What's New – June 2012

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1. Case Summaries

Drake Coal Pty Ltd, Byerwen Coal Pty Ltd/Grace Smallwood & Ors (Birri People)/Queensland, [2012] NNTTA 9 (6 February 2012)

6 February 2012
Decision on whether the Tribunal has power to conduct an inquiry
National Native Title Tribunal – Brisbane
Member John Sosso

The Tribunal held that Drake Coal Pty Ltd and Byerwen Coal Pty Ltd had fulfilled their obligation to negotiate in good faith under s 31 of the *Native Title Act 1993* (Cth). Therefore, the Tribunal has the power to conduct an inquiry and make a future acts determination pursuant to s 38 of the *Native Title Act 1993*.

The State of Queensland provided notice of the proposed grant of mining leases to Drake Coal Pty Ltd and Byerwen Coal Pty Ltd ('the grantee parties'), both part of the QCoal Group. The prospective tenements all were wholly within the boundaries of the Birri People's registered native title claim. One year after the State had given notice of the proposed Drake tenements, which was about ten months after notice was given for the proposed Byerwen tenements, the grantee parties lodged two future act determination applications with the Tribunal. At a preliminary conference before Member Sosso, the native title party contended that the grantee parties had not fulfilled their obligation under s 31 *Native Title Act 1993* to negotiate in good faith. Pursuant to s 36(2) *Native Title Act 1993*, if the Tribunal finds that a party has not negotiated in good faith, the Tribunal cannot make a determination as to whether the tenements may be granted. Therefore, the Tribunal was required to examine whether the grantee parties had failed to engage in good faith negotiations.

The native title party raised numerous issues concerning the conduct of the grantee parties that it argued exhibited a failure to negotiate in good faith. For example, the native title party had requested information from the grantee parties and did not receive a written response for some two months. The response received did not contain all of the information requested. They argued that this amounted to a failure to respond to reasonable requests for information within a reasonable timeframe. Further, they alleged that the grantee parties intentionally stalled the negotiation process in an attempt to avoid the obligation to negotiate in good faith. In addition, the native title party contended that the grantee parties did not send negotiators with the requisite authority to actually negotiate, and generally adopted an inflexible and non-negotiable position with no attempt to make substantive counter-proposals. They argued that a letter in which the grantee parties asserted that they would only continue negotiations if the native title party agreed to a code of 'acceptable behaviour' at meetings, amounted to unilateral conduct that harmed the negotiation process. Finally, the native title party claimed that the grantee parties had failed in a number of ways to meet the overarching standard of what a reasonable person would do in the circumstances.

The Tribunal examined the quality of the grantee parties' conduct during the course of the negotiations, by reference to the indicia outlined in *Strickland v Minister for Lands for Western Australia* (1998) 85 FCR 303 at 312-313. Regarding the request for information, the Tribunal found that while the native title party's request was reasonable, good faith considerations did not oblige the grantee parties to comply with all aspects of it.

Much of the information had already been subject to discussions between the two parties, and there was no obligation to provide commercial in confidence information. Further, the Tribunal evaluated all material before it and concluded that the grantee party did not stall the negotiations, but instead appeared diligent in their engagement with the native title party. The Tribunal also held that the grantee parties' negotiating team possessed the requisite intention to negotiate as exhibited by the fact that their chief negotiator was present throughout the negotiating process.

In respect of the grantee parties' general flexibility and willingness to negotiate, Member Sosso found that the evidence did not support the native title party's allegations. Whilst the grantee parties were attempting to 'strike a hard commercial deal', they were under no obligation to approach the negotiations in an altruistic manner. The Tribunal cannot as a general rule determine 'good faith' on the basis of evaluating the reasonableness of the offers submitted by a negotiation party, but it may consider the reasonableness of a party's offer if it shines light on the party's general conduct, and Member Sosso found that the offers made by the grantee parties were not manifestly unfair or inappropriate.

Regarding the grantee parties' 'acceptable behaviour' ultimatum, the Tribunal held it was an over-reaction by the grantee parties and constituted a lapse in good faith negotiations. However, the Tribunal reiterated the principle observed by Deputy President Sumner in *Strategic Minerals Corporation NL/Allan Kynuna & Ors on behalf of the Woolgar Group/Queensland* [2003] NNTTA 83 at [184] that good faith must be considered in the context of the whole negotiations. Overall, the grantee parties had approached the negotiations in a proactive and open manner, and this lapse did not by itself imply a total failure of good faith. Finally, the evidence as a whole did not support the contention that the grantee parties were engaging in 'sham' negotiations nor that they had intended to mislead or deceive the native title party.

In light of the material before the Tribunal, Member Sosso concluded that the grantee parties' offers, negotiating behaviour and positions had been professional and reasonable, and accordingly that they had negotiated in good faith. This meant that the Tribunal had the power to deal with the future act determination application.

Tullock and Others v Western Australia and Another (2011) 257 FLR 320

24 February 2011
Expedited procedure objection
National Native Title Tribunal – Perth
Hon C J Sumner, Deputy President

In this matter, Sumner DP determined that the grant of an exploration licence by the Western Australian Government to Bushwin Pty Ltd ('Bushwin') is a future act that attracts the expedited procedure.

In 2009, the government party gave notice of its intention to grant an exploration licence over 214.53 km^2 of land south-west of Wiluna. The notice contained the State's view that the grant was subject to the expedited procedure and so did not require the normal negotiation process under s 31 of the *Native Title Act 1993* (Cth). The Tarlpa native title claimants lodged an expedited procedure objection application on the basis that the proposed licence is likely to 'interfere directly with the carrying on of the community or social activities' under s 237(a) of the *Native Title Act 1993*. No submissions or evidence were brought relating to the issues in ss 237(b) and (c) of the *Native Title Act 1993* (which relate to interference with significant sites and major disturbance to land and waters, respectively).

