Native Title Newsletter

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WHAT'S NEW

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AIATSIS
Australian Institute of Aboriginal and Torres Strait Islander Studies

Native Title Research Unit, AIATSIS

The Native Title Amendment Act 2009: Minor amendments or just playing it small and safe?

By Kevin Smith, CEO Queensland South Native Title Services

This is an abridged version of a paper delivered at the National Indigenous Legal Conference, University of Adelaide, 24 September 2009.[1]

If Indigenous affairs presents as a parallel universe to mainstream Australia, then native title comprises multiple parallel universes; universes that equal the number of interests that are represented at the Bar table (and they can run into the hundreds) all layered 221 years deep with entrenched attitudes and behaviors caused by the colonisation process.

The Native Title Act[2] (bound in its befitting psychedelic swirling purple cover) along with its equally bizarre jurisprudence attempts to harmonise these disparate interests and in the view of many falls spectacularly short with reliable regularity.

In this chaos and over the cacophony of innumerable stakeholders, a common refrain is the need for faster, fairer and cheaper resolution of native title claims. From an Indigenous perspective, what we have got in return have been policies that border on the painfully malevolent (1998 Amendments where the then Deputy Prime Minister promised bucket-loads of extinguishment) to the insipidly painful (here, I would include the 2007 and 2009 amendments).

A holistic, comprehensive coordinated legislative and administrative programme is simply too much to ask for in this environment. All manner of metaphor is par for the course in this area; one step forward two steps back; dancing on moving carpet. But since we are in grand final season, this is an area where the Black fellas always run up hill on an uneven playing field, against the wind toward increasingly smaller goalposts without half time respite!

As the so-called Minor Amendments to the Native Title Act received the royal assent last week on 17 September[3] I was reminded of Nelson Mandela's words of wisdom:

> *"There is no passion to be found playing small – in settling for a life that is less than the one you are capable of living."*

These recent *minor* amendments should be recast as the *small* amendments, the *safe* amendments, if one was cynical even the *recession-busting* amendments because they are guaranteed to ensure that everyone in this industry has another 30 years of work while we fumble through the outstanding 484 odd claims left on the court lists!

If there ever was an opportunity to play it **big -** this was it! If there ever was an opportunity to realise the potential that this Act is capable of achieving - this was it! I understand the trepidation of any Government making amendments to the Native Title Act but this was the opportunity to re-calibrate the legislation to ensure its provisions aligned with the promise of the Preamble – and there is no Act of parliament that has a more inspiring, and dare I say it, passionate Preamble!

Why were these Minor Amendments a lost opportunity? The simple reason is that over the past 12 months and leading up to these amendments, we had a very large section of the users of the native title system saying that it is time to change the legislation to introduce at least three reforms:

1. Changing the burden of proof[4] – this change was capable of evoking the behavioral change we all speak of

[1] K Smith, 'The Native Title Amendment Act 2009: Minor amendments or just playing it small and safe?', paper presented at the National Indigenous Legal Conference, University of Adelaide, 24 September 2009.
[2] *Native Title Act 1993* (Cth).
[3] *Native Title Amendment Act 2009* (Cth).
[4] Australian Greens Senator Rachel Siewart unsuccessfully moved an amendment to the Native Title Amendment Bill 2009 (Cth) that would have inserted a presumption of continuity into the principal Act. The amendment was based on an amendment suggested by Chief Justice French in July 2008: See, Commonwealth, *Parliamentary Debates Hansard*, Senate, 14 September 2009, 53-54 (Senator Rachel Siewart); Justice French.

2. Disregarding some forms of extinguishment – when you increase the options there is a commensurate probability of achieving negotiated outcomes (in fairness the minor amendments includes judicial recognition of non-native title outcomes but it is not the same as disregarding extinguishment)
3. Streamlining the process for recognising native title (the minor amendments focused on this backend option – many of my Rep Body colleagues and our supporters supported these changes but you have to get to the end of a very convoluted process to avail yourself of them)

The most astonishing observation that can be made about these proposals was not only **what** was being said but **who** was saying it. Obviously when native title representative bodies, the Aboriginal and Torres Strait islander Social Justice Commissioner and AIATSIS say that there is a dire need to reform the system that would be expected but you don't expect the Chief Justice of the High Court[5], current and former judges of the Federal Court and the Law Council of Australia to openly support such reforms. Indeed getting lawyers to agree on anything is hard enough but when they give such advice freely you don't play small!

The Proposals

The different models

There are a number of models that could be put forward to ameliorate the current harsh evidential burden placed on Applicants. The two popular and abundantly sensible models are proffered by Chief Justice French and Justice North.

In a nutshell the **French model** is a rebuttable presumption of continuity of the relevant society and the acknowledgement of its laws and customs from sovereignty to the present time.[6] This presumption will be based on the fact that the native title claim group acknowledges laws and observes customs it **reasonably believes to be the laws and customs acknowledged and observed by their ancestors right back to sovereignty;**[7] in a sense a 'reverse domino of continuity'. It would then be up to the State or another respondent to rebut the presumption based on credible evidence.[8] The Chief Justice even drafted two additional subsections to the existing s61 to facilitate the change.[9] It was that simple!

