AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

WHAT'S NEW IN NATIVE TITLE

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1. Case Summaries

Rrumburriya Borroloola Claim Group v Northern Territory of Australia [2016] FCA 776

30 June 2016, Connection and Extinguishment Hearing, Federal Court of Australia, Northern Territory, Mansfield J

In this case, Mansfield J recognised the native title rights and interests of the Rrumburriya Borroloola people over approximately 15,000 square metres of vacant crown land within the township of Borroloola. The Court heard together two separate applications filed by the claim group in 2000 and 2003, which combined cover the whole of the land and waters in the Town of Borroloola. The respondents were the Northern Territory (NT) Government and the Commonwealth of Australia.

The parties agreed that the Binbinka, Gudanji, Yanyuwa, Garawa, Mara and Wilangara language groups were or were part of the original society united in and by its acknowledgement and observance of a body of laws and customs that had been passed down through the generations. Notwithstanding, the respondents disputed the applicants asserted right to use the resources in the claimed area for commercial purposes.

The right to use resources for 'any purpose'

The applicants argued that at the time of acquisition of sovereignty, their ancestors possessed rights to access and take for any purpose the resources of the estate, and to control access to and use of the estate and its resources by others. The NT Government relied on the decision in *State of Western Australia v Willis on behalf of the Pilki People* [2015] FCAFC 186 (*Pilki FC*) to argue that the relevant traditional law and customs at the time of sovereignty distinguished between use of land and/or resources for commercial purposes and use of land and/or resources for purposes of a domestic or subsistence nature. They contended that the goods traded with the Macassans were either used only for subsistence purposes (the perishables) or were only incorporated into the ceremonial exchange system (non-perishables). The Territory argued that the terms 'commercial' and 'business' contemplate enterprise or activity in which a transaction or a system is directed, via buying and selling or barter or exchange of goods, to the making of profit or material gain and the latter two terms 'domestic' and 'subsistence' are used in contrast to this definition.

In rejecting the Territory's argument, Mansfield J examined the legal framework and the anthropological and ethnographic evidence presented by each party to recognise the right to use resources for any purposes.

Legal framework

In considering the authorities relevant to the use of resources for commercial purposes, his Honour found that the nature and extent of the native title rights and interests should be determined upon the 'careful consideration of the whole of the evidence' at [128].. Rejecting the Territory's argument about the distinction between commercial and non-commercial purposes, Mansfield J considered the existence of a right under traditional laws and customs (as North J said at first instance) as logically separate from the fact of its exercise. Affirming the comments made by Gleeson CJ, Gummow and Hayne JJ in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [84], his Honour held that the nature and extent of an activity may inform the existence of a right, but it is the possession of the right, not its exercise, which is the proper question. Furthermore, Mansfield J did not consider that there was anything in *Pilki FC* to suggest that the traditional laws and customs drew a distinction between the use of land for one or other purposes.

Evidentiary findings

His Honour found that the Rrumburriya Borroloola permitted the Macassan to access and use their lands and waters to fish for trepang in exchange for material objects such as spears and other weapons, canoes, fishing lines, nets, harpoons, yam sticks, and baskets. Mansfield J held that these objects were not just part of ceremonial or religious exchange, as the Territory contended, but represented a commercial 'barter or exchange of commodities' [at 325] and could be considered a 'distinct sphere of activity of economic participation and endeavour' [at 307]. His

Honour said the exchange was regular and annual and opportunistic as the agreement between the Macassans and the Aboriginal people was grounded in economic considerations of bargaining and mutual advantage. His Honour did not consider it necessary for there to have been some intermediate currency, against which the value to the Macassans of what they received and the value to the native title holders of what they received was each measured.

While the exchange with the Macassans commenced in 1780, just a few years before sovereignty, his Honour held that the activities became part of the group's normative system about a year or so after commencement. This normative system included the exercise of the right to control permission to use the country which can be granted or refused and the control of the use of resources so they take place on a sustainable basis. His Honour said that the fact that the great majority of persons subject to this normative system had no knowledge or experience of commerce or business does not mean that the exercise of the right to take and deal in the resources of the area was external to, and remote from, that normative system when those dealings took place, as the respondents contend. Moreover, his Honour found that even if these dealings involved only small numbers of the ancestors of the Rrumburriya Borroloola people, the norms associated with those dealings were not outside their normative system as such norms apply to whichever members of the society were dealing with the Macassans. His Honour gave the example of norms that govern the behaviour of uninitiated males, saying they are nevertheless societal norms notwithstanding that they apply to only a fairly small proportion of the overall population.

Mansfield J also rejected a 'frozen-in-time' approach, arguing that the traditional right to take and use the resources is not to be limited to the resources actually used at the moment of sovereignty. His Honour considered that at sovereignty, some resources would not have been used because there was then no known use for them or because something else was more useful. His Honour said degrees of biological relationships, or degrees of utility, or nuances in the perceived benefit to be derived of or from particular resources, do not provide a basis for defining and restricting traditional native title rights and interests. While the Court found the resource rights were constrained by traditional laws relating to waste and conservation, his Honour held that this did not restrict the resource rights to non-commercial purposes as the respondents contended.

Extinguishment

The Territory contended that exclusive native title rights and interests in respect of flowing or subterranean waters in the claim area were extinguished by the passage of the *Control of Waters Ordinance 1938* (NT) (the CWO). The CWO was repealed and replaced by the *Water Act* (NT) in 1992. By the CWO, the Crown asserted rights in and/or powers over waters in lakes, springs and watercourses (including the bed and banks). The Territory contended that the extinguishment was effected legislatively and via the Crown's assertion of its rights and powers over the subject

matter, not 'by the creation of any prior interest' within the meaning of s 47B(2) of the NTA; and further, that flowing and subterranean waters cannot be occupied by a member of the claim group as required by s 47B(1)(c).

