no other claim groups assert a claim to hold native title, 'this supports an inference of an absence of native title over the land'. They reinforced that this *does not* imply that without anything more this supports a declaration of native title but found that there was no error in the expression of the trial judge.

Santo v David [2010] FCA 42 (5 February 2010) (FCA: Logan J)

The Applicants were inhabitants of Erub (Darnley Island) in the Torres Strait Islands. They alleged that the Respondent had constructed a dwelling on Erub land without their permission. The land in question was traditionally owned and occupied by members of the Applicants' family.

The native title rights and interests held over the land were determined to be held in trust by the Erubam Le Traditional Land and Sea Owners (Torres Strait Islanders) Corporation. Justice Logan therefore found that Applicants did not have standing to seek the enforcement of the native title rights. He found that the correct party to have standing in this situation would have been the Erubam Le Traditional Land and Sea Owners Corporation.

As the Corporation had not applied for joinder as an applicant party and the Applicants did not have standing, Logan J found that there was no determination to be made and consequently dismissed the application.

Legislation

Wild Rivers (Environmental Management) Bill 2010 (Cth)

The Wild Rivers (Environmental Management) Bill 2010 (Cth) was tabled in the House of Representatives on 8 February 2010. The private member's bill is described as 'an act to protect the interests of Aboriginal traditional owners in the management, development and use of native title land situated in wild river areas, and for related purposes'.

The Bill is available for download at [ComLaw](#)

Possible historical extinguishment amendment

On 14 January 2010, the Commonwealth Attorney-General released draft legislation detailing a proposed amendment to the *Native Title Act 1993* (Cth). This proposed reform would allow, in certain circumstances, parties to agree to disregard the historical extinguishment of native title in areas of land set aside for the purpose of preserving the natural environment. The reform would not affect any existing interests in the area. This proposed amendment was suggested in July 2008 by High Court Chief Justice Robert French.

The Act already includes provisions that allow historical extinguishment of native title to be disregarded in certain circumstances, such as where a native title application is made over land that is subject to a pastoral lease held by a native title claimant (section 47). Similarly, the proposed amendment would allow the historical extinguishment of native title to be disregarded in areas set aside or vested by a government law for the purpose of preserving the natural environment of the area, such as a State or Territory park or reserve. It is possible to download information regarding proposed amendments from the [Attorney-General's Department](#).

The Attorney-General's Department invites submissions on the possible reform until 19 March 2010

Senate Report on the Native Title Amendment Bill (No. 2) 2009 (Cth)

On 29 October 2009 the Senate referred the *Native Title Amendment Bill (No. 2) 2009* (Cth) to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report. The Bill would amend the future acts regime of the *Native Title Act 1993* (Cth) to provide a process for the construction of public housing and other facilities by or on behalf of the Crown, a local government body or other statutory authority in communities on Indigenous-held land. The Bill would provide for a representative Aboriginal or Torres Strait Islander body or native title claimant to be notified and afforded the opportunity to comment on acts which could affect native title, and for compensation for any impact on native title rights and interests. The committee received 17 submissions as part of their inquiry. These can be viewed on the [Senate Committee Website](#).

As part of the inquiry, a public hearing took place in Sydney on Thursday 28 January 2010. [Transcripts of the hearing can be found on the Senate website](#). The reporting date of the Committee was originally set at 2 February 2010, however, on 2 February 2010, the Senate granted an extension of time for reporting until 23 February 2010.

The Report of the Senate Committee was tabled on Thursday 25 of February 2010. The Senate Committee recommended that subdivision JA of the Bill be amended to include the provision of staff housing as part of the new future acts process. Subject to that, the Committee recommended that the Bill be passed.

Liberal senators of the Committee agreed with the majority of the Report's recommendations. They supported Indigenous Land Use Agreements (ILUAs) as the preferred method for agreement-making with native title holders and claimants and recommended that the Australian, State and Territory Governments develop template ILUAs for future service delivery.

Liberal senators expressed concern over the ten year sunset clause contained in the Bill, and recommended that the effectiveness of the program could be reviewed after the first five years of operation. Then, if necessary, this could be extended for a further five years to take advantage of the ten year funding provided for in the National Partnership Agreements. Subject to these recommendations, Liberal senators recommended that the Senate pass the Bill.

Senator Rachel Siewart of the Australian Greens did not support the recommendations of the majority report and dissented from the greater part of the assertions presented at the end of the report under 'Committee's View'. Senator Siewart found that the vast majority of the submissions received in the inquiry from relevant organisations, land councils and researchers, as well as the evidence presented to the Committee in the public hearing, put forth an alternative viewpoint than that expressed in the Report. She raised concern that the conclusions of the Report neither reflected nor adequately addressed the evidence and arguments put forward in the submissions and the public hearing.

Senator Siewart proposed that recommendations for template ILUAs be developed, the registration test be removed where an ILUA has been certified by the responsible Native Title Representative Body (NTRB), and that section 47A be amended to explicitly state that the non-extinguishment principle applies for the provision of public housing and services. Senator Siewart recommended that the Bill be opposed, however, if it is to proceed, the government should introduce **amendments proposed by the National Native Title Council (NNTC)** to protect the rights of native title holders and ensure the right to negotiate.