The native title party contended that the proposed exploration licence would interfere with the community activity of looking after country. The native title party argued that looking after country involves entering discussions, agreements and conducting follow-up operations to ensure that visitors show respect and care for the land. According to the native title party, the expedited procedure would preclude them from entering into negotiations and agreements with Bushwin and thus fulfilling the 'vitally important community activity' of looking after country. They submitted that the Regional Standard Heritage Agreement ('RSHA') does not deal with all elements of looking after country and that the right to negotiate provisions in the *Native Title Act 1993* are the only appropriate mechanism to mitigate interference with community activities.

The government party placed emphasis on the absence of Aboriginal communities in the proposed licence area and the grantee party's willingness to enter into a RSHA, which would require it to notify, provide information and consult with the native title claim group. It argued that the native title claim group does not

conduct physical activities within the tenement area, and even if community and social activities do not require a physical dimension, the RSHA is capable of alleviating the native title party's concerns.

The government party also challenged the probative value of the affidavit of anthropologist Lindsay Langford, on the grounds that he is an employee of Central Desert Land Native Title Services rather than a member of the native title claim group. This argument was rejected by the Tribunal – Sumner DP held that Langford's employment and closeness to some members of the native title claim group did not discredit his evidence and affirmed that expert anthropological evidence of traditional laws and customs and connection to country is probative.

The Tribunal accepted that the RSHA framework provides some capacity for consultation with native title parties, especially in relation to Aboriginal sites. However, Sumner DP stated that the RSHA does not cover all community activities and is subject to ministerial discretion, permitting interferences in certain circumstances. As a result, the Tribunal gave the RSHA minimal consideration in its determination.

The criteria of directness, physicality, likelihood and proximity were major issues in this case. Sumner DP affirmed that community or social activities under s 237(a) must be physical and not merely spiritual, and will encompass all manifestations of traditional laws and customs, regardless of whether they are grounded in exclusive or non-exclusive native title rights or interests. Applying these principles, Sumner DP concluded that looking after country involves physical, community activities and it was not appropriate to divide the proposed licence area into exclusive and non-exclusive native title claims.

The principal issue in this case was the issue of direct interference. The Tribunal held that 'interference' for the purposes of s 273(a) encompasses any 'action which has the effect of hampering or affecting adversely any community activities.' The interference must be likely, which requires a 'predictive assessment of the effects of the proposed future act', as stated by French J in *Smith v Western Australia & Anor* (2001) 108 FCR 442. The impact must also be direct, not irrelevant or trivial, which necessitates an evaluative, functional and contextual judgment about the 'proximate cause of the apprehended interference'. In considering the issue of proximity, Sumner DP accepted the native title party's contentions that it is not necessarily definitive that the community or social activities take place outside of the proposed licence area. The weight given to the location of activities will vary in each case and, in general, the further the activities are from the proposed licence area, the less likely a relevant interference will be established.

Sumner DP concluded that the grant of the exploration licence and the conduct of exploration activities would not directly interfere with community activities. Bushwin had indicated that it was prepared to enter discussions about the exploration proposal and to sign a RSHA. Further, there was no indication that serious conflict would emerge in negotiations. Taking into account the wider context of the objection application, it was noted that the carrying on of community activities was already subject to interference from a non-exclusive pastoral lease over 95.5 per cent of the land. Sumner DP held that the native title party could continue to look after country, albeit in the circumstances of the grant of the exploration tenement.

It was relevant in this case that the community activity of looking after country is likely to be common to all native title holders across Australia. Sumner DP accepted the government party's contention that if the native title party's arguments were accepted, it would give rise to a virtual veto over the use of the expedited procedure mechanism. This, it was held, would be inconsistent with the statutory intention of the 1998 amendments to the *Native Title Act 1993*.

As there was no direct and proximate interference with community or social activities, the Tribunal concluded that the expedited procedure was attracted.

Murray v Western Australia and Another **(2011) 257 FLR 450**

27 May 2011
Expedited Procedure Objection
National Native Title Tribunal – Perth
Hon C J Sumner, Deputy President

In this matter, the Native Title Tribunal held that the proposed grant of a prospecting licence to Drew Griffin Money attracted the expedited procedure under s 237 of the *Native Title Act 1993* (Cth). The proposed tenement relates to 48.88 hectares of land located 80 kilometres east of Cosmo Newberry Mission in the Shire of Laverton, WA. The land entirely overlaps with the Yilka registered native title claim.

In 2010 the Yilka claimants made an expedited procedure objection application to the Tribunal. Under s 237 of the *Native Title Act 1993*, an objection to the expedited procedure mechanism must establish that the proposed future act is (a) likely to interfere with the carrying on of the community or social activities; (b) with areas or sites of particular significance; or (c) to involve major disturbance to any land or water concerned.

The native tile party argued that the Tribunal, when considering the application, was not entitled to presume that Mr Money, the prospector, was likely to act lawfully when exercising rights under the prospecting licence and comply with all of the licence conditions. This 'presumption of regularity', as it is called, would involve the Tribunal drawing conclusions about the future behaviour of the grantee party without evidence to support those conclusions. According to the native title party, there is no presumption of regularity recognised at law and relevant case law indicates that the presumption should only be applied in limited circumstances. The native title party argued that by applying the presumption of regularity, the Tribunal would be placing limits on its own discretion and would fail to take into account 'cogent and persuasive information' about the conduct of the mining industry. Drawing on press releases and a submission of the Department of Indigenous Affairs, they contended that in an overwhelming number of cases, tenement conditions are not complied with and the *Mining Act 1978* (WA) and *Aboriginal Heritage Act 1972* (WA) ('AHA') are not properly monitored or enforced by the Western Australian government. It was submitted that the Tribunal should act on the general assumption that grantee parties do not comply with environmental regulatory regimes and that the government party should have provided direct evidence on Mr Money's future conduct.