His Honour held that the native title rights could not be subject to the public rights referred to in the CWO or the *Water Act* because the public could not meaningfully access these waters. His Honour also said the statutory rights to take water in the circumstances prescribed would be confined to the claim group, and having regard to *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33, would not of themselves amount to the extinguishment of native title rights in relation to waters (as a resource).

Moreover, the Court held that the CWO in the *Water Act* does not vest in the Territory the land over which or upon which water lies because the expression 'waters' in s 47B(1)(b)(ii), applying the definitions in s 253 of the NTA, does not have the same meaning as 'water' in that legislation; it encompasses both the water and the bed or subsoil. His Honour did not accept that the words 'the land or waters in the area' used in s 47B(1)(b) were intended to allow for the legislative extinguishment of native title over the bed or subsoil, as well as water over the bed or subsoil (or subterranean water) by an enactment which related to water only. His Honour said the reference to 'area' in s 47B(1) is to address the particular areas within a claim area where, potentially, s 47B may be applicable. Consequently, the Court held that s 47B applies to the areas within the claim area where they would apply to water.

However, Mansfield J also found that the surveying and declaration of land as available for the construction of a public road in accordance with a statutory process extinguishes native title rights in the claimed area, notwithstanding whether or not the road is actually constructed.

Murray on behalf of the Yilka Native Title Claimants v State of Western Australia (No 5) **[2016] FCA 752**

29 June 2016, Connection and Extinguishment Hearing, Federal Court of Australia, Western Australia, McKerracher J

In this case, McKerracher J recognised that the Yilka and Sullivan claimants hold native title rights and interests over the Cosmo Newberry Reserve, 100km north-east of Laverton in Western Australia. A collection of similar claims, including the Cosmo claim, were dismissed in *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No 9) (2007) 238 ALR 1 (*Wongatha*). In response, the first Yilka claim was lodged on 15 December 2008 and a second claim was lodged on 1 August 2013. The Court ordered in August 2013 that the two claims should be heard together as they partially overlap. The Sullivan claim was lodged on 7 December 2011. On 1 March 2012, the Court ordered that the Sullivan and Yilka claims should

also be heard together as they also overlap. The claimed area includes the Cosmo Newberry Aboriginal Community, a number of large reserves for the use and benefit of Aboriginal people, some small reserves of other kinds, some small areas of unallocated Crown land (UCL), and a pastoral lease. The sole respondent was the State of Western Australia (the State).

The State opposed the Yilka and Sullivan claims on the basis that continuous connection cannot be asserted by only a small group of individuals purporting to represent the rights and interests of the wider society. They further contended that historical changes in circumstances, including migration, since sovereignty impede inferences of continuity. McKerracher J held that there were multiple 'pathways to connection' which can be established through birth, long association and the holding of ritual status rather than just common ancestry. His Honour said this enabled the recognition of tenurial adjustments in response to long term movements of people as well as accounting for diversity in the claimant group due to the sparse population and harsh, unpopulated desert environment.

His Honour rejected the state's argument that s 61 of the NTA requires claimed rights to be 'common or group rights' rather than individual rights. His Honour accepted the Yilka applicant's submission that the State's construction of s 61 is strained and inconsistent with the object and intent of the NTA, stating that 's 61 does not impose a taxonomical requirement for either 'group' or 'common' rights, as the contradistinction with 'individual, group or communal' rights in s 223(1) NTA makes clear'. The Court held that s 61 does not preclude the bringing of a representative claim by individuals for their rights in individual areas within an artificially bound claim area.

The State contended that there needs to be a 'clear mechanism' for finding asserted native title rights, such as through an adjudicative process. McKerracher J considered that the State was merely searching for a conventional European style mechanism to assist in the recognition process. His Honour said the substance of the evidence presented by the claimants and the anthropologists ensures that there is a process which produces results and is relied upon. But His Honour said this is not particularly amenable to being more precisely defined in a non-customary context.

Abuse of process

The State argued that given the Yilka and Sullivan claim's similarity to the *Wongatha* case, it would be an abuse of process for the court to relitigate the matter. The State argued that the principle of *res judicata* comes into operation whenever a party attempts in a second proceeding to litigate a cause of action which is merged into a judgment in a prior proceeding. The State argued that a party can be estopped from bringing an action which, if it succeeds, will result in a judgment which conflicts with an earlier judgment, and furthermore, the Wongatha and Cosmo claims covered the whole of the area claimed by the Yilka and Sullivan applications and the rights and

interests claimed in the Cosmo claim are, insofar as exclusive possession is claimed, indistinguishable from those claimed in the Yilka claim. Moreover, the State asserted that the applicants in the Cosmo claim and the Wongatha claim relied upon the traditional laws and customs of the people of the Western Desert, as is the case in the Yilka claim and the Sullivan claim. The State further submitted that the expert anthropological reports filed in the Yilka claim rely heavily on evidence that was given in the *Wongatha* proceedings and, particularly, in the reports of Dr Sackett.

His Honour accepted on the Yilka claimants' submissions that there are a number of important differences between the present claim and the issues decided in the Wongatha case, meaning it does not amount to relitigation. These include the difference between the claimant groups in the two cases; the differences between the native title rights and interests sought; and the fact that the Wongatha and Cosmo claim were decided on jurisdictional grounds, meaning the ultimate merits issue was not decided, and the case is therefore not determinative of the issues relevant in the Yilka and Sullivan claims. His Honour rejected the *res judicata* and estoppel arguments, stating that 'no departure from the ratio in *Wongatha* is required in permitting the Yilka claim and the Sullivan claim to proceed and be determined on its substantive merits' [at 2477]. His Honour said that there was no risk of conflicting judgments or improper purpose, and there would be manifest unfairness in the merits of the Yilka and Sullivan claim not being determined.

