



WHAT'S NEW IN NATIVE TITLE

February 2016

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1. Case Summaries

[Drury on behalf of the Nanda Native Title Claim Group v State of Western Australia \[2016\] FCA 52](#)

5 February 2016, Joinder Application, Federal Court, Perth, Western Australia, Barker J

In this matter, Barker J considered whether two respondents to the native title proceeding made on behalf of the Nanda people, William Charles Mallard Jnr and William Charles Mallard Snr (the Mallards) should be removed as respondent parties under [s 84\(8\)](#) of the [Native Title Act 1993 \(Cth\)](#) (NTA), given they were also claim group members and [applicants](#). Barker J ordered that the Mallards cease to be respondents to the proceeding.

The Mallards argued that they should remain as respondents to the native title proceeding until they could be satisfied that their apical ancestor Sarah Feast would be included in the determination of native title. The Mallards submitted that they had a real and substantial concern that they will be removed from the claim group if that apical is not included among the ancestors for the native title claim group.

Both the State and Commonwealth have differing views on the nature of the court's discretion in applying s 84(8). Relying on Mansfield J's judgment in [Starkey & Ors v South Australia & Ors \[2011\] FCA 456](#) (*Starkey*) at [48], the State contended that the considerations relevant to joinders under ss [84\(3\)](#) and [84\(5\)](#) of the NTA are also relevant to the power to make orders removing a party to a proceeding under s 84(8). The Commonwealth disputed that *Starkey* was authority for that proposition, because the power to become a party pursuant to that provision does not involve any exercise of discretion, in contrast with the power to join a person as a party under s 84(5). As a consequence, the Commonwealth considered that there are no considerations relevant to joinder under that provision.

The State contended that under s 84(3), a person who may become a party to a proceeding must be a person other than the person or persons who are jointly the applicant to the native title application. As such, they argued that the applicant may not become a party to the proceeding, and the Mallards did not at that time meet the criteria set out in that provision.

The State further submitted that in accordance with the reasoning in *Starkey* at [66], s 84(3)(a)(ii) refers to persons who claim to hold native title in relation to the land or waters 'in competition' with the claim group, rather than members of it, and that the 'interest' referred to in s 84(3)(a)(iii) is an interest other than a native title right and interest. Secondly, it was argued that although there is no legal impediment to a member of a native title claim group being joined, or remaining, as a respondent party to the claim, the circumstances in which a dissentient member will be permitted to become a respondent party under s 84(5) or, having become a respondent party under s 84(3), will be permitted to remain a respondent party, will be rare according to the authority contained in *Starkey* at [61].

The Commonwealth disputed the State's submissions on the construction of s 84(3), reiterating that Mansfield J's comments in *Starkey* on the first issue were obiter, and therefore did not constitute a binding precedent. The Commonwealth also considered that Mansfield's reasoning in *Starkey* at [61] is contrary to that of Logan J's construction of s 84(3)(a)(ii) in [Butterworth on behalf of the Wiri Core Country Claim v State of Queensland \[2010\] FCA 325](#). The Commonwealth argued that the construction of that section in *Butterworth* should be preferred over that in *Starkey*, because rather than reading down the qualifying circumstances prescribed by s 84(3)(a)(ii), Logan J highlighted the protective function of the power conferred by s 84(8) to remove respondent parties, as well as the breadth of that power.

They further disagreed with the State's contention that if a person was not joined as a party automatically, that becomes a factor that would weigh in favour of the Court exercising its discretion under s 84(8) to remove the person as a party to the proceeding. The Commonwealth considered that the power conveyed of joinder conveyed by s 84(5) rendered such an operation unnecessary.

Barker J affirmed his decision in [*Chubby on behalf of the Puutu Kunti Kurrama and Pinikura People v State of Western Australia* \[2015\] FCA 964](#), in which he held that a dissentient group of claimants, may, in rare circumstances, be joined as respondents under s 84(5). His Honour did not consider that it was necessary in the circumstances to determine whether such a group could automatically become respondents by virtue of s 84(3)(a)(ii), however stated that it was difficult to imagine that the provision was intended to have that effect.

His Honour held that the manner in which the Mallards were joined as respondents was 'effectively accidental' and there was no proper reason for them to remain as both applicants and respondents to the proceeding. Barker J considered that the Mallards could appropriately address their apical ancestor concerns by ceasing to be members of the claim group and taking the necessary steps to be joined as respondents. Legislation

2. Legislation

Australian Capital Territory

[Human Rights Amendment Bill 2015](#)

Status: The Bill was introduced, read for the first time and moved to be agreed to in principle on 26 March 2015, and passed on 11 February 2016. It was notified on 26 February.