The government party relied on previous cases, including *Silver v Northern Territory* [2002] NNTTA 18; *Western Australia v Smith* [2000] NNTTA 239 and *Ward v Western Australia* [1996] FCA 1452, where a presumption of regularity was recognised and applied. The government party submitted that the *Mining Act 1978*, AHA and other laws and regulations provide sufficient protection against interferences or disturbances under s 237 of the *Native Title Act 1993*. They argued that the native title party had failed to provide sufficient evidence to show that Mr Money would not comply with the licence conditions and other laws.

The Tribunal accepted that a presumption of regularity will apply in expedited procedure objection matters. It held that the presumption is not limited to the circumstances identified in *Kingham v Sutton* [2002] FCAFC 107 (relating mainly to acts that happened in the past), and that it has received judicial endorsement by the Federal Court in *Ward v Western Australia* (1996) 69 FCR 208. Sumner DP stated that the State's regulatory regime will be a relevant factor in determining whether the expedited procedure is attracted, but the weight given to the regulatory scheme will depend on the facts in question. Evidence of a native title party's prior experiences with the grantee party and its attitude to the regulatory regime may help to displace the presumption.

Applying this presumption, the Tribunal found that the grant of the proposed licence is not likely to have any of the negative effects listed in s 237 *Native Title Act 1993*. In relation to 'community or social activities', the native title party had made essentially the same argument as in *Les Tullock and Others on behalf of the Tarlpa Native Title Claimants/Western Australia/Bushwin Pty Ltd* [2011] NNTTA 22 ('*Tarlpa*'). Sumner DP adopted his analysis from *Tarlpa* and concluded that the proposed tenement would not directly interfere with the community activity of 'looking after country'. In relation to the likely effect on significant sites, the Tribunal noted that there were no registered Aboriginal sites within the proposed licence area, and the native title party did not provide evidence of other sites of particular significance. Even if there had been sites of significance, the Tribunal indicated that the expedited procedure objection application would still have failed.

The AHA and other regulations are likely to be effective in protecting against interferences or disturbances and insufficient evidence was tendered to rebut the presumption. The media release was not directed specifically at the grantee, was 3 ½ years old, failed to take into account the new Enforcement and Prosecution Policy for the Department of Mining and Petroleum, and referred to exploration, not prospecting licences. The Tribunal took into account Mr Money's willingness to execute a Regional Standard Heritage Agreement ('RSHA'), indicating his awareness of its legal obligations under the AHA and willingness to consult the Yilka native title claimant. No specific evidence was presented showing that the grantee party was likely to breach his legal obligations. The Tribunal noted in relation to s 237(c) that exploration and prospecting licences are unlikely to result in major disturbance to land or waters, and that no evidence was raised to the contrary. As there was no relevant disturbance or interference, the Tribunal determined that the grant of the prospecting licence is a future act attracting the expedited procedure.

***Maldorky Iron Pty Ltd v South Australian Native Title Services Ltd* [2012] SASCFC 63**

1 June 2012
Summary Determination
Supreme Court of South Australia (Full Court)
Gray, Peek and Blue JJ

In this appeal, the Full Court upheld the decision of the Environment, Resources and Development Court, which refused an application by Maldorky Iron Pty Ltd for a summary determination under the *Mining Act 1971* (SA) authorising Maldork Iron to commence mining production operations.

In 2010, Maldorky Iron received exploration authority over four mineral claims southeast of Olary, South Australia, and gave notice of its intention to seek mining leases for the land. In accordance with Part 9B of the *Mining Act 1971*, a person seeking a production tenement must have a native title mining agreement with the registered native title holders or claimants, or a native title mining determination made by the South Australian Environment, Resources and Development Court. Maldorky Iron published notice of its intention to initiate negotiations with native title parties, and stated that if no native title holders or claimants came forth within two months, it would apply for a summary determination under s 63N *Mining Act 1971*, authorising entry to the land for the purpose of carrying out mining operations.

In May 2011, the Environment, Resources and Development Court dismissed Maldorky Iron's application for a summary determination. The Judge concluded that an applicant is not entitled to initiate negotiations for a native title mining agreement unless they hold or have already applied for a relevant production tenement. As Maldorky Iron did not fit this description, it was not entitled to initiate negotiations. Further, the Judge held that Maldorky Iron was in substance seeking a conjunctive authorisation, as its claim related to a future production tenement. In accordance with s 63N(4) *Mining Act 1971*, the Court found that it had no power to make a summary determination in these circumstances. The issue on appeal was whether the Environment, Resources and Development Court was correct to dismiss Maldorky Iron's application.

Maldorky Iron contended that if Parliament intended for an application for a mining lease to be a precondition for a summary determination, it would have stated so in express terms. It argued that it was entitled to a summary determination, notwithstanding that it did not hold and had not applied for a relevant production tenement.

South Australia Native Title Services submitted that as no application for a production tenement had been made and the claim related solely to a future production tenement (thereby amounting to a conjunctive authorisation), the Court had no power to make a summary determination.