Extinguishment

Both parties agreed that native title rights and interests are partially extinguished by the gold mining leases, mineral leases and petroleum interests granted before 31 October 1975, as well as the pastoral leases and unvested reserves in the claimed area. The roads within the area were an issue of contention between the parties. While the Yilka applicant accepted that two roads created under the *Road Districts Act 1919* (WA) extinguished native title, the State submitted that other roads in the claimed area shown on maps and diagrams also extinguished native title as they also constituted public works. The Yilka applicant objected to any generalised submission about extinguishment for which the specific area is not identified and for which there was no specific evidence as to the status of the area of a road or otherwise. The Yilka applicant said it is unconscionable for the State to suggest that the claim area should, in effect, be regarded as open to access by any trafficable route by any person.

The Court found that the weight of authority favoured the State's submission that the roads constitute public works pursuant to s 253 of the NTA. His Honour considered that the more difficult question was whether, on the assumption that a road about which there is no evidence of construction is a public work, the interests of the Crown in the public work is a 'prior interest' within the meaning of s 47A(2), which must be disregarded. His Honour held that the roads do not involve the creation of a prior interest in members of the public and in the relevant Road Board. As the acts do not involve works, there is nothing else to protect by failing to disregard

extinguishment. His Honour said that to refuse the application of s 47A in the circumstances would lack utility and be contrary to the beneficial intent of the provision. Moreover, the Court accepted the applicant's submission that when read with s 47A(3)(a)(iii) which preserves the interests of the Crown in any capacity in any public works, the intention of the parliament in s 47A(2)(b) of the NTA was that public works fall within the category of interests in respect of which extinguishment is to be disregarded.

McKerracher J considered that both the Yilka and Sullivan applicants made out their claims, and recognised that they possess and hold native title rights and interests in the claimed area together, subject to the extinguishment to be confirmed.

Croft on behalf of the Barngarla Native Title Claim Group v State of South Australia (No 2) [2016] FCA 724

23 June 2016, Consent Determination, Federal Court of Australia, South Australia, Mansfield J

In this case, Mansfield J recognised the native title rights and interests of the Barngarla people over 44,500 square kilometres of land and waters on South Australia's Eyre Peninsula.

The group first lodged an application with the National Native Title Tribunal (NNTT) on 4 April 1996, which was subsequently referred to the Federal Court in 1998. The claimed area covers almost two thirds of the peninsula, stretching along the coast between Port Augusta and Port Lincoln in the east, the Gawler Ranges in the north and between Wudinna, Wirrulla and Cummins in the west. The application covers 23 pastoral leases, 15 local government areas, 2 pipeline leases, and a number of national parks, and overlaps with a number of commercial fishing, mining and energy interests. The original application also covered the city of Port Augusta, however in 2012; the Application was split to allow the Port Augusta town claims to be dealt with separately. This matter concerns the area excluding the town. Due to the amount of overlapping interests, the State of South Australia was joined by 330 respondents, including a number of local government bodies, pastoralists and energy corporations.

On 22 January 2015, the Court made findings on the issue of connection in *Croft on behalf of the Barngarla Native Title Claim Group v State of South Australia* [2015] FCA 9. The determination in this case was sought by the parties to give effect to those findings and the terms agreed to in relation to the issues of extinguishment.

Mansfield J held that the Barngarla people possess the non-exclusive rights to live on, use and enjoy the land and waters; access the land and waters; make decisions about the use and enjoyment of the land and waters by those Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the native title holders; use and enjoy resources of the land and

waters and control the use of resources of other Aboriginal people governed under traditional laws; to maintain and protect places of importance under traditional laws, customs and practices; and the right to conduct burial ceremonies.

His Honour acknowledged that these rights and interests are subject to the rights of other interest holders in the determination area, including pastoral leases; the public right to fish and navigate in the area; the rights of the Crown in relation to the *National Parks and Wildlife Act 1972* (SA); the rights of the local councils under the *Local Government Act 1934* (SA), the *Local Government Act 1999* (SA) or the *Outback Communities (Administration and Management) Act 2009* (SA); the rights of registered proprietors; and the interests of telecommunications, fisheries, mining, energy and manufacturing companies.

The determination will take effect upon the Barngarla Settlement ILUA being registered on the Register of Indigenous Land Use Agreements. The applicant is yet to nominate a prescribed body corporate.

Doyle on behalf of the Iman People #2 v State of Queensland [2016] FCA 743

23 June 2016, Consent Determination, Federal Court of Australia, Queensland, Reeves J

In this case, Reeves J recognised the native title rights and interests of the Iman People over 13,997 square kilometres of land in Central Queensland surrounding the towns of Taroom and Wandoan, including Robinson Gorge National Park, Expedition National Park and Isla Gorge National Park.

In October 1997, three native title applications were made with the NNTT. Two of the applications have since been dismissed or discontinued. The respondents to the this claim include the State of Queensland; the Western Downs, Maranoa, and Central Highlands Regional Councils; the Banana Shire Council; Ergon Energy Corporation Limited; Telstra Corporation Limited; a number of mining companies and pastoralists. The parties reached an agreement to resolve this proceeding in relation to all but three sections of land within the claim area, and sought a determination in accordance with the terms of the agreement which were filed with the Court on 7 June 2016.