Justice North proffered a different approach.[10] Under the **North model**, applicants would need to show that there were Indigenous people at sovereignty occupying the land in question according to traditional laws and customs.[11] The onus would then shift to the respondents to demonstrate that the other requirements of the *Yorta Yorta* test do not exist. Justice North suggested the changes be made to s223.[12] Justice North's model is consistent with overseas common law jurisdictions where there is a presumption of continuity from sovereignty – so this concept is no stranger to the common law. However, a distinguishing feature of those cases is that in those overseas jurisdictions the Aboriginal parties have the benefit of treaties recognizing those Peoples at the time sovereignty was asserted.

These models are not the panacea to the woes of native title litigation – one could never be that naïve. There is the reality of overlapping claims (who is entitled to the presumption or does the existence of an overlap negate the presumption from the outset); under the North model, how do you explain concepts of succession (where one group takes over the rights and interests to land and waters of another group). While these present as issues they are far from insurmountable in fact they border on the infinitesimal compared to the current nonsense of complying with the Yorta Yorta test.

The NNTC's submission[13] on these collateral issues included the utilisation of the registration test so that the presumption would be limited to those claims that are registered. It would also require NTRBs and applicant groups themselves to sort out intra and inter Indigenous disputes and unmeritorious claims. A challenge that needs to be accepted if such reforms are embraced!

'Lifting the burden of native title – some modest proposals for improvement'. Paper presented to the Federal Court Native Title User Group (Adelaide, 9 July 2008).

[5] See e.g., French, above n4.

[6] Ibid [28].

[7] Ibid [29].

[8] Ibid [30].

[9] Ibid [31].

[10] See, Justice AM North and T Goodwin, '*Disconnection – the gap between law and justice in native title: A proposal for reform*', paper delivered to the AIATSIS National Native Title Conference, Melbourne, 4 June 2009.

[11] Ibid 14.

[12] Ibid 16.

[13] See, National Native Title Council, '*Submission – Proposed Minor Native Title Amendments*', submission to the Attorney-General in response to the December 2008 Commonwealth discussion paper on proposed minor native title amendments, 20 February 2009.

Behavioural change

I appreciate that legislation can be a blunt instrument when it comes to behavioral change but it is the only tool we have left in the tool box. Parties and their legal representatives are not going to change their behaviour or indeed their professional standards when the law and process favours them and their clients. Only in the parallel universe of native title would you get fundamentally good people behaving inherently unfairly. Real change - behavioral change – cannot occur unless the current playing field is leveled. Legislative amendments ought to serve as a significant catalyst to change attitudes.

The presumption of continuity, whichever model is adopted, would achieve the following:

- Make the system fairer for Indigenous parties
- Places the burden on the State; the party that has the tactical advantage of disproving continuity and extinguishment through the "institutional memory" of how it colonised
- Investigating issues of connection and extinguishment simultaneously and by the one party is the most logical way of getting a clear picture of the evidence: each grant of tenure has locked within it a story about what happened to the Aboriginal people on that land
- The commercial reality (and there is no commercial reality in current native title land) of being put to proof on both connection and extinguishment is enough to explore a broader range of options – the cost of proving or disproving is often more sometimes twice and thrice as much as the freehold value of the land in question
- There is nothing like pricking the raw nerve of morality to invoke an epiphany: the State would need to prove that each succeeding government was an effective coloniser the sordid details that would include acts of genocide would be abhorrent.
- It would dispense with the current linear, technical and blinkered way native title cases are prosecuted and defended
- With the reduction of unnecessary transaction points, time, money and misery is saved – sounds like faster, cheaper, fairer outcomes??

Increasing the options for a negotiated outcome

It is particularly heartening to hear the range of options that are available to increase the options. The Chief Justice, Justice North, Justice Mansfield and former Justice Wilcox have all made invaluable contributions. Those contributions range from disregarding historical extinguishment to judicial recognition of non native title outcomes: the latter being picked up in the minor amendments.

Sadly increasing the options don't get you anywhere if you are stuck at first base on the connection issue. At present, respondent parties have no real motivation to consider negotiated outcomes. The process is linear and respondents, patiently or impatiently, wait in turn to play their role in the process as the system heaves along. If we change the process, we change the behaviours and it is in that space where options abound.

There are many extinguishing tenures that could be characterised as "historical extinguishment". Justice French has suggested that a modest amendment to the NTA:

> *would allow extinguishment to be disregarded where an agreement was entered into between the States and the applicants that it should be disregarded. Such agreements might be limited to Crown land or reserves of various kinds. The model for such a provision may be found in ss47 to 47B. …Native title so agreed would also be subject to existing interests. If, for example, the vesting of a reserve was taken to have extinguished native title an agreement of the kind proposed could require that extinguishing effect to be disregarded while either applying the non-extinguishment principle under the NTA or providing in the agreement itself for the relationship between native title rights and interests and the exercise of powers in relation to the reserve.*[14]

Confidence in the system

Finally, parties need to be confident that their agreement will be recognised. The Minor Amendments pick up Justice Mansfield's statements around agreed statements of fact in s 87 consent determination. This proposal is very positive but, alone does not represent a comprehensive response to ensure fairness in the negotiation process. We need to reiterate the interrelationship of s87 process changes to the proposed presumption of continuity and increasing the available options.