The Full Court accepted the Environment, Resources and Development Court's interpretation of the *Mining Act 1971* and concluded that an applicant must have, at the very least, applied for a production tenement, before it is entitled to a summary determination. The Court held that s 63N(4) *Mining Act 1971* precludes the court from conferring a conjunctive authorisation during summary determination proceedings, as conjunctive authorisations may only be granted where native title parties come forward, are represented in proceedings, and agree to the authorisation. Underlying this restrictive interpretation is the intention to avoid pre-authorising future mining operations, which have not yet been precisely defined or delimited, in the absence of native title parties' consent.

The Full Court upheld the Court's decision and in reaching its conclusion, affirmed the proposition that native title rights should not be eroded until all interests have been heard.

White Mining (NSW) Pty Ltd, Austral-Asia Coal Holdings Pty Ltd and ICRA Ashton Pty Ltd/Scott Franks and Anor (Plains Clans of the Wonnarua People)/New South Wales, [2011] NNTTA 110 (24 June 2011)

24 June 2011
Future Act Determination
National Native Title Tribunal – Brisbane
Member John Sosso

In this matter the Tribunal had to decide whether a Mining Lease could be granted over land near Ravensworth, NSW that included land that is subject to a registered native title determination application by

the Plains Clans of the Wonnarua People ('the native title party'). The Tribunal determined under s 39 of the *Native Title Act 1993* (Cth) that the Mining Lease, which was for open cut coal mining, could be granted to White Mining (NSW) Pty Ltd, Austral-Asia Coal Holdings Pty Ltd and ICRA Ashton Pty Ltd ('the grantee party').

On 11 June 2010, the State of New South Wales ('the government party') provided notice of its intention to grant Mining Lease Application MLA 351 ('the proposed tenement') to the grantee party. On 11 February 2011 (more than six months after the government party had given notification), the grantee party lodged a future act determination application with the Tribunal. The proposed future act related to the South East Open Cut ('SEOC') development, an open cut coal mine with related surface support facilities. The proposed tenement largely consists of freehold land owned by Ashton Coal Mines Limited, as well as Crown reserves and a parcel held by the local Council. Sosso M turned his attention to the criteria under s 39 of the *Native Title Act 1993* in order to determine whether the development may or may not proceed, and if it may proceed then what conditions (if any) should be imposed.

The native title party argued that the proposed tenement should not be granted. They argued it would result in the destruction of Aboriginal cultural sites. They also contended that it would have a 'disastrous effect' on the enjoyment of their native title registered rights and interests. Effectively, an open-cut mine would result in significant disturbance to soil structures and therefore, immediately impact their right to gather natural products, participate in cultural activities, and maintain and protect places of importance in the area. Furthermore, they argued that their rights under native title would be lost to future generations if the development was to proceed. They contended that they do not need to establish existing or recent exercise of native title rights in order to successfully claim that the grant of the tenement would affect the enjoyment of those rights.

In contrast, the grantee party argued that the development would have a minimal impact on the cultural aspects of the site and would lead to numerous economic benefits for the community. Firstly, they argued that the proposed development would have a minimal impact on the enjoyment of the native title party's registered rights and interests. In particular, the grantee party argued that the native title party could only assert these rights and interests over the limited area of land within the tenement that was not freehold land, and within that area many of the registered native title rights were incapable of being exercised at all. For example, the native title party could not exercise their right to fish because the only water bodies in the area were man-made agricultural dams which did not appear to contain fish. Further, the grantee party argued that there was little to no evidence of the enjoyment of these registered rights and interests in the relevant area of land. They argued that the development would have no impact on the 'way of life, culture and traditions' of the native title party. In addition, the grantee party emphasised the significant direct and indirect positive social and economic effects of the development. For example, the grantee party submitted that it would offer two traineeships and two apprenticeships to the native title party during the term of the mining lease. They also contended that the development would have undisputed economic benefits for the local area, the State of New South Wales and the Commonwealth of Australia.

The Tribunal engaged in the balancing exercise required by s 39 when determining a future act determination application in light of the evidence submitted by all parties. The real issue facing the Tribunal was the lack of evidence submitted by the native title party. While the government party and grantee party had provided a great deal of evidence, including maps and documents concerning land tenure, cultural heritage and land use issues, the native title party provided only brief written submissions and a single affidavit from one of the native title claimants. That affidavit, in Sosso M's words, 'consisted mostly of assertions and did not contain the type of direct primary evidence that is critical when undertaking a s. 39 evaluation'. He said that the material provided by the native title party contained little evidence of any exercise of registered native title rights and interests by the native title party on the area concerned.

Contrary to the native title party's contention, he held that demonstration of actual 'enjoyment' of native title rights and interests was necessary in order to object to the tenement on that basis. He also found in the material no significant evidence about the life, culture and traditions of the native title party in the proposed tenement area. Accordingly there was no way of assessing the likely impact of the tenement on these values. Further, there was no evidence that the land in question had been accessed by native title party members or that any of these sites were of a particular significance. Whilst the Tribunal took account of the native title party's opposition to the development, such opposition is only one factor that should be

considered under the s 39 inquiry. The Tribunal provided considerable weight to the evidence provided on the economic and social benefits that would arise from the development.

In light of the lack of evidence provided by the native title party, and in consideration of the positive economic and social benefits of the development highlighted by the grantee party, the Tribunal concluded that the proposed future act should be approved without the imposition of conditions.

***Quall v Northern Territory of Australia* [2012] FCA 677**

27 June 2012
Application for extension of time to file notice of appeal
Federal Court of Australia – Adelaide (via video link to Darwin)
Mansfield J

In this matter, seven applications for extensions of time to file notices of appeal were refused on the grounds that the issues had already been decided and no new evidence had been tendered.

