What's New - March 2011

1. Cases

Mangarrayi Aboriginal Land Trust v Banibi Pty Ltd (No 2) [2011] FCA 173

7 March 2011
Federal Court of Australia – Northern Territory Registry
Justice Mansfield

Decision concerning costs in the decision of *Mangarrayi Aboriginal Land Trust v Banibi Pty Ltd [2010]* FCA 1195. The matter concerned the Banibi Corporation who was licensed to use Elsey Station which was managed by the Northern Land Council (NLC) on behalf of the Mangarrayi Aboriginal Land Trust (the Land Trust). The Court considered the question of costs and noted that it has unfettered discretion to order costs under s.43 of the *Federal Court Act 1976* (Cth). Generally an order for costs follows the event and if the substantive issues have not been determined by the Court, it will usually make no order as to the costs of the proceeding (citing *L & A Maglio Pty Ltd v Commissioner of Taxation [2007]* FCA 1365). In this case, the corporation claimed that they were not liable for costs as the matter had not been concluded. Further, the sole shareholders of the corporation are traditional owners living around Elsey station. The Court also considered the fact that the land trust did not support the action taken by the NLC as its representatives. However it held that the Banibi Corporation pay the costs and that it was up to the parties to determine internally how they should be recovered.

FQM Australia Nickel Pty Ltd v Bullen [2011] FCAFC 30

9 March 2011
Full Federal Court of Australia – Perth Registry
Justices North, McKerracher and Jagot

Appeal by State of Western Australia and FQM Australia Nickel Pty Ltd that the primary judge had erred in holding that there were registered native title holders in the mining lease areas of M74/169 and M74/172 (see *Bullen v State of Western Australia* [2010] FCA 900). One of the registered claimants was deceased and the primary judge held that the applicant in relation to a claim to hold native title in relation to land or waters continues to be the 'registered native title claimant' after the death of that person or persons. The appellants relied on s. 28 of the NTA, which states that 'the right to negotiate' provisions apply is invalid to the extent that it affects native title unless one of the conditions in that section is satisfied. They also include circumstances where (s. 28(1)):

1. By the end of the period of 4 months after the notification day for the act (see subsection 29(4)), there is no native title party in relation to any of the land or waters that will be affected by the act;
2. After the end of that period, but immediately before the act is done, there is no native title party in relation to any of the land or waters that will be affected by the act.

However, Justices North, McKerracher and Jagot noted that the decision involved reconciling the provisions of the NTA that assume that a registered native title claimant is a living person (s. 28(1)(b)) and other provisions that constitute a registered native title claimant as a representative or the native title claim group and can be replaced (s. 66B). They rejected the appellant's argument noting that 'the answer follows from the language of the statute construed in context.'

***Jax Coal Pty Ltd/Birri People/Queensland* [2011] NNTTA 46**
17 March 2011
National Native Title Tribunal, Brisbane
Deputy President John Sosso
Application for a determination of a future act under s. 38 for a mining lease 12 km south of Collinsville within the boundaries of the Birri People's registered native title determination application (QUD 6244/98). Section 38 of the NTA that requires the National Native Title Tribunal (NNTT) to make a determination that a future act 'must not be done or may be done with or without conditions'. The parties did not contend that the grant of the lease should not go ahead only whether conditions should be placed on the grant. In considering the criteria for the making of a future act determination under s. 39, it was found that the 'parties had reached an accord in principle but due to circumstances beyond the control of (usually) the native title party, the execution of the s.31(1)(b) agreement is rendered impossible. The NNTT can make an agreed determination pursuant to s. 38(1) in order to give legal effect to the agreement in principle they have reached. In these circumstances an extensive evaluation of the s. 39(1) criteria is not required (citing *Claimants/Western Australia/Newmont Wiluna Gold Pty Ltd* [2008] NNTTA 114, *Simpson & Ors on behalf of Wajarri Yamatji/Western Australia/Dianna Austin Trigg* [2009] NNTTA 144 and *Webb & Ors on behalf of South West Boojarah #2/Peter Michael Johnson/Western Australia* [2010] NNTTA 130.)

The issue in contention was the nature of the conditions imposed by the NNTT. The Birri People sought a determination of this nature including the sum of compensation money and employment positions that were initially agreed to. The state refused to grant its consent to the making of a consent determination so far as it related to the 'financial benefit' condition on the basis that the 'NNTT does not have power to make a determination containing a condition for payment of compensation'. Jax Coal agreed to recharacterise the payments and employment position as financial benefits but the state contended the issue on the basis that it is not open for the NNTT to make compensation payments a condition of granting a mining lease. Following *Western Australia v Thomas* (1996) 133 FLR 124 (at 193-202), the NNTT noted the primary issue was whether the benefit agreed to primarily or calculated solely on the basis that it was a fair payment for the likely injurious ramifications of the doing of the future act on the native title party's registered native title rights and interests? However after weighing up the evidence particularly the 'reluctance' of the native title party to accept the offer, the NNTT found that 'it would be entirely unrealistic and artificial to characterise what appear to be basic and less than amicable negotiations, as an attempt by them to rationally and objectively calculate a compensation package for the likely injurious affection to native title occasioned by the doing of the future act.'