Stated purpose: This Bill was introduced following the conclusions of the 2014 review of the *Human Rights Act 2004* (HRA), entitled – '[Economic, social and cultural rights in the Human Rights Act 2004](#)' (the 2014 review), which the Attorney-General tabled in the Legislative Assembly on the 27 November 2014.

Native title implications: This Bill makes a number of amendments to introduce Aboriginal and Torres Strait Islander cultural rights in the HRA. These amendments are in accordance with a decision of the ACT Government to incorporate cultural rights for Aboriginal and Torres Strait Islander people in a similar form to s 19 of the Victorian *Charter of Rights and Responsibilities 2006* (the Charter).

Under the new section 27(2):

(2) Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right—

(a) to maintain, control, protect and develop their—

- (i) cultural heritage and distinctive spiritual practices, observances, beliefs and teachings and
- (ii) languages and knowledge and
- (iii) kinship ties and

- b) to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.

In the absence of an ACT land rights regime, this amendment represents a further avenue through which Aboriginal and Torres Strait Islander people may assert their cultural rights to land. Note that the primary source of the proposed section is the United Nations Declaration on the Rights of Indigenous Peoples, articles 25 and 31.

For further information please see the [Explanatory Memorandum](#).

South Australia

[Aboriginal Heritage \(Miscellaneous\) Amendment Bill 2016](#)

Status: The Bill was introduced in the Legislative Council on 26 February 2016, and passed the Legislative Council on 10 March 2016.

Stated purpose: The Bill seeks to amend the *Aboriginal Heritage Act 1988* (SA) to recognise direct agreements between traditional owners and government, as well as developers and mining operators, regarding the use of sites protected under the Act. It will resolve discrepancies between current land access agreements.

Native title implications: Section 9 of the Bill inserts Part 2B, establishing a process for registering Aboriginal and native title representative groups as 'recognised Aboriginal representative bodies' (RARBs), therefore allowing them to negotiate with land use proponents. All native title claimant body corporates will become official RARBs upon the act becoming law, unless these bodies specifically opt out. Section 10 of the Bill inserts Part 3 Division A2 outlining the process for negotiating agreements with RARBS. Part 3 Division A2 enables the Minister to approve agreements affecting Aboriginal heritage under other Acts, such as the *Native Title Act 1993* (Cth), after consulting with the Committee

Section 6(2) of the Act, which stipulates that the minister must delegate their powers under ss 21, 23, 29 and 35 to the traditional owners of the site or object at their request, will be deleted. Currently, the delegation can only be made to individuals, not groups or native title prescribed bodies corporate. The delegation is one of ministerial power, and considered at the Committee stage to mean that the people to whom it is delegated must act as if they were the minister, not as a traditional owner, when making any decision. It was noted that the operation of the section is difficult due to the unsatisfactory drafting creating internal inconsistencies within the subsections.

The Bill will have no effect on the operation of the *APY Land Rights Act 1981* (SA).

For further information please see the [Hansard extracts](#) of the Second Reading and Committee Stage in the Legislative Council and the Introduction and First Reading in the Legislative Assembly.

3. Native Title Determinations

In February 2016, the NNTT website listed no native title determinations.

4. Registered Native Title Bodies Corporate & Prescribed Bodies Corporate

[The Native Title Research Unit](#) within AIATSIS maintains a [RNTBC summary document](#) which provides details about RNTBCs and PBCs in each state/territory including the RNTBC name, RNTBC type (agent or trustee) and relevant native title determination information. The statistics for RNTBCs as of 29 February 2016 can be found in the table below.

Information on RNTBCs and PBCs including training and support, news and events, research and publications and external links can be found at nativetitle.org.au. For a detailed summary of individual RNTBCs and PBCs see [PBC Profiles](#).

Additional information about RNTBCs and PBCs 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.

Table 1: National Registered Native Title Bodies Corporate (RNTBCs) Statistics (24 February 2016)

State/Territory	RNTBCs	No. of successful (& conditional) claimant determinations for which RNTBC to be advised
Australian Capital Territory	0	0
New South Wales	6	0
Northern Territory	19	40
Queensland	73	1
South Australia	15	0
Tasmania	0	0
Victoria	4	0
Western Australia	35	2
NATIONAL TOTAL	152	43

Note: some RNTBCs relate to more than one native title determination and some determinations result in more than one RNTBC. Where a RNTBC operates for more than one determination it is only counted once, as it is one organisation.