Each application concerned a proposed appeal from the decision of the Court in *Quall v Northern Territory of Australia* (2011) 286 ALR 374 ('the primary decision'). In the primary decision, seven native title claims in the rural areas surrounding Darwin were summarily dismissed on the basis that their continuation would amount to an abuse of process.

Mr Quall, on behalf of the Danggalaba clam ('the applicant'), sought to appeal from this dismissal but did not apply within the time limit. This meant that he needed an extension of time for leave to appeal. The proposed grounds of appeal were: misapplication of the principles of abuse of process; the contention that the applicant had not had every opportunity to fully litigate the issue in the earlier decision, *Risk v Northern Territory* [2006] FCA 404 ('*Risk*'); and, the primary judge failed to have regard to the weight of new expert evidence.

The Court rejected the applicant's contention that the primary judge had misapplied the principles of abuse of process to native title claims, stating that it is well settled that abuse of process applies to claims under the *Native Title Act 1993* (Cth).

Having regard to the finality of litigation, the promotion of public confidence, the just and efficient allocation of the Court's resources and the balancing of justice between the parties, and the right of any person to present a real and genuine controversy to be determined on its merits, the Court agreed with the primary judge in concluding that the applicant had already put forward the question whether the Danggalaba Clan was the relevant Aboriginal society at sovereignty; that claim had been rejected in *Risk*.

The Court agreed with the primary judge that the evidence the applicant relied on was not new evidence in any sense, but evidence which was available to be called. Moreover, Justice Mansfield agreed with the primary judge's finding that the material relied on by the applicant would not overcome the deficiency in the evidence going to show that the Danggalaba Clan was the relevant Aboriginal society at sovereignty possessing native title rights and interests in relation to the lands and waters in the Darwin area. Justice Mansfield held that the proposed appeal had no prospect of success and, accordingly, the applications for an extension of time to appeal were refused.

***Ellaga (on behalf of the Murrunggun Kunakingka Group and the Guyal Bardi Bardi Group) v Northern Territory of Australia* [2012] FCA 665; *Ellaga (on behalf of the Badpa Group, the Murrumggum Kunakingka Group and the Guyal Bardi Bardi Group) v Northern Territory of Australia* [2012] FCA 670**

27 June 2012
Consent Determination
Federal Court of Australia – Historic Newcastle Waters Township
Lander J

In these matters Lander J made a determination by consent that native title exists in land and waters within the areas of the Maryfield Pastoral Lease and the Kalala Pastoral Lease in the Northern Territory. The first application was filed on behalf of the members of the Murrunggun Kunakingka estate group and the Guyal Bardi Bardi group; the second application was filed on behalf of those two groups plus the Badpa group. These matters were two of eleven applications heard together because of their close geographical proximity.

The claimants, the State of Northern Territory ('the Territory'), pastoral respondents and Telstra Corporation Limited had reached an agreement as to the terms of the proposed determinations. Pursuant to s 87 of the *Native Title Act 1993* (Cth) the parties requested that the Federal Court make determinations in accordance with the terms of their agreements. The Court recognised that the estate group members possessed non-exclusive rights to use and enjoy certain parts of the determination areas as identified by the parties. Some of these non-exclusive rights include: the right to travel over and access these areas, hunt and fish, gather and use natural resources, live and camp in the area, conduct cultural activities, and maintain and protect sites of particular significance. The right to take and use natural water was specified not to apply to water captured by the pastoralists. The agreements also identified the areas where native title has been wholly extinguished because of public works such as public roads and pastoral improvements such as bores and homesteads.

The Court was satisfied that the parties had reached agreement and that it was appropriate for the Court to make orders to give effect to that agreement. In particular, Lander J focused on the process behind the formation of the agreements: the primary consideration was whether they had been entered into on a free and informed basis (*Nangkiriny v State of Western Australia* (2002) 117 FCR 6; [2002] FCA 660). As such the Court was not required to examine the merits of the applicants' claims except in relation to whether the government respondent was acting in good faith and rationally on behalf of the wider community (*Munn on behalf of the Gunggari People v Queensland (*2001) 115 FCR 109 at [30]).

Lander J held that the criteria of s 87 of the *Native Title Act 1993* had been satisfied. In particular, his Honour considered that a determination was appropriate in each application in light of the following factors: all parties were legally represented; all relevant non-native title interests in the land had been identified; there were no overlapping claims in the area; and the Territory had played an active role in the negotiation of the consent determination, having had regard to the requirements of the legislation, conducted a thorough assessment process, and concluded that a determination was appropriate in all the circumstances.

Lander J described the process by which the Territory had assessed the factual basis for native title in each claim: an anthropological report and genealogies had been prepared by the claimants' anthropologist according to the Territory's 2009 guidelines; this material was considered by the Territory and an anthropologist they engaged; the parties met and corresponded about outstanding issues; and ultimately reached agreement. The Court also noted the various reports produced by the parties about extinguishing tenures, public works and pastoral improvements. Finally, Lander J determined that a prescribed body corporate would need to be nominated for the purposes of s 57 of the *Native Title Act 1993*.

In ordering the consent determination, Lander J commended the co-operative approach undertaken by the parties.

***Jackson (on behalf of the Karranjini Group and the Bamarrnganja Group) v Northern Territory of Australia* [2012] FCA 664; *Jackson (on behalf of the Kinbininggu Group and the Bamarrnganja Group) v Northern Territory of Australia and APN Pty Ltd* [2012] FCA 668**

27 June 2012
Consent Determination
Federal Court of Australia – Historic Newcastle Waters Township
Lander J

In these matters the Federal Court made a determination by consent that native title exists in land and waters within the area of the Amungee Mungee Pastoral Lease and the Shenandoah Pastoral Lease in the Northern Territory. The first application was brought forward on behalf of members of two estate groups: the Karranjini group and the Bamarrnganja group. The second application was brought forward on behalf of members of the Bamarrnganja group as well as the Kinbininggu group. These matters were two of eleven applications heard together because of their close geographical proximity.

