

What's New - January 2011

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1. Cases

Atkinson on behalf of the Mooka and Kalara United Families Claim v Minister for Lands for the State of New South Wales (No 2) [2010] FCA 1477

16 December 2010

Federal Court of Australia, Sydney

Jagot J

In a previous hearing, orders had been handed down requiring the applicants to file and serve an amended native title determination application. The applicants did not comply with those orders. Two notices of motion were filed, seeking to extend the time for the filing and serving of material until 30 April 2011.

Justice Jagot dismissed the notices of motion and reserved costs. He considered that fundamental requirements of fairness demanded that the other parties to the proceeding be served with all the relevant material before the hearing to allow them adequate opportunity to consider the material and formulate a response. He also doubted that the material was, at that time, complete.

Far West Coast Native Title Claim v State of South Australia [2011] FCA 24

21 January 2011

Federal Court of Australia, Adelaide

Mansfield J

Justice Mansfield found that the Mirning Community Incorporated did not have sufficient interest in the case for the purposes of s. 84(5) of the *Native Title Act 1993* (Cth) as the objects of the Community as set out did not include any basis on which they could assert a direct entitlement to interests in the land or waters that constitute the present claim area. He therefore refused the Mirning Community Incorporated's application to be joined as respondents to this proceeding.

Straits Exploration (Australia) Pty Ltd & Anor v The Kokatha Uwankara Native Title Claimants & Ors [2011] SAERDC 2

14 January 2011

Environment Resources and Development Court of South Australia

Tilmouth J

The applicants, Straits Exploration (Australia) Pty Ltd and its joint venturer Kelaray Pty Ltd, applied to the Environment, Resources and Development Court of South Australia (ERDC) for a determination authorising mining operations to commence on land the subject of an exploration licence.

The applicants argued that there is a geological anomaly within the area of the exploration licence – covering part of Lake Torrens in South Australia – showing the potential to discover valuable minerals capable of profitable exploitation. The applicants also argued that it was in the public interest to develop this resource.

The respondent, the Kokatha Uwankara Native Title Claimants, argued that the land in question is of extreme cultural and traditional significance to them, and that the proposed mining operations should not be

allowed to proceed because of the negative effect they would have on various rights attaching to this significance.

The ERDC determined that the mining operations not be authorised, pursuant to the relevant section of the *Mining Act 1971* (SA). In making this determination, Judge Tilmouth found at [263] that the 'fundamental shortcomings of the applicants in the field, the failure to secure adequate consents and the posture of avoiding scrutiny and accountability for precipitous decision making, tell heavily against the proposed mining operations going ahead'.

Magnesium Resources Pty Ltd; Anthony Warren Slater/Puutu Kunti Kurrama and Pinikura People; Puutu Kunti Kurrama and Pinikura People #2/Western Australia [2010] NNTTA 211
(19 December 2010)

National Native Title Tribunal, Perth
Hon C J Sumner, Deputy President

In this matter the grantee party (Magnesium Resources Pty Ltd) and the native title parties (the Puutu Kunti Kurrama and Pinikura and Puutu Kunti Kurrama and Pinikura #2 People – PKKP) failed to reach agreement within the statutory six month timeframe on the terms on which several mining and related tenements could be granted. The grantee party subsequently applied to the National Native Title Tribunal (NNTT) for a determination that the tenements could be granted.

The parties' submissions evidenced that the issues in contention centred around the level of funding to be provided by the grantee party towards the cost of a meeting with the native title party, and whether correspondence between legal representatives (as opposed to a face-to-face meeting) constitutes negotiation. In particular the native title party contended that the grantee party did not make a reasonable effort to engage and adopted a rigid, minimum compliance position and therefore brought into question whether the grantee party negotiated 'in good faith'.

The NNTT was satisfied that although the negotiations were largely 'desultory' [71] and despite the grantee party's 'rather formal approach' [72], the negotiations satisfied the requirements for good faith. This was on the basis that the grantee party was prepared to meet with the native title party, despite the fact that it did not agree with the level of funding requested.

The NNTT also made several observations 'of a policy nature' [73] about the funding of future act negotiations. In particular it noted that funding limitations have the potential to place native title representative bodies in a position where they are not adequately able to act for native title parties in future act negotiations, unless mining companies are willing to meet these costs. It proposed that 'the appropriate funding authorities' give this further consideration [78].

Austmin Platinum Mines Pty Ltd and Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji, [2010] NNTTA 212
19 December 2010

National Native title Tribunal, Perth
Hon C J Sumner, Deputy President

As with the *Magnesium Resources* matter above, this matter was primarily concerned with determining whether the grantee party negotiated in good faith with the native title party.