Indigenous Land Use Agreements

- 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 **National Native Title Tribunal Website: ILUAs**
- Information about specific ILUAs is available in the **Agreements, Treaties and Negotiated Settlements (ATNS) Database**.

Native Title Determinations

- 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 **National Native Title Tribunal Website: Determinations**
- The **Agreements, Treaties and Negotiated Settlements (ATNS) Database** provides information about native title consent determinations and some litigated determinations.

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.

Native Title Publications

Journal Articles:

- G Neate, 'Land rights, native title and the "limits" of recognition: getting the balance right?', *Flinders Journal of Law Reform*, Vol. 11, No. 2, 2009, pp. 1-196.
- A Reale, 'Assisted theft: compulsory land acquisition for private benefit in Australia and the US', *Alternative Law Journal*, Vol. 34, No. 3, 2009, pp. 147-151.

Books:

- S Berg (ed.), *Coming to terms: Aboriginal title in South Australia*, Kent Town, South Australia: Wakefield Press, 2009.
- DG Newman, *The duty to consult: new relationships with Aboriginal peoples*, Saskatoon: Purich Pub., 2009.
- P Butt, 'Native title', in *Land law (6th edition)*, Pyrmont, NSW: Thomson Reuters, 2010.

Papers:

- D O'Dea, *Managing emotion in native title matters*, Paper delivered to the Institute of Arbitrators & Mediators, Mediation Colloquium, 8 December 2009.
- J. Hunt, J.C. Altman, and K. May, *Social benefits of Aboriginal engagement in natural resource management*, CAEPR Working Paper 60/2009, Canberra: Centre for Aboriginal Economic Policy Research, 2009.

Reports:

- K Magarey, *Native Title Amendment Bill (No. 2) 2009*, Bills Digest (24 February 2010) 2009-10, No. 118, Parliamentary Library, 2010.

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
- 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
 - 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](#).

Training and Professional Development Opportunities

University of Queensland Native Title Mediation Course

University of Queensland's TC Beirne School of Law is running an intensive *Mediation Strategies for Native Title Stakeholders* course at St Lucia campus from April 8 – 11, 2010. Coordinated by international mediation expert Patrick Cavanagh, the four-day course is the only one of its kind in Australia. It is designed specifically for lawyers, policy makers, government agency employees, negotiators and mediators and will identify the glitches in the existing system, examine the new legislation amendments and changes and offer effective options to expedite settlement. Although offered as part of UQ's Master of Laws program, legal qualifications are not a prerequisite to undertake the course. For further information visit:

www.law.uq.edu.au/mediation-strategies.

Scholarship

The Australian Government and Rio Tinto are offering two scholarships to lawyers currently working or interested in working at Native Title Representative Bodies (NTRBs) or Native Title Service Providers (NTSPs). Successful candidates will undertake a one-year Master of Laws (LLM) in Mineral Law and Policy at the Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP) at the University of Dundee and must commit to work within an NTRB or NTSP for a minimum period of two years upon their return. Candidates must be Australian citizens or permanent residents and reside in Australia and there is no age restriction for applicants. The scholarship has a value of approximately AUD\$55,000 which is paid in British Pounds. Applications for the 2010/2011 round **open 9am AEDST Monday 22 February 2010** and **close 5pm AEDST Friday 19 March 2010**. For more information see the [Aurora Website](#).

Aligning Indigenous Land Management with Economic Development Conference 24 & 25 March, 2010, Holiday Inn, Darwin

Criterion Conferences is bringing together key stakeholders in the land management and economic development spheres with the aim of maximising the economic benefits of native title for Traditional Owners.

This conference is designed specifically for Indigenous advocates, Land Councils, Community and Land & Sea Management Organisations, Local Councils, environmental groups, government officials from Commonwealth, State/ Territory and Local Government in addition to academics, NGOs and representatives from the private sector involved in:

- Indigenous land management
- Economic development
- Native title/ land tenure & leasing
- Environmental protection, land rights & Indigenous Land Use Agreements
- Community development
- Employment & business development
- Skills development, education & training
- Mining, tourism & pastoral industries
- Welfare reform

Speakers include:

- Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission
- Wayne Bergmann, Executive Director, Kimberley Land Council & Chairman North Australian Indigenous Land and Sea Management Alliance (NAILSMA)
- Warren Mundine, Chief Executive Officer, NTSCORP Ltd
- Graeme Neate, President, National Native Title Tribunal
- Richie Ah Mat, Board Member, North Australian Indigenous Land and Sea Management Alliance (NAILSMA)
- Gary Gray, AO, Parliamentary Secretary for Western and Northern Australia
- Kevin Smith, CEO, QLD South Native Title Services
- Peter Cochrane, Director of National Parks, Australian Government
- Duncan Ord, Executive Director North, Department of Indigenous Affairs, WA
- Professor Rolf Gerritsen, Research Leader, Central Australia Charles Darwin University, NT.

A limited number of scholarships for Indigenous community representatives are available. For more information visit the website at: <http://www.indiglandmanagement.com>

Also see the [Aurora Project: Program Calendar](#) for information about [Learning and Development Opportunities](#) for staff of native title representative bodies and native title service providers. [Applications are now open for Aurora's NTRB Training Programs.](#)