In these matters the claimants, the Northern Territory, and pastoral respondents reached an agreement detailing the proposed determination area, identity of the native title holders, their native title rights and interests, other interests in the areas where native title exists and areas where native title had been extinguished. Regarding native title rights and interests, the parties determined that these rights would be non-exclusive such as the right to hunt and fish. Pursuant to s 87 of the *Native Title Act 1993* (Cth) the parties requested that the Court determine these matters in accordance with the terms of their agreement.

Lander J applied the same principles and analysis to the requirements of s 87 as in the *Ellaga* matters summarised above. His Honour noted the assessment process and the connection material provided by the claimants. This anthropological and genealogy material was considered by the respondents who raised certain contentions arising from their own anthropological assessment. A mutual agreement was reached between these parties as to who were the native title holders. Secondly, Lander J noted reports produced by the respondents regarding the extinguishment of title arising from public works and pastoral improvements. It also considered a report filed by Telstra Corporations Limited in respect to public works on particular parcels of land in the area.

In ordering the consent determination, Lander J applauded the co-operative approach of all parties and their legal representatives in reaching the agreement.

***Rowena Albert (on behalf of the Badpa Group) v Northern Territory of Australia* [2012] FCA 673**

27 June 2012
Consent Determination
Federal Court of Australia – Historic Newcastle Waters Township
Lander J

In this matter the Federal Court made a determination by consent that native title exists in land and waters within the Town of Daly Waters in the Northern Territory. The application was filed on behalf of members of the land holding group associated with the Badpa estate group. This matter is one of eleven applications heard together because of their close geographical proximity.

The claimants and the Northern Territory government had reached an agreement as to the terms of the proposed determination. Pursuant to s 87 of the *Native Title Act 1993* (Cth), the parties requested that the Federal Court make a determination in accordance with the terms of their agreement. The Court recognised that the estate group members possessed non-exclusive rights to use and enjoy certain parts of the determination area as identified by the parties. The agreement also identified the areas where native title has been wholly extinguished.

Lander J applied the same principles and analysis as in the *Ellaga* matters summarised above, and considered similar evidence. His Honour considered that it was appropriate to make the determination sought. The claim group was determined to have the following non-exclusive rights in the determination area: to travel on and access the area; to hunt and fish; to gather and use the natural resources; to take and use natural water; to live, camp and erect shelters; to light fires (but not for clearing vegetation); to conduct cultural activities and meetings; to maintain and protect sites and places of significance; to share or exchange subsistence and other traditional resources; and to be accompanied on the area by non-native title holders.

***Wavehill v Northern Territory of Australia* [2012] FCA 666; *Wavehill v Northern Territory of Australia* [2012] FCA 671**

27 June 2012
Consent determination
Federal Court of Australia – Historic Newcastle Waters Township
Lander J

Wavehill v Northern Territory of Australia [2012] FCA 666 and *Wavehill v Northern Territory of Australia* [2012] FCA 671 were two of eleven cases heard together due to their geographical proximity.

The first consent determination involved an application by the Longreach Birdum estate group over approximately 3169 km² of land and waters within the bounds of the Forrest Hill Pastoral Lease in the Northern Territory. In the second consent determination, the native title rights of the Warrangku, the Karranjini and the Lija/Muwartpi estate groups were recognised over land and waters within the Mungabroom Pastoral Lease. Respondents in both matters were the Territory, Telstra Corporation and two holders of perpetual pastoral leases, Maryfield Station Pty Ltd and Yarabala Pty Ltd. By consent, the Court made a determination in favour of the applicants, under s 87 of the *Native Title Act 1993* (Cth).

Lander J applied the same principles and analysis, and considered similar evidence, as in the other matters heard together with these two (summarised above). The following non-exclusive native title rights and interests were recognised in both determinations: the right to access and move about the determination

area; hunt and fish on the lands and waters; gather and use natural resources, including water resources (but not water captured by the pastoralists); share and exchange the subsistence and other traditional resources; live, camp and erect shelters; cook and light fires for domestic purposes (but not for clearing vegetation); engage and participate in cultural activities and ceremonies; be accompanied by others; and visit, maintain and protect sites of cultural significance.

In both cases, the Federal Court recognised the interests of Maryfield Station Pty Ltd and Yarabala Pty Ltd under perpetual pastoral leases; the rights of Aboriginal persons pursuant to reservations in the pastoral leases and the rights of the Telstra Corporation. In the first case, the Court also recognised usage rights for the passage of travelling stock and usage rights for commonage purposes.

***Raymond v Northern Territory of Australia* [2012] FCA 667; *Raymond v Northern Territory of Australia* [2012] FCA 669; *Raymond v Northern Territory of Australia* [2012] FCA 672; *Raymond v Northern Territory of Australia* [2012] FCA 683**

27 June 2012
Consent determination
Federal Court of Australia – Historic Newcastle Waters Township
Lander J

These consent determinations were four of eleven applications heard together because of their geographical proximity.