***Seven Star Investments Group Pty Ltd/Western Australia/Wilma Freddie and Others on behalf of Wiluna* [2011] NNTTA 53**
24 March 2011
National Native Title Tribunal, Perth
Deputy President Hon C J Sumner
Tribunal Deputy President Sumner described this future act determination as 'unique'. The proponent, Seven Star Investments Group P/L (SSIG), had applied for an exploration licence (EL) within the Wiluna native title claim area, WA. SSIG had marked out the area in the shape of a cross, based on a story of Constantine, and located by the 'mystical knowledge' of shareholder-director Mr Ghaneson. Negotiations over a heritage agreement took place but broke down.

SSIG asked the Tribunal to allow the granting of the EL under s.38 of the *Native Title Act 1993* (Cth)(NTA). The Wiluna people opposed the grant of the tenement primarily based on SSIG's conduct (through Mr Ghaneson) in negotiations with the Wiluna people and Central Desert Native Title Service (CDNTS) staff. They submitted that SSIG: had made remarks intended to intimidate the native title party, which escalated to threats of violence; had made inappropriate and disrespectful remarks about the native title party and the area of the tenement application; and 'appears to have substantive difficulty distinguishing the real world from a fictitious world'. Thus, they argued, it would be unconscionable to grant the tenement.

In listings hearings, Sumner proposed setting a condition by consent that Mr Ghaneson would not be involved with the Wiluna people or come onto the area. SSIG submitted that only Mr Ghaneson possesses the mystical knowledge required for the proposed exploration, so the parties could not consent.

The Tribunal accepted affidavit evidence from Wiluna man Robert Wongawol about the claimants' cultural obligations regarding their country, including ensuring that other parties coming onto the country understand those obligations. Sumner also considered the relevant factors in s.39 NTA, and found that granting the tenement would not, in normal circumstances, affect the Wiluna claimants' use and enjoyment of the area or sites of significance.

Sumner concluded that it was not in the public interest to grant the tenement for two reasons: firstly, the exploration methodology 'has no rational or scientific basis'; and secondly because Mr Ghaneson's prior conduct had caused an 'irretrievable breakdown in relations between CDNTS and SSIG... [with] real potential for further serious disputations... which will impact on the claimants' capacity to carry out their cultural obligations'.

Noelene Margaret Edwards & Ors v Santos Limited & Ors [2011] HCA 8

30 March 2011
Chief Justice French
Justices Gummow, Hayne, Heydon, Crennan, Kiefel and Bell

This case considered whether the Wongkumara claimants can seek declarations in the Federal Court on whether the right to negotiate applies to a particular application for a petroleum licence, and an injunction restraining Queensland from granting such a licence unless the right to negotiate process has been completed.

The Wongkumara native title claimants had sought to negotiate a new Indigenous land use agreement (ILUA) with Santos (and a partner company) to supersede an earlier ILUA. The companies had held an Authority to Prospect for petroleum (ATP) in south-west Queensland since 1979, and intended to apply for a production licence. In negotiations for the new ILUA, the Wongkumara had requested a gift of two pastoral leases, to which the companies did not agree. The companies argued that, as they hold the ATP, a production licence would be granted automatically. As such, they said, the grant of a production licence would be a 'pre-existing right-based act' and the right to negotiate under the *Native Title Act 1993* (Cth) (NTA) does not apply.

The Wongkumara people went to the Federal Court seeking a declaration that the act was a future act requiring negotiation under the NTA. Justice Logan summarily dismissed the application (i.e. without a full hearing) on the grounds that the Wongkumara were seeking an advisory opinion from the Court, which courts do not provide. Logan J also found that the Wongkumara did not have standing (i.e. sufficient direct interest in the matter to seek relief in Court) regarding the petroleum licence, and made costs orders against Wongkumara.

The Full Federal Court of Stone, Greenwood and Jagot JJ refused leave to appeal. Section 33(4B)(a) of the *Federal Court of Australia Act* precluded an appeal to the High Court on this decision, so the Wongkumara applied to the High Court for judicial review in relation to errors of law made in the Federal Court rulings. This is within the High Court's 'original jurisdiction'.