Source: National Native Title Tribunal as at 24 February 2016.

5. Indigenous Land Use Agreements

In February 2016, 4 ILUAs were registered with the National Native Title Tribunal.

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
17/02/2015	<u>Masig (Yorke Island) Defence Facilities ILUA</u>	QI2015/085	Body Corporate	QLD	Government, Infrastructure
17/02/2016	<u>Newcrest Mining Project Area ILUA</u>	WI2015/022	Body Corporate	WA	Infrastructure, Access, Mining
09/02/2016	<u>Balla Balla Port ILUA</u>	WI2015/020	Body Corporate	WA	Access, Transport
08/02/2016	<u>Initial Indigenous Land Use Agreement - Banjima and BHP Billiton Comprehensive Agreement (Body Corporate Agreement)</u>	WI2015/021	Body Corporate	WA	Mining, Access

For more information about ILUAs, see the [NNTT website](#) and the [ATNS Database](#).

6. Future Acts Determinations

In February, 3 Future Acts Determinations were handed down.

Date	Parties	Coverage	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
03/02/2016	<u>Ashwin (dec) & Ors on behalf of Wutha (WC1999/010)</u> -and- <u>The State of Western Australia -and- Yellow Rock Resources Ltd</u>	-	WO2015/0574	WA	Objection - Dismissed	Member H Shurven did not receive any contentions from the Wutha claim group as to why the objection should not be dismissed, nor was a request for extension of time made in order to comply with directions. Ms Shurven considered the group had been given sufficient opportunity to comply with directions set by the Tribunal, and it would be unfair to prejudice the other parties with further delays.
03/02/2016	<u>Waterton & Ors on behalf of the Bidjara People #7 (QC2012/018)</u> - and - <u>The State of Queensland</u> - and - <u>Waratah Coal Pty Ltd</u>	100%	QO2015/0043	WA	Objection – Dismissed	A representative of the Bidjara people #7 notified the Tribunal that they were unable to access the area to collect evidence in support of their objection. To the contrary, the State provided tenure information showing that most of the area covered by the application was national park and publicly accessible. The Bidjara people #7 did not provide the Tribunal with information about any attempts to access the area or identifying the people who could speak for that country, nor was an application made to extend the timeframe of the orders. Member JR McNamara held that the Bidjara people #7 had been given sufficient opportunity to comply with orders or request they be extended, and considered it would be unfair to prejudice the other parties with further delays.

Date	Parties	Coverage	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
01/02/2016	<u>Kallenia Mines Pty Ltd -</u> <u>and -</u> <u>Gooniyandi Aboriginal</u> <u>Corporation RNTBC</u> <u>(WCD2013/003)</u> <u>- and -</u> <u>Britten & Ors on behalf of</u> <u>Purnululu (WC1994/011)</u> <u>- and -</u> <u>John & Ors on behalf of</u> <u>Malarngowem</u> <u>(WC1999/044)</u> <u>- and -</u> <u>The State of Western</u> <u>Australia</u>	-	WF2015/0014; WF2015/0015; WF2015/0016	WA	Future Act – May be done	<p>The parties filed an agreed statement of facts, outlining that they had reached an agreement the terms of a Heritage Protection Agreement that the licences could be granted.</p> <p>Due to the logistical difficulties associated with obtaining the signatures, and in the interest of concluding these matters expeditiously, parties agreed to proceed by way of a determination rather than through the execution of a State Deed.</p> <p>Member JR McNamara made the determination having taken into account the agreement between the parties as to the grants, and the satisfaction of the NTA s 39(1) factors.</p>

7. Native Title in the News

The [Native Title Research Unit](#) with AIATSIS published the [Native Title in the News](#) which contains summaries of newspaper articles and media releases relevant to the native title sector.

8. Publications

Australian Government – Department of the Prime Minister and Cabinet

Closing the Gap Prime Minister's Report

The 2016 Closing the Gap Report notes that all Australian governments should aim to strengthen their efforts in working with Indigenous people, and other Australians to effect change. Focused on health, education and employment, which are key targets in addressing the significant discrepancy of health and well-being between Indigenous and non-Indigenous Australians, the report shows that these targets and their impacts cannot be viewed independently because they are intrinsically linked.