The Court held that the native title rights existed over the determination area in 4 separate parts. In relation to Part 1, which covers the land and waters in the north-west corner of the determination area, Reeves J recognised the right to possess, occupy, use and enjoy the area to the exclusion of all others. The rights recognised in relation to water include the non-exclusive rights to hunt, fish and gather from the water of the area; take and use the natural resources of the water in the area; and take and use the water of the area, for personal, domestic and non-commercial communal purposes.

In relation to the remaining area, including the townships of Taroom and Wandoan, the Court recognised the following common non-exclusive rights: the right to access, be present on, move about on and travel over the area; the right to fish and gather on the land and waters of the areas for non-commercial purposes; the right to maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas from physical harm; the right to teach on the area the physical and spiritual attributes of the area; the right to be accompanied on the area by those persons who, though not native title holders, are: spouses of native title holders or are persons required or permitted under the traditional laws to assist in ceremonies; and the right to be buried and bury native title holders within the area

His Honour recognised separate rights over Part 2 (which encompasses a large portion of the land and water, excluding townships) and Wandoan to share and exchange natural resources from the land and waters for non-commercial purposes. His Honour also recognised the right to perform dances, conduct smoking ceremonies and ceremonies associated with the reinterment of remains in Wandoan and Taroom. In relation to Part 2, His Honour recognised the right to camp and live temporarily on the area as part of camping, and for that purpose build temporary shelters. The Court also recognised the right to hunt for non-commercial purposes in Wandoan, but not to do so using weapons as defined in the *Weapons Act 1990* (Qld).

Reeves J noted that the native title rights are subject to the interests of the respondents, which may be exercised notwithstanding the existence of native title rights and interests. The other interests include various Indigenous land use agreements entered between a number of pastoralists, resources and energy companies and local government bodies.

Noting the length of time that application has taken since being filed, Reeves J endorsed the observations of Rares J in *Prior on behalf of the Juru (Cape Upstart) People v State of Queensland & Ors (No 2)* [2011] FCA 819 (at [32]) that 'justice delayed is justice denied'. Reeves J argued that since the 2009 amendments to the NTA and the introduction of Part VB to the *Federal Court of Australia Act 1976* (Cth), the Court has sought to use its case management powers to attempt to reduce and avoid these sorts of delay occurring in its native title lists. The Court has also adopted a priority listing system of native title proceedings to attempt to ensure that its native title lists are dealt with as justly, quickly, inexpensively and efficiently as possible.

Wardingarri Aboriginal Corporation is the nominated prescribed body corporate.

Ngal/Jangala on behalf of the Rrwerk/Mamp/Arrwek, Yinjirrpikurlangu, Janyinpartinya, Yanarilyi/Anerely and Ngarliyikirlangu landholding groups v Northern Territory of Australia [2016] FCA 684

16 June 2016, Consent Determination, Federal Court of Australia, Northern Territory, Rangiah J

In this decision, Rangiah J recognised the native title rights and interests of the Rrwerk/Mamp/Arrwek, Yinjirrpikurlangu, Janyinpartinya, Yanarilyi/Anerely and Ngarliyikirlangu landholding groups over the 2,702 square kilometres of land and water within the Mount Dennison Station in central NT. The application was lodged on 6 December 2013. The sole respondent to the claim was the Northern Territory Government.

The non-exclusive native title rights and interests recognised include the right to: speak for and make decisions about the use and enjoyment of the land and waters; access and travel over the land and waters; live on the land, and for that purpose, to camp, erect shelters and other structures; hunt, gather and fish; take and use the natural resources, except water captured by the holders of Perpetual Pastoral Lease No. 1110; light fires for domestic purposes; access and maintain and protect sites and places; conduct cultural activities, ceremonies; meetings, teaching the physical and spiritual attributes of sites; and the right to privacy in the exercise and enjoyment of these activities.

Rangiah J noted that the anthropological reports indicate that the landholding groups are part of a society whose Dreaming tracks extend well beyond the determination area. His Honour said the native title holders are descendants of people who have occupied the determination area since 'time immemorial' and communally acknowledge beliefs about the physical and cultural landscape, and the legal, social, kinship and religious systems. However, Rangiah J noted that both descendants and non-descendants may possess a traditional connection to the land.

The Mt Denison Aboriginal Corporation is to be the prescribed body corporate for the area.

Katakarinja on behalf of Imperlknge, Urlatherrke, Parerrule, Yaperlpe, Urlampe, Lwekerreye and Ilewerr landholding groups and those persons with rights and interests in the area of land and waters known as Kwerlerrethe v Northern Territory of Australia [2016] FCA 685

15 June 2016, Consent Determination, Federal Court of Australia, Northern Territory, Rangiah J

In this decision, Rangiah J recognised the native title rights and interests of the Imperlknge, Urlatherrke, Parerrule, Yaperlpe, Urlampe, Lwekerreye and Ilewerr landholding groups over the over the land and waters within the bounds of the

Narwietooma Pastoral Lease in southern NT. The determination area includes there areas: NT Portion 727 which comprises 2,590 square kilometres under pastoral lease, NT Portion 1607 which comprises 1,100 square metres under Crown land on the Dashwood Creek, and NT Portion 4284 comprising 31 square kilometres under Crown land forming part of the North West Stock Route. The application was lodged on 22 May 2013. The respondents to the claim were the Northern Territory Government, Christopher Anthony Connellan, and Anthony Woodley Davis and Pamela Ruth Davis.

In relation to NT Portion 1607, the Court recognised the following non-exclusive native title rights and interests: the right to possession, occupation, use and enjoyment of the land to the exclusion of all others except in relation to flowing and subterranean waters; and in relation to flowing and subterranean waters, the right to use those waters to hunt on, gather and fish from; and to take and use the flowing and subterranean waters in accordance with their traditional laws and customs for domestic use only.