[14] French, above n4, [32].

The Minor Amendments also includes the interesting suggestions of former Justice Wilcox being judicial recognition of matters other than native title, this might include recognition of say, traditional ownership[15]. This is a very constructive amendment that obviously needs to be explored in the context of how that power might be exercised.

Conclusion

I agree that behavioural change is critical to faster, fairer and more cost effective outcomes. I also agree that the recent amendments are a move in the right direction. But those amendments alone will not evoke the necessary behavioural change. In fact the changes associated with implementing the amendments are likely to add yet another layer of confusion and effort upon an already change-fatigued environment.

We need to introduce the other limbs to the reform programme as soon as possible; not in two, three or four years' time. If the changes were made and made quickly, the system stands a good chance of reducing 30 years of work down to 10. In fact why not aim for five years! After all "there is no passion to be found in playing small".

Kevin Smith, CEO Queensland South Native Title Services at the 2009 National Indigenous Legal Conference in Adelaide.

Kevin Smith is also a member of the Native Title Research Unit Advisory Committee.

[15] The new s87(4) states "without limiting subsection (2) or (3), if the order under that subsection involves the Court making a determination of native title, the Court may also make an order under this subsection that gives effect to terms of the agreement that involve matters other than native title".

Native Title in Context: Report from the 2009 National Indigenous Legal Conference

By Cynthia Ganesharajah, Research Officer NTRU

As a part of professional development a colleague and I were afforded the opportunity to travel to Adelaide and participate in the 2009 National Indigenous Legal Conference.[16] For me, the Conference highlighted the importance of recognising and being continually aware, that native title does not exist in a vacuum. Rather, it is important to understand the role of native title within broader discussions about self-determination, sovereignty and non-discrimination.

At the Conference Federal Attorney General Robert McClelland spoke about closing the gap, creating partnerships, and Aboriginal and Torres Strait Islander peoples taking responsibility for their own communities. Yet, it is difficult to see why, or even how, Aboriginal and Torres Strait Islander peoples should, or could, take primary responsibility for the end product of successive government policies. As pointed out by Dr Irene Watson in her keynote address, the role of colonisation in producing dysfunction and impairing capacity is often overlooked. Dr Watson further argued that the colonisation of Aboriginal and Torres Strait Islander peoples is ongoing. The acknowledgement of this continuing colonisation is a necessary precursor to decolonisation and discussions of sovereignty.

Interestingly, Dr Watson maintained that the underlying rationale for the continuing colonisation of, or at least discrimination against, Aboriginal and Torres Strait Islander peoples is control. In my view, racism also plays a major role. This was highlighted in a presentation by Professor George Williams who spoke about the Australian Constitution and Indigenous people. As a foundational governing document, and the highest

[16] Selected papers are available at: http://www.nilcsa2009.com/

source of law in Australia, the Australian Constitution is a critical component of Australia's governance framework. Since its inception, the Constitution has contained overt references to race that have had a negative impact for Aboriginal and Torres Strait Islander peoples. Despite the amendments during the 1967 referendum, the Constitution fails to adequately represent and recognise Aboriginal and Torres Strait Islander peoples.[17]

The most obvious example of deliberate disempowerment, for reasons of control and racism, is the Northern Territory Emergency Response. However, systemic racism is also evidenced in the results of a number of coronial inquiries over the years. In his presentation on coronial reform, Professor Ray Watterson referred to excerpts of coronial reports and highlighted the repeated usage of phrases such as 'communication breakdown' 'system failure' and 'avoidable and unfortunate deaths'.[18]

In the context of these critical issues and others I found myself thinking about the broader context of those Aboriginal and Torres Strait Islander peoples who are fighting for recognition of native title or who are trying to make sense of what their native title means. Given the context of lack of control and systemic discrimination, native title is perhaps all the more important because it has the potential to be empowering and restorative. Despite this potential, at times, the current native title system seems to have the opposite effect. Although Justice Mansfield, in his presentation about the current state of native title was very optimistic,[19] a more realist assessment was made by Kevin Smith, Chief Executive Officer of Queensland South Native Title Services. In Kevin Smith's view, the recent amendments present a lost opportunity. This lost opportunity is all the more concerning given the broader context of Indigenous affairs in Australia.

There is a still a long way to go before self-determination, sovereignty and non-discrimination for Aboriginal and Torres Strait Islander peoples. However, the presentations at the 2009 National Indigenous Legal Conference highlighted that these issues are still very much on the national agenda.

[17] At the 1967 referendum both sections 51(xxvi) and 127 were amended to remove overt references to Aboriginal people. However, section 25 implicitly recognises that a State can disqualify people of a particular race from voting. For more see, G Williams, 'After the Apology: Recognising Indigenous Peoples and their Rights in the Australian Constitution', presentation at the National Indigenous Legal Conference 2009, Adelaide, 24 September 2009.