The State of Western Australia proposed to grant several mining leases to the grantee party (comprising various resource companies including Weld Range Metals). The grantee party failed to reach agreement on the terms of the grant with the native title party (the Wajarri Yamatji) within the statutory timeframe. The grantee party subsequently applied to the National Native Title Tribunal (NNTT) for a determination that the leases could be granted.

The native title party argued that the 'unilateral' provision of a draft agreement, ignoring consistent requests for a face to face meeting was indicative of bad faith. On this issue the NNTT adopted its findings in *Magnesium Resources*, determining that there is no requirement for a grantee party to meet personally with a native title party for negotiations to have commenced. The NNTT further held that 'the preparation of a proposal in the form of a draft agreement is perfectly consistent with the obligation on a grantee party to

negotiate in good faith' (at [27]). In doing so the NNTT distanced itself from its earlier determination in *Cox and Others v FMG Pilbara Pty Ltd* [2008] NNTTA 90, which was overturned on appeal to the Federal Court in *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49. The NNTT therefore found in favour of the grantee party, determining that the grantee party had negotiated in good faith.

The NNTT did however note that the negotiations in this matter were 'of a quite limited and cursory kind' (at [73]) and further stated that it 'cannot pretend that the outcome of this matter ... is entirely satisfactory given the importance of the right to negotiate in protecting native title' (at [76]). It went on to state that there is a need for greater alignment between government policy and the operation of the NTA, in that the latter does not require grantee parties to discuss or contribute to funding for negotiations, while the former channels funding principally toward the resolution of native title claims rather than future act negotiations – in this case placing a 'considerable burden' on the native title party (at [78]).

2. Legislation

Extension for submissions to the inquiry into Indigenous economic development in Queensland

The House of Representatives Economics Committee is continuing its inquiry into Indigenous economic development in Queensland and the review of the Wild Rivers (Environmental Management) Bill 2010. The Bill was introduced by the Leader of the Opposition Mr Tony Abbott MP on Monday 15 November 2010. A copy of the bill is available [here](#).

Initially, submissions from the public were due Friday 28 January 2011. This has now been extended until Friday 18 February 2011. Further extensions beyond this date can be negotiated with the Committee secretariat. Public hearings are now expected to be held in Queensland during the week beginning 7 March 2011. Further details about the inquiry, including the terms of reference and advice on how to make a submission, can be obtained from the committee's website at www.aph.gov.au/economics. Submissions addressing the terms of reference should be emailed to economics.reps@aph.gov.au.

3. Policy

Submissions available for viewing: 'Leading Practice Agreements: Maximising Outcomes from Native Title Benefits'

The Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs released a Discussion paper entitled 'Leading Practice Agreements: Maximising Outcomes from Native Title Benefits' on 3 July 2010. The Australian Government sought written submissions from interested parties and the general public on the Discussion paper. Submissions closed on 30 November 2010. Twenty eight submissions were received in response to the Leading Practice Agreements discussion paper. They can be viewed at:

http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Consultationonpossiblegovernanceandfutureactsreforms

Native Title Anthropologists Grants Program

Applications are now open for second round of funding in 2011–12. Applications are invited from consultants, organisations, educational institutions and other interested parties working directly with anthropologists in the native title sector. An amount of \$526,000 is available for grants in 2011–12. Applications close on 18 March 2011 at 5.00pm EDT.

For further details see the Attorney-Generals website:

http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_NativeTitle_NativeTitleAnthropologistGrantsProgram

4. Indigenous Land Use Agreements

- In January 2011, **11** ILUAs were registered with the National Native Title Tribunal.
 - **3** ILUAs were registered in Queensland. They were all Area Agreements (AA).
 - **6** ILUAs were registered in Western Australia. **1** of these was an Area Agreement and **5** were Body Corporate Agreements (BCA).
 - **2** ILUAs were registered in the Northern Territory. They were Area Agreements (AA).
- 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**
- Further information about specific ILUAs is available in the **Agreements, Treaties and Negotiated Settlements (ATNS) Database**.

5. Native Title Determinations

- In January 2011, **0** native title determinations were handed down.
- 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.

6. 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.

7. 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**.

8. 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.

9. Native Title Publications

Reports:

Home Ownership on Indigenous Land Program: Department of Families, Housing, Community Services and Indigenous Affairs, Indigenous Business Australia

The Australian National Audit Office has undertaken an independent performance audit in the *Department of Families, Housing, Community Services and Indigenous Affairs* and *Indigenous Business Australia* in accordance with the authority contained in the *Auditor-General Act 1997*.

10. Training and Professional Development Opportunities

See the Aurora Project: 2011 Program Calendar (PDF 100Kb) for information about **Learning and Development Opportunities** for staff of native title representative bodies and native title service providers. Applications are open for Aurora's NTRB Training Programs.