In relation to NT Portions 727 and 4284, Rangiah J recognised non-exclusive native title rights and interests including the right to: speak for and make decisions about the use and enjoyment of the land and waters; access and travel over any part of the land and waters; live on the land, and for that purpose, to camp, erect shelters and other structures; hunt, gather and fish on the land and waters; take and use the natural resources of the land and waters, except water captured by the holders of Perpetual Pastoral Lease No. 1019; light fires for domestic purposes; access and to maintain and protect sites and places; conduct cultural activities, ceremonies; meetings, teaching the physical and spiritual attributes of sites; and the right to privacy in the exercise and enjoyment of these activities.

Rangiah J noted that the native title holders 'share subsection systems, moieties, descent ideology, intermarriage, initiation ceremonies, cosmology, mythology (with localised differences) and reciprocal recognition of territorial rights' over the determination area.

The Wala Aboriginal Corporation is to be the prescribed body corporate.

Congoo on behalf of the Bar Barrum People #2 v State of Queensland **[2016] FCA 693; *Congoo on behalf of the Bar Barrum People #3 v State of Queensland* [2016] FCA 694; *Congoo on behalf of the Bar Barrum People #4 v State of Queensland* [2016] FCA 695**

10 June 2016, Consent Determination, Federal Court of Australia, Queensland, Reeves J

In this decision, Reeves J recognised the native title rights and interests of the Bar Barrum People over land and waters in the Atherton Tableland in and around the

Walsh River in North Queensland. The respondents in this case are the State of Queensland, the Mareeba Shire Council, and Ergon Energy Corporation Ltd.

Reeves J found that non-exclusive native title rights exist on the land and waters described in Part 2 of Schedule 1A, including the rights to: access, be present on, move about on and travel over the area; camp, and live temporarily on the area as part of camping, and for that purpose build temporary shelters; hunt, fish, gather and take natural resources, including water, from the land and waters of the area for personal, domestic and non-commercial communal purposes; conduct ceremonies on the area; be buried and bury native title holders within the area; maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas from physical harm; teach on the area the physical and spiritual attributes of the area; hold meetings on the area; and light fires on the area for domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation.

In cases #2 and #4, Reeves J recognised exclusive native title rights and interests to possess, occupy, use and enjoy the land described in Part 1 of Schedule 1A of the judgement. In relation to water in this area, the Court recognised the non-exclusive rights to: hunt, fish and gather from the water and take and use the natural resources of the water for personal, domestic and non-commercial communal purposes.

No prescribed body corporate had been nominated by the Bar Barrum applicant at the time of the judgment.

BP (Deceased) on behalf of the Birriliburu People v State of Western Australia [2016] FCA 671

6 June 2016, Consent Determination, Federal Court of Australia, Western Australia, North J

In this case, North J recognised the native title rights and interests of the Birriliburu people over 66,698 square kilometres of the lands and waters located in the Little Sandy Desert region in the Western Desert, north of Wiluna and west of Warburton in central WA.

The Court determined the four largely overlapping claims together. The applications were made on 19 June 2013. French J (as he then was) made a consent determination over part of the area of Birriliburu #1 on 20 June 2008. While not making a determination over the remaining areas, his Honour held that the claimant families, despite moving away from the determination area due to European settlement, still had a connection to the region through descent from parents and grandparents. The only remaining issue of contention between the parties, the right to access resources including for commercial purposes, was determined by the Court in *BP (Deceased) on behalf of the Birriliburu People v State of Western Australia* [2014] FCA 715. On 12 May 2016, the parties filed a joint submission in

support of the making of the orders in relation to the remaining areas. The sole respondent in the present case was the State of Western Australia.

North J held that the following non-exclusive rights and interests exist in relation to the determination areas: the right to access, to remain in and to use the determination area; the right to access and take for any purpose the resources of the determination area; and the right to have access to, maintain and protect places, and areas and objects of importance on or in the determination area.

The only issue in contention was whether the claimants possessed the right to the access and use of resources for commercial purposes. The Court followed its decision in on this issue, finding in favour of the Birriliburu people.

The Mungarlu Ngurrarankatja Rirraunkaja (Aboriginal Corporation) is to be the prescribed body corporate.

2. Legislation

Northern Territory

Fisheries Legislation Amendment Act 2016

Status: This legislation was introduced on 20 April 2016, was passed on 26 May and received assent on 9 June 2016.

Stated purpose: This Act amends the *Fisheries Act* and *Fisheries Regulations* to complement various Blue Mud Bay settlement agreements to allow permit-free fishing in intertidal waters overlying Aboriginal Land. The Act also increases the efficiency of fisheries licencing and infringement and confiscation notices for minor offences. The Bill also provides powers to deal with biosecurity threats.

Native title implications: The new section 7A inserts a new category of Authorised Officer known as Fisheries Inspectors. This will meet Government's commitments in Blue Mud Bay agreements by allowing Indigenous marine rangers to have enforcement powers. The Minister may appoint Fisheries Inspectors with the powers and functions to be prescribed by regulation. These powers and functions will be commensurate with the level of training and qualifications of the individual. The Indigenous marine rangers will have the power to deal with recidivist offenders by suspending or revoking fishing entitlements for offences committed under the act or other relevant legislation, for example, fishing in a sacred site.

For further information please see the Explanatory Statement.

Bushfires Management Act 2016

Status: This Bill was introduced on 21 April 2016 and assented to on 7 June 2016.