[18] R Watterson, 'Coroners and Indigenous death' presentation at the National Indigenous Legal Conference 2009, Adelaide, 24 September 2009. See also Australian Coronial Reform Working Group, 'Australian Coronial Reform – The Way Forward', Australian Coronial Reform Working Group, 2009.

[19] The Hon. Justice Mansfield, 'Native Title – Where are we now?', presentation at the National Indigenous Legal Conference 2009, Adelaide, 24 September 2009.

Observations from the National Indigenous Legal Conference - Water and Native Title

By Ingrid Hammer, Research Assistant NTRU

One of the concurrent sessions held at the 2009 National Indigenous Legal Conference was on the topic of Indigenous rights in water. Associate Professor Poh-Ling Tan from Griffith Law School and Solicitor, Ms Virginia Falk spoke of the complexity of water rights under the National Water Initiative (NWI), State and Territory regimes and how native title rights and interest are accounted for.

Incontestably, water is the buzz word flying around the government and private enterprise at a rate of knots. Climate change, water rights, irrigation, licences and natural flows are all catchphrases that dominate the headlines but the rights and interest of Indigenous people receive comparatively little exposure.

Poh-Ling Tan began the session by outlining the NWI and the situation of Indigenous rights under the scheme. What greatly surprised many participants was the lack of prominence that Indigenous participation and rights to water resources are afforded under the NWI. Most concerning is the largely discretionary language that is utilised in referring to Indigenous interests. Terminology such as 'wherever possible'[20] in referring to Indigenous

[20] Intergovernmental Agreement of a National Water Initiative Between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the

participation in water planning and 'wherever they can be developed'[21] in relation to incorporating Indigenous social, spiritual and customary objectives and strategies to achieve the objectives of the NWI, begs the question, just how much prominence will water planners afford to Indigenous rights and interests?

Another concerning feature of the NWI is the lack of guidance given to water planners about how to consult with affected Indigenous people, including the most effective ways to engage, who to approach, when and how to best approach them. These questions are left unanswered under the NWI.

Virginia Falk provided the second presentation, focussing on the research that she undertook for her PhD. Virginia spoke of the need to reconsider water as a sacred resource and an asset for Indigenous people. Contemporary thinking about water issues should extend beyond a classic physical science understanding to incorporate Indigenous science. Virginia raises a somewhat overlooked point in advocating for the knowledge and science of natural resources as understood by Indigenous people. The knowledge that abounds from an Indigenous perspective might assist in water planning and directly benefit native title holders in access to water based rights and interests.

Virginia Falk and Poh-Ling Tan raise important points in relation to native title and water. The National Water Initiative, while recognising that Indigenous interests are important, lacks any compelling mechanism to ensure Indigenous engagement in water planning is effectively carried out. It must be remembered that without access to decent supplies of good quality water and planning that accounts for access to these supplies, the rights and interests of Indigenous people recognised through native title will be compromised.

Both presentations are available online from the NILC website: http://www.nilcsa2009.com/.

Australian Capital Territory and the Northern Territory, (signed 25 June 2004 at COAG meeting) Cl 52(i).

[21] Ibid Cl 52(ii).

Summer Course in Native Title in January 2010 @ UNSW

The UNSW Law School will be offering an intensive course in Native Title Law, Policy and Practice in Sydney in the week commencing Monday 11 January 2010.

Over four days, the course examines the essential elements of native title law in Australia. Because that law can only be properly understood in context, the course also covers the broader policy and political debates that have influenced the evolution of Australian native title law in the last 15 years. The course also looks at the practical impacts of native title at ground level.

In past years, the class has included a mix of NTRB personnel, government and private sector lawyers, postgraduate coursework students and some final-year undergraduates. Since the course started in 2006, participants have come from NSW, WA, NT, Qld, SA, Victoria and the ACT.

For those not seeking academic credit, the course can be taken on a Continuing Legal Education (CLE) basis.

For those seeking academic credit, the course can be undertaken (with assessment and at a higher cost) on three other bases:

- through UNSW's postgraduate coursework programs
- cross-institutionally, for students enrolled elsewhere
- on a non-award voluntary basis (ie one-off, for interest or professional development).

For CLE enrolments, contact the CLE Centre at UNSW on 02 9385 2267 or cle@unsw.edu.au. For cross-institutional and non-award voluntary enrolments, go to www.unsw.edu.au/futureStudents/nonAward/sad/fsnacrossinst.html. Existing UNSW postgraduate students can enrol online.

Places are limited, so early enrolment is advisable to avoid missing out.

Classes will be held on Monday 11, Tuesday 12, Thursday 14 and Friday 15 January 2010 on the UNSW Kensington campus in Sydney.

For more information about the content of the course, contact the course convenor Sean Brennan at the UNSW Law School on 02 9385 2334 or s.brennan@unsw.edu.au.