In the first matter, the Federal Court recognised the native title rights and interests of the Warrangku, the Karranjini and the Lija/Muwartpi estate groups in relation to the land and waters within the Mungabroom Pastoral Lease in the Northern Territory. The second determination concerned the rights and interests of the Warrangku group with respect to the Ucharonidge Pastoral Lease; the third case recognised the Kinbininggu, the Warrangku and the Marlinja estate groups' rights over determined land and waters within the Hayfield Pastoral Lease; and the fourth determination related to the rights and interests of the Karranjini, the Bamarrnganja, the Warranangku, the Pinda (OT Downs) and the Lija/Muwartpi estate groups over the Beetaloo Pastoral Lease.

Respondents in these proceedings included the Territory, Telstra Corporation and holders of perpetual pastoral leases, including Yarabala Pty Ltd, Consolidated Pastoral Company Pty Ltd and APN Pty Ltd. The Federal Court made consent determinationS under s 87 of the *Native Title Act 1993* (Cth) and found that native title existed in the determination areas.

The following non-exclusive native title rights and interests were recognised in each determination: the right to access and move about the determination area; hunt and fish on the lands and waters; gather and use natural resources, including water resources (though not water captured by the pastoralists); share and exchange the subsistence and other traditional resources; live, camp and erect shelters; cook and light fires for domestic purposes (but not for clearing vegetation); conduct of cultural activities and ceremonies; teach the physical and spiritual attributes; be accompanied by non-native title holders; and visit, maintain and protect sites of cultural significance. Various rights and interests of non-native title parties were recognised, including rights in certain pipelines on the land and the rights to move stock over the land.

2. Legislation

Western Australia

Aboriginal Heritage Act 1972 (WA)
The Government of Western Australia intends to make amendments to the *Aboriginal Heritage Act 1972*, which is the State's principal legislation enabling the protection of Aboriginal cultural heritage. The Government states that amendments are intended to improve protection, certainty and compliance in relation to Aboriginal cultural heritage. There was a five-week period for public comment on the discussion paper or to make a comment in relation to these proposed amendments, which closed on 26 June 2012 (extended from 5 June).

- Download the discussion paper, 'Seven proposals to regulate and amend the *Aboriginal Heritage Act 1972* for improved clarity, compliance, effectiveness, efficiency and certainty'.
- View the questions and answers publication for more information about the discussion paper.
- View the media statement issued by the Minister for Indigenous Affairs.
- Read submissions on the proposed changes to the *Aboriginal Heritage Act 1972*.
  - Submission by Yamatji Marlpa Aboriginal Corporation
  - Submission by South West Aboriginal Land and Sea Council
  - Submission by Central Desert Native Title Services
  - Submission by Goldfields Land and Sea Council
  - Submission by Kimberley Land Council
  - Submission by Professor Mick Dodson AM & Gary Toone

3. Policy

Western Australia

Department of Indigenous Affairs (WA) Strategic Framework 2012-2014

The Department of Indigenous Affairs (DIA) launched a Strategic Framework 2012-2014 designed to meet the contemporary needs of Aboriginal people. The framework focuses on four priority areas: Aboriginal Heritage, Aboriginal Land, Community Development and Accountable Government.

- View the media statement issued by the Minister for Indigenous Affairs.
- Further details are available on the Department of Indigenous Affairs website.

Federal Government

Native title organisations review terms of reference

The Minister for Indigenous Affairs has initiated a review of the role and functions of native title representative bodies (NTRBs) and native title service providers (NTSPs). The changing native title environment sets the context for the review. As more claims are determined and more Registered Native Title Bodies Corporate (RNTBCs) are established, there is a growing need for a framework for post-determination or post-settlement support for native title holders.

- On 6 June 2012, the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) released its terms of reference for the review.

Native title respondent funding scheme

The review into the Native Title Respondent Funding Scheme (NTRFS) was conducted by an independent consultant, Mr AC Neal, SC. The review was finalised in late 2011 after public consultations with stakeholders. Submissions to the review and the final report are available on the Attorney-General's website. All grants that commence during 2012 will be dealt with under the existing scheme, with an end date of 31 December 2012.

- From 1 July 2012, applications for the NTRFS will be made under the new system via an online application form available from the Attorney-General's website.

Development of Australian Heritage Strategy

The Strategy is intended to provide a high-level framework for managing Australian heritage. It is set to include clear goals for the management of all heritage, including Indigenous heritage. The Strategy is being prepared in consultation with all state and territory governments, which is now underway.

- The Australian Heritage Strategy public consultation paper was designed to draw out community discussion on how we can best recognise, manage and interpret our heritage. Download the discussion paper, 'Australian Heritage Strategy public consultation paper'.
- In developing the Strategy, the Department of Sustainability, Environment, Water, Population and Communities commissioned nine essays to help identify key issues facing the heritage sector. These essays aim to provoke thought and encourage discussion amongst the community about what should be addressed through the development of the Strategy.

Funding announcements

The Federal Government announced $7.8 million additional funding to support native title groups:

- $5.4 million to the Aurora Education Foundation to expand their current training, professional development and scholarship program for native title organisations.
- $2.4 million to continue the work of the Native Title Research Unit of the Australian Institute of Aboriginal and Torres Strait Islander Studies.

Further details are available on the Attorney-General's website.

Native Title Anthropologist Grant Program

The Attorney-General also announced the successful recipients of the $540,000 Native Title Anthropologist Grants Program for 2012-13. Successful recipients of funding under the Native Title Anthropologist Grants Program for 2012-13 are:

- Australian National University School of Anthropology and Archaeology
- Goldfields Land and Sea Council
- Northern Land Council
- South West Aboriginal Land and Sea Council
- The Cairns Institute, James Cook University, and
- University of Adelaide, School of Social Sciences.

Further details are available on the Attorney-General's website.