Stated purpose: This Act replaces the *Bushfires Act 2014* and aims to increase public safety through improved bushfire management. It clarifies the fire

management responsibilities of key stakeholders such as land owners, land occupiers, Bushfires Council and Regional Bushfires Committees, Volunteer Bushfire Brigades and land management organisations and establishes management zones that define fire management planning and mitigation based on risk.

Native Title Implications: The Act clarifies the role of stakeholders in bushfire management and puts in place fire management zones that define fire management planning and mitigation. Native title holders, particularly those engaging in fire management or abatement programs may have to comply with this Act. Fire Control Officers are granted powers to enter land and to require a person to extinguish a fire. Offences for the contravention of those powers were also introduced.

For further information, please see the Explanatory Statement.

Queensland

Mineral and Other Legislation Amendment Bill 2016

Status: Introduced on 23 February 2016, was passed on 24 May and given assent on 14 June 2016.

Stated purpose: The purpose of this Bill is to amend the *Mineral and Energy Resources (Common Provisions) Act 2014* (MERCP Act) to reduce limits on objection rights for mining projects; include key agricultural infrastructure within the definition of restricted land; repeal the proposed change which would have allowed a mining lease to be granted over restricted land where landholder consent has not been given and compensation has not been agreed; and remove the Minister's power to extinguish restricted land for mining lease applications where coexistence is not possible on proposed mining sites.

Native title implications: Section 408B amends section 10A of the *Mineral Resources Act 1989* by inserting a new subsection (4). This new subsection provides that where a person enters land for the purpose of carrying out an activity under section 386V (such as conducting a land survey or prospecting), a reference to owner of land in section 386X and schedule 1 includes a registered native title body corporate or registered native title claimant under the NTA. This does not apply for the purpose of schedule 1, section 4 (Consent of owner of reserve). Registered native title bodies corporate or registered native title claimants should thus be aware that their consent will be required before persons conducting such activities enter their land.

For further information please see the Explanatory Statement.

North Stradbroke Island Protection and Sustainability and Other Acts Amendment Bill 2015

Status: This Bill was introduced to Parliament on 3 December 2015, was passed with amendment on 25 May 2016 and received assent on 14 June 2016.

Stated purpose: The main objective of the bill is to repeal the amendments made by the *North Stradbroke Island Protection and Sustainability and Another Act Amendment Act 2013* in order to substantially phase out sand mining by 2019.

Native Title implications: The Quandamooka People are the traditional owners and native title holders of land and waters on and surrounding North Stradbroke Island. Access needs to be retained for some time by mine site operators to carry out rehabilitation of the area. This access could be to land which is subject to native title. If entry to the land interferes with native title interests, the holder of the authorisation to access could be liable for compensation to the native title holders. The explanatory notes state 'if compensation must be paid to a freehold owner, then the native title holders will have equivalent rights to compensation.'

The Bill also provides that Aboriginal cultural heritage and environmental values need to be considered in determining the location of all new disturbance areas and mineral extraction areas. Amendments to the bills also prevent changes to the mine area where that change would significantly increase impacts on significant Aboriginal areas, Aboriginal objects, or evidence of Aboriginal occupation of an area.

For further information, please see the Explanatory Statement.

Victoria

Land (Revocation of Reservations - Regional Victoria Land) Bill 2016

Status: This Bill passed the Legislative Assembly on 23 June 2016 and was read for a second time in the Legislative Council on the same date.

Stated purpose: The Bill provides for the revocation of permanent reservations over four areas of Crown land. This will enable the sites to be used for other purposes or be sold.

Native title implications: This Bill revokes the Crown's permanent reservations over Crown land near Burke's Flat, Campbelltown, Lake Charm, and Walpeup, freeing up those areas for native title claims.

For further information please see the Explanatory Statement.

Western Australia

Biodiversity Conservation Bill 2015

Status: This Bill was read for a second time on the 22 June 2016, amendments were adopted on 23 June and the third Reading took place on the 29 June in the Legislative Assembly. In the Legislative Council, the Bill was introduced on 30 June and had its first and second reading on the same date.

Stated purpose: The purpose of this Bill is to create an Act to provide for the conservation and protection of biodiversity and biodiversity components in Western Australia; and the ecologically sustainable use of biodiversity components in Western Australia. This Bill also repeals the *Wildlife Conservation Act 1950* and the *Sandalwood Act 1929*.

Native title implications: This Act will not affect the operation of the *Conservation and Land Management Act 1984* (*CALM Act*) and applies only to non-*CALM Act* land. The Bill provides a defence for Aboriginal people against the prohibition on taking or disturbing flora or fauna if such a taking is for a customary purpose. If the offence is alleged to have been committed on exclusive native title land, the person must have either held the exclusive native title or had permission of the exclusive native title holder of the area. If the act done was inconsistent with the continued existence, enjoyment, or exercise of any native title rights and interests held by another person, the defence does not apply unless the person did the act to obtain fauna or flora sufficient only for food for themselves and their family but not for sale (see s 182).

Further, fauna may be possessed by an Aboriginal person for an Aboriginal customary purpose. However, the sale of either fauna or flora is prohibited unless the regulations (see s 184) are met. In relation to permission, an exclusive native title holder may give permission for the taking or disturbance of fauna, and does not commit an offence in doing so.

The Bill also places restrictions on the taking of sandalwood. Sandalwood may not be taken without lawful authority to do so. The Bill provides that being an owner or occupier, or having the consent of an owner or occupier, of land is not lawful authority to take sandalwood.

The Bill provides that the Minister may fix the maximum quantity of sandalwood that can be taken in a specified period or part of the specified period; however this provision does not relate to cultivated sandalwood. The Minister may decide if the limit applies to sandalwood of a specified kind or that taken in specified circumstances (see s 187).