Letter to the Editor

Comment on Burnside Paper

Blair McGlew, Head of Land Access, Fortescue Metals Group Limited

Sarah Burnside's article "Negotiation in Good Faith under the Native Title Act: A Critical Analysis" (Volume 4 Issues Paper No.3, October 2009) discusses the recent Full Federal Court decision of FMG Pilbara v Cox (an application for special leave to appeal the High Court was refused recently) in which FMG Pilbara (a subsidiary of Fortescue Metals Group) was found to have negotiated in good faith over the grant of a mining lease. Burnside draws several conclusions about the way in which negotiations were undertaken and the overall application of s31(1) (b) of the NTA and the concept of negotiating in good faith. I wish to respond to Burnside's comments about the conduct of the negotiations and discuss the experience of Fortescue Metals Group (Fortescue) in conducting negotiations with Native Title Claimant Parties (NTCPs) in the Pilbara and their representatives, particularly in relation to the Puutu Kurnti Kurrama Pinikura (PKKP) people and their representatives Yamatji Marlpa Aboriginal Corporation (YMAC).

In section III of the article, Ms Burnside discusses the limits of good faith and notions of bad faith and notes the following:

• Good faith does not require the proponent to fund negotiations;

• Good faith does not require face to face meetings with the native title parties;

• Negotiations could be conducted wholly through a party's legal representatives; and

• Indicia of bad faith include delays, non responses and an "ulterior purpose" - namely the avoidance of contractual obligations to a native title party.

In specifically discussing FMG Pilbara v Cox, Ms Burnside asserts that:

• Fortescue unilaterally ended negotiations when they were "at a preliminary stage"; and

• Fortescue's "obvious 'ulterior purpose'" in the negotiations was to obtain the "tenement with no contractual obligations attached".

Fortescue's negotiations with PKKP occurred in a manner quite different to what is represented in the article. From the inception of negotiations with PKKP, Fortescue funded an internal YMAC lawyer, external consultant lawyer chosen by YMAC and an economist. Fortescue attended face to face meetings with the PKKP working group which includes over 20 members (a one day meeting costing the company in excess of $50,000). Various representatives of Fortescue attended these meetings including representatives of exploration and resource development, heritage, land access and Fortescue's internal native title lawyer. All these actions were taken with a view to concluding a comprehensive, contractually binding agreement covering mining, which was always envisioned to include the benefits Burnside lists such as heritage protection, environmental provisions, employment and training opportunities as well as financial compensation. A draft of such an agreement was provided to the YMAC lawyers at the commencement of negotiations and mirrored previous comprehensive agreements concluded between Fortescue and three other NTCPs represented by YMAC.

These negotiations continued until 22 October 2009, when Fortescue reached an in-principle agreement that guarantees the PKKP substantial financial and other benefits into the future. The agreement with PKKP came almost two years after Burnside asserts Fortescue "unilaterally ended negotiations" and was reached despite the High Court decision one week earlier that provided strong support to the conclusion that the tenement would be granted to Fortescue without further contractual obligations. Prior to the meeting at which the agreement was brokered, YMAC released a press statement that claimed "FMG never began any substantial negotiations towards an agreement … they just went through the motions".

Burnside's claim that Fortescue sought to avoid contractual obligations and terminate negotiations prematurely is invalid and unsustainable in light of these facts and decisions by the Full Federal Court and two judges of the High Court in Fortescue's favour.

The second point I wish to discuss is Ms Burnside's conclusion that "s31(1)(b) of the Native Title Act 1993 (NTA) "requires amendment if it is to be both substantive and enforceable". I would suggest that there is a better and more immediate solution to the problem that she identifies in her paper. Namely, that the right to negotiate provisions contained within the NTA represent a "minimal safeguard for native title claimants and holders who wish to fulfil their cultural obligations to protect country and to obtain a share in the profits derived". Ms Burnside's paper explains that the RTN and the requirement for "good faith" is somewhat unusual in law, but was established due to the inherent power imbalance that generally exists between the two negotiation parties (in this case a mining company and a Native Title Claim Group). She suggests that although it has the appearance of protecting the NTCP, it actually works to disempower them by providing a legitimate structure through which the grantee party can secure its rights to land without ever having to engage in meaningful negotiations.

Where Ms Burnside argues that better legal protection is required, I recommend a different focus from the legal or negotiation representatives. In my view, while the lawyers with whom Fortescue has negotiated are competent in their field of legal expertise, Native Title Representative Body (NTRB) lawyers generally do not act "commercially", instead focusing on process at the expense of advancing a negotiated outcome.

They seem to expect that the Grantee Party fund expensive representation and meeting costs ad infinitum, regardless of progress made towards agreement. Also, they seem to hold out and delay with a view to increasing the level of compensation. Delays to the grant of a tenement have significant cost implications to mining companies. Therefore, delaying behaviour is not rewarded and only works to disadvantage their clients in the long run. In the case of PKKP, the deal would have been substantially more rewarding had the agreement been concluded twelve months ago. The NTRB lawyers should not find it surprising when a Grantee Party resorts to the only real alternative to securing the grant of the tenement – a determination through the National Native Title Tribunal.

In its NTA negotiations, Fortescue foots the bill for all legal, economic and strategic resources employed by the NTRB and NTCP. With this in mind, it seems implausible to suggest that there is any power imbalance in the negotiation room. Yet this seems to be the case. No amount of statutory amendment will change that. It requires NTRBs to employ specialist and experienced negotiators in matters where the stakes are high.

Author Response to Comment

Sarah Burnside

The letter written by Fortescue is apparently a response to my paper. I would like to be clear that my paper was not about FMG or its negotiating conduct at all; it was an analysis of s31(1)(b) of the NTA.