For further information, [please visit the Australian Government website](#)

Reconciliation Australia

The State of Reconciliation in Australia Report

The State of Reconciliation in Australia Report highlights what has been achieved under the five dimensions of reconciliation, including race relations, equality and equity, institutional integrity, unity, and historical acceptance. Additionally the report demonstrates how significant milestones have been addressed, including the establishment of native title, the Apology, the Closing the Gap framework, and progress on constitutional recognition for Indigenous Australians.

For further information, [please visit the Reconciliation Australia website](#)

Centre of Native Title Anthropology – Australian National University

The Future of Native Title Anthropology

From the 4-5 February 2016, the Centre of Native Title Anthropology (Australian National University), Queensland South Native Title Services, and the Anthropology Department of the University of Queensland, convened The Future of Native Title Anthropology conference at the Women's College at the University of Queensland, in Brisbane. Conference papers and related documents are now available for download.

For further information, [please visit the CNTA website](#)

9. Training and Professional Development Opportunities

AIATSIS

Australian Aboriginal Studies

Australian Aboriginal Studies (AAS) journal is inviting papers for coming issues. AAS is a quality multidisciplinary journal that exemplifies the vision where the world's Indigenous knowledge and cultures are recognised, respected and valued. Send your manuscript to the Editor by emailing aasjournal@aiatsis.gov.au.

For more information, [visit the journal page of the AIATSIS website](#)

Australian Government – Attorney-General's Department

Native Title Anthropologist Grants Programme

The Attorney-General's department is now seeking applications for the Native Title Anthropologist Grant's Programme for 2016-17 to 2018-19 financial years. Funds will be awarded to successful candidates for up to three years. Applications are due by 5pm, 1 April 2016.

For more information, [visit the Australian Government website](#)

The Aurora Project

See the [Aurora Project: 2015/16 Program Calendar](#) for information on training and personal development for staff of native title representative bodies, native title service providers, RNTBCs and PBCs.

The Aurora Internship Program – upcoming winter 2016 round

The Aurora Internship Program places law, anthropology and other social science graduates from Australian universities in Native Title Representative Bodies and Prescribed Body Corporates and other Indigenous organisations involved in policy development, native title, research and social justice Australia-wide.

The on-line application period for the winter 2016 round of internships is open from Monday 7 March and closes on Friday 1 April 2016.

For more information, [visit the Aurora website](#)

ORIC

ORIC provides a range of training for Aboriginal and Torres Strait Islander corporations about the [Corporations \(Aboriginal and Torres Strait Islander\) Act 2006 \(CATSI Act\)](#), the corporation's rule book and other aspects of good corporate governance. More information on upcoming training is outlined below.

Training courses 2016

Course	Location	Dates	Applications Close	Details
Introduction to Corporate Governance workshops	Mildura	10-12 May 2016	Applications close: 15 April 2016	Apply online
Introduction to Corporate Governance workshops	Tamworth	14-16 June 2016	Applications close: 27 May 2016	Apply online

For further information on training courses, [visit the ORIC website](#)

10. Events

AIATSIS

National Native Conference 2016

Register now for the National Native Title Conference 2016. The conference is co-convened by AIATSIS and the Northern Land Council (NLC), and hosted by the Larrakia people - the traditional owners of Darwin.

The 2016 conference title 'strong culture, strong country, strong future' is reflected in the following themes: Being on Country, Practising and Learning Culture, Holding Title, Being Sovereign, Community and Commerce, and Just Recognition; Just Settlement.

The conference also aims to highlight the challenges and opportunities that native title can create in the broader context of Indigenous people's aspirations for their lands, waters and communities.

Date: 1-3 June 2016

Location: Darwin Convention Centre, NT

For further information and to register [visit the AIATSIS website](#)

AIATSIS

Prescribed Body Corporate (PBC) National Meeting

The PBC National Meeting is a stand-alone event that is free of charge for PBCs to attend. It is separate from the National Native Title Conference held on the 1-3 June 2016.

Date: 31 May 2016

Location: Darwin Convention Centre, NT

For further information and to register [visit the AIATSIS website](#)

The Cairns Institute

Masterclass in Native Title for Anthropologists

Early career Anthropologists are invited to a unique Masterclass in Native Title. This eight day workshop is facilitated by the Cairns Institute.

Date: 10-17 June 2016

Location: James Cook University, QLD

For further information or to register your interest, please contact Jennifer Gabriel, Jennifer.gabriel@jcu.edu.au

The Native Title Research Unit produces monthly publications to keep you informed on the latest developments in native title throughout Australia. You can subscribe to NTRU publications online, follow @NTRU_AIATSIS on Twitter or 'Like' NTRU on Facebook.