The Bill also includes provisions relating to owners and occupiers placing duties on both the Minister and owners and occupiers in relation to flora and fauna. The Minister's obligations include notifying owners and occupiers of the existence of and providing information about threatened species or ecological communities. The

owner or occupier may in certain circumstances (see s 53(2)(c)) be obliged to inform other persons of the presence of the relevant species or community on their land. They may also have to ensure that habitat damage does not occur on their land, in the circumstances listed in s 59.

When preparing a draft recovery plan to aid in species or habitat recovery, the owner or occupier must be consulted. The Minister may enter a biodiversity conservation agreement with an owner or occupier of land which may among other things restricts access or activities which can be carried out on the land (see s 115 for more information).

For further information please see the Second Reading Speech from the Legislative Council.

Prevention of Forced Closure of Remote Aboriginal Communities Bill 2016

Status: This Bill was introduced on 30 June 2016 and was read for the first and second time on the same date.

Stated purpose: The purpose of this Bill is to prevent the forced closure of remote Aboriginal communities.

Native Title implications: Remote Aboriginal communities are communities wholly or principally composed of persons of Aboriginal descent as defined by the *Aboriginal Affairs Planning Authority Act 1972* section 4.

Forced closure refers to any action taken without the free, prior and informed consent of residents that has the aim or effect of closing the community or relocating residents. It also refers to deterring people from living in the community through inadequate municipal or essential services. Municipal and essential services include power, water, sewerage, infrastructure, education, health services, and waste disposal.

The Bill would require decision makers to adhere to the principles of the Declaration on the Rights of Indigenous Peoples, especially Articles 8, 9, and 10 which outline the right to belong to an indigenous community and to not be removed from lands; Articles 3, 4, 18, and 23 which outline the right to self-determination and self-government in matters relating to their own affairs and development; and Articles 19 and 39 which outline the right to develop their own health, social, and economic programs and to receive co-operation and support from the State.

Should a public authority make a decision that leads to the forced closure of a remote Aboriginal community, which includes the inadequate provision of municipal or essential services, the Bill would enable residents to apply to the State Administrative Tribunal for a review of a decision to close their community. Residents must apply within six months after the decision was made; or if the community was unaware of the decision, six months after they became aware of it. Applications for

review must be made in writing, or if made orally, put into writing by the executive officer as defined in the *State Administrative Tribunal Act 2004* section 3(1).

3. Native Title Determinations

In June 2016, the NNTT website listed 10 native title determinations.

Short Name (NNTT)	Case Name	Date (NNTT)	State	Outcome	Legal Process	Type	RNTBC/ PBC
Iman People #2	Doyle on behalf of the Iman People #2 v State of Queensland	23/06/2016	QLD	Native title exists in the entire determination area	Consent	Claimant	Not registered
Barngarla Native Title Claim	Croft on behalf of the Barngarla Native Title Claim Group v State of South Australia	23/06/2016	SA	Native title exists in parts of the determination area	Litigated	Claimant	Not registered
Darumbal People	Hatfield on behalf of the Darumbal People v State of Queensland	21/06/2016	QLD	Native title exists in parts of the determination area	Consent	Claimant	Not registered
Mt Denison Pastoral Lease	Ngal/Jangala on behalf of the Rrwerk/Mamp/ Arrwek, Yinjirrpikurlangu, Janyinpartinya, Yanarilyi/Anerely and Ngarliyikirlangu landholding groups v Northern Territory of Australia	16/06/2016	NT	Native title exists in parts of the determination area	Consent	Claimant	Mt Denison Aboriginal Corporation
Narwietooma	Katakarinja on behalf of Imperlknge, Urlatherrke, Parerrule, Yaperlpe, Urlampe, Lwekerreye and Ilewerr landholding groups and those persons with rights and interests in the area of land and waters known as Kwerlerrethe v Northern Territory of Australia	15/06/2016	NT	Native title exists in parts of the determination area	Consent	Claimant	WALA Aboriginal Corporation

Short Name (NNTT)	Case Name	Date (NNTT)	State	Outcome	Legal Process	Type	RNTBC/ PBC
Bar Barrum People #2	Congoo on behalf of the Bar Barrum People #2 v State of Queensland	10/06/2016	QLD	Native title exists in the entire determination area	Consent	Claimant	N/A
Bar Barrum People #3	Congoo on behalf of the Bar Barrum People #3 v State of Queensland	10/06/2016	QLD	Native title exists in the entire determination area	Consent	Claimant	N/A
Bar Barrum People #4	Congoo on behalf of the Bar Barrum People #4 v State of Queensland	10/06/2016	QLD	Native title exists in the entire determination area	Consent	Claimant	N/A
Birriliburu People, Birriliburu #2, Birriliburu #4	BP (Deceased) on behalf of the Birriliburu People v State of Western Australia	06/06/2016	WA	Native title exists in the entire determination area	Consent	Claimant	Mungarlu Ngurrarankatja Rirraunkaja (Aboriginal Corporation) RNTBC
Birriliburu #3	BP (Deceased) on behalf of the Birriliburu People v State of Western Australia	06/06/2016	WA	Native title exists in the entire determination area	Consent	Claimant	Mungarlu Ngurrarankatja Rirraunkaja (Aboriginal Corporation) RNTBC

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 12 July 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 (12 July 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	22	8
Queensland	74	6
South Australia	15	1
Tasmania	0	0
Victoria	4	0
Western Australia	36	1
NATIONAL TOTAL	**157**	**16**

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: http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx and Registered Determinations of Native Title and RNTBCs as at 12 July 2016.

5. Indigenous Land Use Agreements

In June 2016, 2 ILUAs were registered with the National Native Title Tribunal.