My paper focused on the meaning of 'good faith' in s31(1)(b) of the Native Title Act 1993 (Cth) and the inherent limitations of this section from the perspective of native title claimants and holders.

It should also be noted that my paper was about the Tribunal and Court decisions and on the facts before the courts; it only dealt with the state of negotiations prior to the s35 application. Any negotiations or outcomes reached since then were not the concern of the Tribunal or the Court and are not relevant to my paper.

The issues paper is available to read online at: http://ntru.aiatsis.gov.au/publications/issue_papers.html.

Alternatively, if you would like to receive a hard copy please email: ntru@aiatsis.gov.au .

NTRU Project Report

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.

What's New

Legislative Reforms

Aboriginal Land Rights Amendment Bill 2009 **(NSW)**

Fisheries Management Amendment Bill 2009 **(NSW)**

Major Transport Projects Facilitation Act 2009 (Vic)

Native Title Amendment Act 2009 **(Cth)**

Native Title Amendment Bill (No. 2) 2009

Recent 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.

Combined Gunggandji People v State of Queensland [2009] FCA 979

In this case a non-claimant party claimed entitlements over a part of the claim area in the Combined Gunggandji People native title application. The claim area lies to the south of Cairns, borders Mission Bay and includes the Yarrabah township. It is vested in the Council under a deed of grant in trust. The non-claimant party (Mr Ludwick) argued that he was entitled to a lease under section 361A or a licence to occupy under section 452A of the *Land Act 1962* (Qld). Justice Dowsett held that Mr Ludwick was entitled to a lease. He did not, however, determine whether Mr Ludwick was also entitled to a

licence and the effect of the lease on native title but rather indicated he would hear further submissions.

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.

Jabiru Metals Ltd v Lynch [2009] WASC 238

In this case the issue was whether the situating arising in the case was fundamentally different from the situation contemplated by the contracts initially signed between Jabiru Metals and the native title claimants. In particular, did payments due to native title claimants under a mining agreement still need to be made after the native title claims had been dismissed? The court confirmed that the contracts had been terminated due to frustration. If payments were due as a result of accrued rights, these would be made voluntarily.

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.

Nucoorilma Clan of the Gamilaaroy Aboriginal People v NSW Minister for Land & Water Conservation [2009] FCA 1043

In this case the native title claimants sought an extension of time to file a number of documents required under a previous court order. The judge was not satisfied that the extension should be granted because of the history of non-compliance with court orders and the resulting delay, expense and other prejudice to the respondent.

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).

Reports

Australian Human Rights Commission, '"Our future in our hands" – Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples', Australian Human Rights Commission, 2009.

The report outlines a proposed model for a new national representative body for Aboriginal and Torres Strait Islander peoples, which was designed and developed from 12 months of intensive consultations with Indigenous peoples.

Attorney-General's Department, 'A Strategic Framework for Access to Justice in the Federal Civil Justice System', Report by the Access to Justice Taskforce Attorney-General's Department, 2009.

The Access to Justice Taskforce was established to conduct a comprehensive examination of the federal civil justice system with a view to developing a more strategic approach to access to justice issues. The report is the result of that examination.

Chapter 3 discusses the 'supply of justice' – essentially the availability of solutions for the resolution of disputes. Native title is discussed within the context of types of disputes that are suited to particular forms of dispute resolution.

Native Title Publications

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

J Baxter and M Trebilcock, ' "Formalizing" land tenure in First Nations: Evaluating the case for reserve tenure reform', The Indigenous Law Journal, vol.7, no.2, 2009, pp.45-122.

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.

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K O'Bryan, 'Issues in natural resource management: inland water resources: implications of native title and the future of Indigenous control and management of inland waters', *E Law: Murdoch University Electronic Journal of Law*, vol.14, no.2, 2007, pp.280-327.

Native title in the News

National

16-Sep-09 AU Laws aim to speed native title claims Native title claims are expected to be processed more efficiently under new laws passed by Federal Government. The amendments to the *Native Title Act 1993* give the Federal Court the power to manage the mediation of claims. The Court will be able to more forcefully pull into line reluctant parties if a matter becomes deadlocked. *Northern Territory News,* (Darwin NT, 16 September 2009), 6. *Cairns Post,* (Cairns QLD, 15 September 2009), 10.

New South Wales

03-Sep-09 NSW Githabul divided over use of native title land After fighting to stop the Repco Rally, Githabul custodian Doug Williams will now perform a welcome ceremony at the event's launch. Mr Williams said that there is no official agreement in existence between the rally organisers and the Githabul people for the use of the land which is subject to a native title claim. *Northern Star,* (Lismore NSW, 3 September 2009), 5. *Daily News Tweed Heads,* (Tweed Heads NSW, 1 September 2009), 2.