The High Court held that the Federal Court (and Full Court) had made errors regarding its jurisdiction to hear the matter. The High Court ruled that there is 'a matter' of controversy between the parties and not merely a hypothetical question or request for advice. The Wongkumara do have standing regarding the petroleum licence based on their interests in negotiating an ILUA, and the matter is within Federal jurisdiction as it involves the NTA. So, the Federal Court had made errors about its jurisdiction, and the High Court quashed the two lower rulings (by issuing the common law writ of *certiorari*). The Wongkumara are now entitled to have the matter heard and decided by the Federal Court. The High Court held that Santos (and the partner company) pay the costs of all proceedings.

***Banjo Wurrunmurra & Others on behalf of Bunuba Native Title Claimants/Western Australia/Thomson Aviation Pty Ltd* [2011] NNTTA 38**
8 March 2011
National Native Title Tribunal, Melbourne
Member Neville MacPherson
The WA Department of Mines and Petroleum notified the Bunuba people that it intended to grant an Exploration License (EL) 56km outside of Fitzroy Crossing. The Department stated that the proposed grant attracts the expedited procedure (s. 29 *Native Title Act 1993* (Cth)(NTA)), meaning that the Bunuba people would have no right to negotiate with the exploration company.

The Bunuba people objected to the expedited procedure in the National Native Title Tribunal (NNTT), and Bunuba man Kevin Oscar gave affidavit evidence. Member MacPherson considered (on the papers) whether it was likely that the EL would affect Bunuba community or social activities, or sites of significance.

Although Member MacPherson accepted Mr Oscar's evidence about the Bunuba people's activities on their country, he found that the evidence was not specific evidence in relation to the area of the proposed EL, and so it did not prove that exploration was likely to affect those activities. At paragraph [34] he described what details could have been provided.

However, he determined that the grant does not attract the expedited procedure because there are a large number of sites of significance within the proposed EL. As the explorer had failed to submit details of its intended activities, Member McPherson assumed it would explore the entire EL. This reasoning at [45] follows the decision of (*Silver v Northern Territory & Ors)*. He found that *'this is a case where compliance with the* (Aboriginal Heritage Act) *is not sufficient to make it unlikely that there will be interference with areas or sites of particular significance'.* The Bunuba people maintained their right to negotiate over the proposed EL.

***Straits Exploration (Australia) Pty Ltd & Anor v The Kokatha Uwankara Native Title Claimants & Ors* [2011] SASCFC 9**
8 March 2011
Supreme Court of South Australia
Chief Justice Doyle and Justices White and Peek
This was an application for permission to appeal a decision of the Environment, Resources and Development Court (ERD Court), which refused to allow exploration on claimed native title land where the native title party opposed the exploration: [2011] SAERDC 2. The Full Court of the Supreme Court of SA granted permission to appeal the ERD Court's decision.

Background – the case in the ERD Court
Straits Exploration and Kelaray (the companies) had planned to explore for minerals within their exploration permit at Lake Torrens in northern SA, in an area of great cultural significance to the Kokatha Uwankara people and also to Western Desert Peoples. The Kokatha Uwankara Native Title Claimants (Kokutha Uwankara) opposed any disturbance of this area and declined monetary compensation, and no agreement with the companies was reached.

Under s. 63S of the *Mining Act 1971* (SA), the companies had applied to the ERD Court, seeking a determination allowing the exploration to proceed. The ERD Court heard evidence from Kokutha Uwankara of the cultural and religious significance of the area (including some confidential men's evidence), the consequences they believed would follow if it was disturbed, and their history of opposing disturbances of this area regardless of offers of financial compensation.

The companies demonstrated that they had taken steps to avoid environmental degradation and argued that a potential mine was valuable to the local and broader economies. Following a ten-day hearing, the ERD Court found in favour of the Kokutha Uwankara and denied the companies permission to explore.

This application for permission to appeal
The companies appealed, according to the *ERD Court Act 1993* (SA), to the Full Court. The Full Court comprising Doyle CJ, White and Peek JJ considered the companies' arguments for an appeal, as appealing on factual grounds requires the Full Court's permission. The Full Court considered whether those grounds

were reasonably arguable, and whether this is an appropriate case for permitting an appeal on those grounds.

The Full Court ruled that it would not be appropriate to grant permission to appeal on two of the major grounds that the companies put forward. First, the companies argued that the finding that the Kokatha Uwankara had consistently opposed mining in the area was incorrect. The Full Court ruled that the ERD Court decision did not deny that they may have been some difference of opinion, and that it would be inappropriate for the Full Court to examine detailed evidence of this history.

The second argument that the Full Court rejected was that the ERD Court failed to recognise the economic significance of the companies' activities. The ERD Court had treated the exploration activities as a separate matter from any mining activity which could follow later, and did not assume that there was future value in the exploration itself. The Full Court agreed, and said it would be inappropriate for the appeal Court to 'make a different forecast' about any likely future mining value.

