

## What's New October 2009

(Sources include NNTT Judgements and Information email alert service and the Federal Court's Native Title Bulletin)

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### 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.

#### ***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.

***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.

### ***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).

## Legislation

### **Native Title Amendment Bill (No. 2) 2009**

The [Native Title Amendment Bill \(No. 2\) 2009](#) introduces a new process into the *Native Title Act 1993* (Cth) on land where native title may exist for the construction of public housing and public facilities, including health, education and emergency services.

The new [Major Transport Projects Facilitation Act 2009 \(Vic\)](#) is intended to fast-track planning, environment and heritage approvals for major transport projects by creating a single, streamlined assessment process. Part 6 Division 2 deals with native title rights and interests.

## 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.

## Indigenous Land Use Agreements

The Native Title Research Unit maintains an [ILUA summary](#) which provides summary statistics and hyperlinks to information on the NNTT and ATNS websites.

## Native Title in the News

The Native Title Research Unit publishes [NTRU Native title in the News](#) which contains summaries of newspaper articles and media releases relevant to native title. The story headings are as they appear in the press.

## Native Title Publications

### **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.

## Other Native Title Publications

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

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.

## Training and Professional Development Opportunities

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.