05-Sep-09 NSW Mines get the all clear Barrick's Cowal Gold Mine has successfully appealed a New South Wales Land and Environment Court decision which had prevented the mine from being extended and modifications to its operations. Wiradjuri Elder and CEO of the Wiradjuri Condobolin Corporation Percy Knight welcomed the appeal court ruling. He said that their native title agreement with the Cowal Gold Mine is delivering real benefits to the Wiradjuri community. *Forbes Advocate,* (Forbes NSW, 5 September 2009), 3. *Daily Advertiser,* (Wagga Wagga NSW, 4 September 2009), 1. *Daily Advertiser, (Wagga Wagga NSW, 10 October 2009), 28.*

01-Oct-09 NSW Native title delays SA's Four Mile mine Australia's fifth uranium mine has been delayed because of a hitch in a native title agreement. The scheduled commissioning has been delayed until April next year or beyond. Primary Industry Resources SA (PIRSA) has requested more information about the native title agreement covering the mine area, about 550km north of Adelaide. *National Indigenous Times, (Malua Bay NSW, 1 October 2009), 12.*

28-Oct-09 NSW Native title agreement Dirk Hartog Island, the site of the first recorded European landing on Australian soil, will become a national park after a native title agreement was struck between local Indigenous communities and the West Australian Government. Environment Minister Donna Faragher said yesterday that making almost the entire 63,000ha of island into a national park would allow the Malgana people to engage in its ongoing management and conservation. *Newcastle Herald, (Newcastle NSW, 28 October 2009), 20. Courier Mail, (Brisbane QLD, 28 October 2009), 18. Age, (Melbourne VIC, 28 October 2009), 10. Advertiser, (Adelaide, 28 October 2009), 24. Bendigo Advertiser, (Bendigo VIC, 28 October 2009), 15. Kalgoorlie Miner, (Kalgoorlie WA, 28 October 2009), 4.*

Northern Territory

30-Oct-09 NT New Indigenous housing deals The State Government is negotiating 40-years leases with Indigenous land holders to improve the roll-out of the Commonwealth's Indigenous housing program. The

delivery of remote housing is faced with many issues and complexities ranging from native title to infrastructure. The Indigenous Land and Infrastructure Program Office had been set up to facilitate the delivery of 1114 new or refurbished houses in disadvantage communities over the next nine years. *Courier Mail,* (Brisbane QLD, 30 October 2009), 23. *National Indigenous Times,* (Malua Bay NSW, 29 October 2009), 7.

Queensland

01-Sep-09 QLD Elder angry her people left out of dam talks The Gubbi Gubbi Aboriginal people have criticised the State Government's handling of pay-outs and preliminary work for the proposed $1.5 billion Traveston Crossing Dam near Gympie. The community has accused the Government of disenfranchising their people by bypassing certain parts of the native title process. *Courier Mail,* Brisbane QLD, 1 September 2009), 18.

23-Oct-09 QLD Native title win on Cape The Kowanyama community has become the third Aboriginal group to get a native title determination in Cape York this year. Justice Andrew Greenwood of the Federal Court recognised the Kowanyama People's exclusive native title rights to 2518sq km of land, about 460km north west of Cairns. The Kowanyama people will also be recognised as holding non-exclusive rights over 213sq km of sea, beach and tidal areas. *Cairns Post, (Cairns QLD, 23 October 2009), 10. Courier Mail, (Brisbane QLD, 23 October 2009), 5. Australia, (AU, 22 October 2009), 8. Cooktown Local News, (Cooktown QLD, 29 October 2009), 7. National Indigenous Times, (Malua Bay NSW, 29 October 2009), 9.*

South Australia

25-Sep-09 SA Uranium mine facing delays Australia's fifth uranium mine has been delayed because of a problem with a native title agreement. Primary Industry Resources SA (PIRSA) has called for more information about a native title agreement of about 550 km covering the mine area north of Adelaide. The alliance resource and joint venture partner Quasar has been unable to meet the statutory registration requirement, which would allow the Minister to grant a mining lease. *Independent Weekly,* (Adelaide, 25 September 2009), 24. *Northern Territory News,* (Darwin NT, 23 September 2009), 20. *North West Star,* (Mount Isa QLD, 23 September 2009), 12. *Australian,* (National AU, 22 September 2009), 20. *Advertiser,* (Adelaide SA, 22 September 2009), 37.

Victoria

05-Sep-09 VIC Lack of funding slows native title resolutions Victorian Deputy Premier Rob Hulls said Victorian efforts to establish a new framework to resolve a backlog of native title claims was being hampered. He voiced his view that the Federal Government is turning its back on native title. The Federal Attorney-General's Department, however, is blaming the economic crisis. *Hamilton Spectator,* (Hamilton VIC, 5 September 2009), 13.

26-Sep-09 VIC Boort on title talk agenda A native title claim on land in the Boort region will be one of the first in Victoria to test new State Government legislation. The Dja Dja Wurrung Land Aboriginal Corporation collectively resolved at a recent meeting to formally engage with State Government regarding the claim. Under the Victorian Native Title Settlement Framework announced in June, traditional owner groups can choose to negotiate directly with the State to settle their native title claim rather than go through the courts. *Bendigo Advertiser,*(Bendigo VIC, 26 September 2009), 9.