However, the Full Court granted permission to appeal on separate grounds. The ERD Court had criticised the companies' conduct in proceeding with their exploration program for two months after the Kokatha Uwankara reported that they did not give heritage clearance to the exploration. The ERD Court had also commented on the companies' senior officers' failure to explain this action in the course of the hearing. The Full Court noted that this conduct seems to have weighed heavily in the ERD Court's decision. The companies submitted that this was a factual error, but the Full Court suggested in its reasons that this is really a question of law: did the companies breach any legal obligation by proceeding with their program? The Full Court agreed that, if the ERD Court had made an error of law on this issue, the decision to deny the grant may have been made in error. For this reason, they permitted the appeal to proceed.

2. Legislation

Commonwealth Legislation:

Native Title Amendment (Reform) Bill 2011
The Native Title Amendment (Reform) Bill 2011 was introduced by Greens Senator Rachel Siewert on 21 March 2011.

The Bill amends the *Native Title Act 1993* (Cth) in relation to 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.

For further information see the Explanatory Memorandum or the Parliament of Australia Website.

Wild Rivers (Environmental Management) Bill 2011
On 24 March 2011 the Senate referred the Wild Rivers (Environmental Management) Bill 2011 for inquiry and report. The Bill, a private senator's Bill introduced by Senator Scullion, seeks to protect the interests of Indigenous people in the management, development and use of native title land situated in wild rivers areas in Queensland. Please note that the Senate agreed on 24 March 2011 that, in conducting this inquiry, the committee should only inquire into those provisions of the bill which have not been previously examined by the Legal and Constitutional Affairs Legislation Committee in its inquiry and report into the Wild Rivers (Environmental Management) Bill 2010 [No. 2].

The Committee is seeking written submissions from interested individuals and organisations. Submissions should be received by **12 April 2011**. The reporting date is **10 May 2011**. See the Committee website for further details.

Carbon Credits (Carbon Farming Initiative) Bill 2011
The draft *Carbon Credits (Carbon Farming Initiative) Bill 2011* and consultation paper outline how the Federal Government proposes to regulate the generation of tradeable carbon credits under the CFI by foresters, landholders and farmers.

According to the Parliament of Australia website 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 Committee invites interested persons and organisations to make submissions by **Wednesday 13 April 2011**.

Northern Territory
Proposed Amendments to the Pastoral Land Act 2011

Supporting documentation for the Proposed Amendments to the *Pastoral Land Act* include:
- Summary Paper [PDF 688Kb];
- Frequently Asked Questions [PDF 276Kb];
- Explanatory Guide [PDF 1.64Mb];
- Consultation Draft - Pastoral Land Amendment Act [PDF281Kb].

Community consultation closes Friday, 31 May 2011. See the Natural Resources, Environment, the Arts and Sport website for more information.

3. Indigenous Land Use Agreements
- In March 2011, **5** ILUAs were registered with the National Native Title Tribunal (NNTT).
    - All **5** ILUAs were Area Agreements (AA).
        - **3** ILUAs were registered in Queensland.
        - **1** ILUA was registered in New South Wales
        - **1** ILUA was registered in Victoria
- 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.

4. Native Title Determinations
- In March 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 NNTT Website: Determinations
- The Agreements, Treaties and Negotiated Settlements (ATNS) Database provides information about native title consent determinations and some litigated determinations.

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;
- 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.

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

- National Native Title Tribunal, *National Report: Native Title*, February 2011
- Stacey, C & Fardin, J., 'Housing on native title lands: responses to the housing amendments of the *Native Title Act*', *Land, Rights, Laws: Issues of Native Title*, (Vol. 4, No. 6), March 2011.

9. 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.

10. Events

2011 National Native Title Conference – Registrations Open!

The National Native Title Conference is convened annually by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and this year co-convened by Queensland South Native Title Services (QSNTS), and hosted by the Turrbal, Jagera, Yuggera and Ugarapul Peoples, the traditional owners of the wider Brisbane area. The conference promotes native title as an agenda for justice for people and country, including the broader relationships between traditional owners and country. This year's conference 'Our Country, Our Future' is reflected in the following themes:

- Decisions, Actions, Results
- Enduring Cultures, Resilient Societies
- Country, Heritage and Development
- Tenure, Title and Possession

Visit the Conference Website for further details.

National Native Title Council Breakfast Seminar Series

Melbourne – Thursday 21st April
Keynote Speaker: Marcia Langton
7.30am to 8.45am
Park Hyatt
$99 per person (inc. GST)

Cairns – June (Date TBC)
Keynote Speaker: TBC
Venue TBC

For more information on the Breakfast Seminar Series see the NNTC website or contact:
carolyn.betts@nntc.com.au