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
28/06/2016	Mapoon Township Community Development ILUA	QI2016/003	Body Corporate	Qld	Community, Community Living Area, Development
17/06/2016	Ergon Energy Corporation Limited and Iman People #2 ILUA	QI2016/001	Area Agreement	Qld	Energy, Infrastructure

For more information about ILUAs, see the NNTT website and the ATNS Database.

6. Future Acts Determinations

In June 2016, 5 Future Acts Determinations were handed down.

Date	Parties	Coverage	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
28/06/2016	IS (Name withheld for cultural reasons) and Others (Wajarri Yamatji) v The State of Western Australia and Terrence Harold Little	-	WO2015/0824	WA	Objection - Expedited Procedure Applies	Member Shurven found that the grant of the exploration licence is an act attracting the expedited procedure as the licence is in an area of particular significance to the native title party, but interference for the purposes of s 237(b) of the Act is not likely. Factors central to Member Shurven's decision are: the limited rights afforded to the holder of a prospecting licence; the underlying pastoral lease and the previous and continuing exploration activity in the area; the evidence of previous disturbance of the licence; and the State's proposed RSHA condition. The Tribunal also took into account the grantee's status as a member of the Wajarri Yamatji people and the insight this affords him into heritage protection issues in the area.
28/06/2016	Raymond William Ashwin (dec) & Others on behalf of Wutha v The State of Western Australia and Angora Blue Pty Ltd	-	WO2015/0506	WA	Objection - Dismissed	Member Shurven did not receive any contentions from the Wutha claim group as to why the objection to the expedited procedure application 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.

Date	Parties	Coverage	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
20/06/2016	Raymond William Ashwin (dec) & Others on behalf of Wutha v The State of Western Australia and Marjorie Ann Molloy	-	WO2015/0621	WA	Objection - Dismissed	Member Shurven did not receive any contentions from the Wutha claim group as to why the objection to the expedited procedure application 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
10/06/2016	Ngan Aak-Kunch Aboriginal Corporation RNTBC v Glencore Bauxite Resources Pty Ltd and The State of Queensland	-	QO2015/0078	QLD	Objection - Expedited Procedure Applies	Mr JR McNamara found that there was insufficient evidence that Glencore's interference was likely to affect the native title party's community or social activities. JR McNamara concluded that there were no sites of particular significance that would be impacted by adverse or unacceptable impacts by the proponent and there was unlikely to be significant ground disturbance.
09/06/2016	Raymond William Ashwin (dec) & Others on behalf of Wutha v The State of Western Australia and Legend Resources Pty Ltd	-	WO2015/0686	WA	Objection - Dismissed	Member Shurven did not receive any contentions from the Wutha claim group as to why the objection to the expedited procedure application 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

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

AIATSIS

Wearing two hats: The conflicting governance roles of native title corporations and community/shire councils in remote Aboriginal and Torres Strait Islander communities

This paper looks at the role of cultural governance in supporting the recognition of Indigenous landholdings and the in the impact of overlapping governance regimes on remote Indigenous communities in Western Australia and Queensland.

It is latest in the *Land, Rights, Laws: Issues in Native Title* series and is available for download from the AIATSIS website.

Yamatji Marla Aboriginal Corporation

YMAC News

The June edition of YMAC News is available for download from the YMAC website.

The Cairns Institute

Traditional owners and sea country in the southern Great Barrier Reef – Which way forward?

This report explores the history of Traditional Owner attempts to secure a more 'joined-up' approach across the Great Barrier Reef and revisits their core aspirations regarding the management of sea country. It then presents the results of consultation with Traditional Owners regarding the effective implementation of Reef 2050 and of the Tropical Water Quality Hub's Indigenous Engagement and Participation Strategy. This report provides the key output required from the research project, detailing 'the coordinated Indigenous framework that has been developed' and showing 'how Indigenous participation in sea country management can be increased'.

The report is available for download from the Cairns Institute website.

9. Training and Professional Development Opportunities

AIATSIS

Australian Aboriginal Studies

Australian Aboriginal Studies (AAS) 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.

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.

Upcoming training courses

Course	Location	Dates	Applications Close	Details
Introduction to Corporate Governance workshops	Melbourne	16-18 August	Applications close: 5 August	Apply online | Download the application form
Two-day governance workshop	Broome	23-24 August	Applications close: when full	Apply online | Download the application form

For further information on training courses and dates, visit the ORIC website.

The Aurora Project

Aurora Internship Program

The Internship Program commenced in 2004 with the placement of legal interns at a limited number of NTRBs and other organisations working in Indigenous affairs more generally. To address the needs of anthropology and research staff at NTRBs and PBCs, the Program expanded to include anthropology students and graduates in 2006 and other social science students and graduates in 2007.

Applications for the summer round of internships will be open from 1 August through 26 August.

For more information on the internship program, visit the Aurora Project website.

10. Events

Yothu Yindi Foundation

Garma Festival 2016

The Annual Garma Festival is Australia's Leading Cultural Exchange event. It is held annually onsite at remote Gulkula, a traditional meeting ground in Arnhem Land.

Date: 29 July – 1 August 2016

Location: Gulkula, Northern Territory

For further information, please visit the Yothu Yindi Foundation website.

AAS Conference 2016

Anthropocene Transitions

The 2016 conference of the Australian Anthropological Society will be hosted by The Department of Anthropology, School of Social and Political Sciences at The University of Sydney in partnership with the Australian Anthropological Society (AAS).

The call for abstracts is open from 18 July through 15 August 2016.

Date: 12-15 December 2016

Location: University of Sydney, New South Wales

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.