Western Australia

02-Sep-09 WA Rio in row over land-use deal Rio Tinto's plan on widening its Pilbara iron-ore operations might be stalled due to issues with native title holders from the Ngarluma Aboriginal Corporation (NAC). Paul Hates, Chief Executive at NAC stated that Rio has breached its initial agreement by not paying money owing, despite stating that upfront payment would be made. *Summaries - Australian Financial Review,* (National AU, 2 September 2009), 5.

12-Sep-09 WA GLSC urges govts to try settlement The Goldfields Land and Sea Council is urging State and Federal Governments to consider redirecting funds from native title litigation processes to settling claims by agreement. The comments came after the State Government expressed its disappointment at a Federal Government decision to withhold a new native title funding agreement that would underline a cost-sharing arrangement for broader, more flexible native title settlements. *Kalgoorlie Miner,* (Kalgoorlie WA, 12 September 2009), 13.

16-Sep-09 WA Atlas signs native title mining agreement Mining company Atlas Iron has recently signed an important native title mining agreement with the Pilbara's Keriyarra people. The agreement will enable iron ore mining to proceed over the Kariyarra claim area covering approximately 17 052 square kilometres of land

and sea. Atlas Managing Director David Flanagan said it was a great result and that the company looked forward to working with the Kariyarra people for many years to come. *North West Telegraph,* (South Headland WA, 16 September 2009), 16. *Mining Chronicle,* (National AU, October 2009), 10.

23-Sep-09 WA Native title claim resolved out of court The Barnett Government in on the verge of reaching an agreement with Aboriginal groups over large areas of Western Australia's south, a month after dropping a High Court appeal against a successful native title claim in and around Broome. Indigenous land groups praised the Barnett Government for their new cooperative approach. They noted that the Government appeared more focused on negotiated outcomes rather than long court battles. *Australian,* (National AU, 23 September 2009), 9.

21-Oct-09 WA Pilbara anger at High Court dismissal of native title appeal A recent decision by the High Court of Australia to dismiss an appeal by Pilbara traditional owners against mining company Fortescue Metals Group (FMG) has been criticised by native title representatives. According to native title representative body Yamatji Marlpa Aboriginal Corporation the decision could potentially disenfranchise thousands of Indigenous people across the nation. The appeal was put forward in anticipation of an FMG mining application, encompassing 4320 hectares in the west Pilbara. *North West Telegraph,* (South Hedland WA, 21 October 2009), 16. *Barrier Daily truth,* (Broken Hill NSW, 16 October 2009), 7. *National Indigenous Times,* (Malua Bay NSW, 29 October 2009), 7.

Oct-09 WA Native title approval paves the way for junior explorer WA-based Hemisphere Resources was given the green light for its Yandigoogina South iron project in early October following lengthy, but ultimately successful, native title negotiations. Following the approval, Hemisphere Resources would proceed with implementing drilling programs at Yandicoogina South as soon as the relevant permits were granted.*Australian Mining Review,* (AU, 2009).

ILUAs

NAME	TRIBUNAL FILE NO.	TYPE	STATE OR TERRITORY	REGISTRATION DATE	SUBJECT-MATTER
Wakka Wakka #2 and Tarong ILUA	QI2008/027	Area agreement	QLD	08/09/2009	Mining
Portland Roads ILUA	QI2008/029	Area agreement	QLD	19/10/2009	Consultation protocol; Government; Infrastructure

This information has been extracted from the Native Title Research Unit ILUA summary: http://ntru.aiatsis.gov.au/research/ilua_summary.html , 1 November 2009. For further information about native title determinations contact the National Native Title Tribunal on 1800 640 501 or visit www.nntt.gov.au.

Determinations

SHORT NAME	CASE NAME	DATE	STATE OR TERRITORY	OUTCOME	LEGAL PROCESS	TYPE
Gandangarra Local Aboriginal Land Council	*Gandangarra Local Aboriginal Land Council (unreported, FCA, 30 September 2009, Jagot J)*	30/09/2009	NSW	Native Title Does Not Exist	Unopposed Determination	Non-Claimant
Wik and Wik Way People	*Wik and Wik Way Native Title Claim Group v State of Queensland [2009] FCA 789*	05/10/2009	QLD	Native Title Exists In The Entire Determination Area	Consent Determination	Claimant

This information has been extracted from the Native Title Research Unit Determinations summary: http://ntru.aiatsis.gov.au/research/determinations_summary.html , 1 November 2009. For further information about native title determinations contact the National Native Title Tribunal on 1800 640 501 or visit www.nntt.gov.au.

Items in the AIATSIS Catalogue

The following list contains either new or recently amended catalogue records relevant to Native Title issues. Please check MURA, the AIATSIS on-line catalogue, for more information on each entry. You will notice some items on MURA do not have a full citation because they are preliminary catalogue records.

The AIATSIS Library now has copies of the *Melbourne Historical Journal*, issues beginning in 1961. Also, the Library holds duplicates of items from the Lambert McBride papers, the originals of which are in the State Library of Queensland. These include material from the Department of Aboriginal Affairs and the Queensland Council for the Advancement of Aborigines and Torres Strait Islanders from 1963-1997

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Bardi and Yan-nhangu field recordings 2007-2008. ca. 96 hours. (BOWERN_C05)

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THE NATIVE TITLE RESEARCH UNIT

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