4. Native Title Reforms

Federal Government

Amendments to the *Native Title Act 1993* (Cth)

On 6 June 2012, the Attorney-General announced that the Australian Government will progress a package of legislative reforms to the *Native Title Act 1993* (Cth). The proposed reforms will:

- clarify the meaning of 'good faith' under the 'right to negotiate' provisions and make associated amendments to 'right to negotiate' provisions
- enable parties to agree to disregard historical extinguishment of native title in areas such as parks and reserves
- streamline Indigenous land use agreement (ILUA) processes. This will include simplifying the process for minor amendments to ILUAs, improving objection processes for area ILUAs and clarifying the coverage of ILUAs.

The proposal to create clear requirements for good faith in negotiations and to simplify the ILUA process came out of the Federal Government's 2010 Discussion Paper, 'Leading practice agreements: Maximising outcomes from native title benefits'. The amendment to enable parties to disregard historical extinguishment in parks and reserves was released as an exposure draft for public consultation in 2010.

View the joint media statement issued by the Attorney-General and the Minister for Families, Communities and Indigenous Affairs.

Visit the ABC website to listen to the Attorney-General Nicola Roxon speaking to delegates at the native title conference in Townsville on the proposed changes to native title laws.

Amendments to tax legislation

On 6 June 2012, the Attorney-General announced that the Government will amend the tax legislation to make it clear that native title payments and other benefits are not subject to income tax (which includes capital gains tax). This change follows the 2010 *Native Title, Indigenous Economic Development and Tax* consultation paper.

Institutional reforms

Reforms to the National Native Title Tribunal (NNTT) and the Federal Court of Australia were announced as part of the 2012-13 Budget and will commence from 1 July 2012. These reforms implement recommendations made by the Strategic review of small and medium agencies in the Attorney-General's portfolio (the Skehill Review). The reforms are:

- transfer of native title claims mediation, and Indigenous land use agreement (ILUA) negotiation assistance that is related to claims, to the Federal Court of Australia,
- removal of the NNTT's status under the *Financial Management and Accountability Act 1997* (Cth) (FMA Act) as an FMA Act agency
- transfer of the NNTT's appropriation (minus savings) and staff to the Federal Court of Australia
- review to determine the NNTT's discretionary services should be reduced or discontinued, and whether cost recovery would be desirable.

The NNTT will continue to exist as a statutory entity, with a sharpened focus on future acts. All of the NNTT's other statutory functions will remain with the NNTT, including:

- ILUA negotiations not related to a mediation
- future acts functions
- maintenance of the Register of Native Title Claims
- statutory assistance functions
- review / inquiry functions about native title issues

Further information on the reforms is available at the Attorney-General's website.

Media releases reviewing reforms:

Australian Human Rights Commission

Native title reforms will deliver benefits but more needed over time – 6 June 2012
Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda has welcomed the native title reforms announced on 6 June 2012 as a step in the right direction, but said that further reform is needed to address inequities that remain in the native title system, such as reversing the currently onerous burden of proof provisions. 'The extinguishment of Indigenous rights in land by unilateral uncompensated acts is also completely at odds with Australia's human rights obligations,' he said. See the Commission's website for more details.

National Congress of Australia's First Peoples

Congress says keep door open for more substantial native title reform – 6 June 2012
National Congress of Australia's First Peoples ('Congress') Co-Chairs Les Malezer and Jody Broun welcomed the positive reforms as the first stage in the Government's incremental approach to making the system stronger and more workable. Congress will continue to advocate for more substantive changes to the *Native Title Act 1993* (Cth), including reversing the onus of proof for claimants. See the Congress' website for more details.

The Australian Greens

Onus of proof omission a native title letdown – 6 June 2012
The Australian Greens say a key element of native title reform has been overlooked by the Federal Government, undermining the effectiveness of their reforms. 'Reversing the onus of proof is the key amendment that is needed to make ensure the native title system is more effective,' Senator Rachel Siewert, Australian Greens spokesperson on Aboriginal and Torres Strait Islander Issues said. See The Greens' website for more details.

5. Indigenous Land Use Agreements (ILUA)

The Native Title Research Unit within AIATSIS maintains an ILUA summary which provides hyperlinks to information on the National Native Title Tribunal (NNTT) and the Agreements, Treaties, and Negotiated Settlements (ATNS) websites.

In June 2012, **15** ILUAs were registered with the National Native Title Tribunal.

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
12/6/2012	Kalkadoon People/Xstrata ILUA	QI2012/042	AA	QLD	Exploration
12/6/2012	Kalkadoon People/Lagoon Creek ILUA	QI2012/043	AA	QLD	Terms of Access
12/6/2012	Kalkadoon People/Gereta and Regent ILUA	QI2012/041	AA	QLD	Terms of Access
15/6/2012	Gawler Ranges Native Title Claim Settlement ILUA	SI2012/004	AA	SA	Consultation protocol
15/6/2012	Gawler Ranges National Park ILUA	SI2012/001	AA	SA	Co-management
21/6/2012	Adnyamathanha Mineral Exploration ILUA	SI2012/005	BCA	SA	Mining Exploration
26/6/2012	Breakaways ILUA	SI2012/007	BCA	SA	Access Pipeline
27/6/2012	Tallaringa Conservation Park	SI2012/006	BCA	SA	Co-management
28/6/2012	Combined Mandingalbay Yidinji-Gunggandji People and Wanyurr Majay People ILUA	QI2011/062	AA	QLD	Terms of Access
28/6/2012	Combined Mandingalbay Yidinji Gunggandji People and Ergon Energy ILUA	QI2011/061	AA	QLD	Infrastructure Energy
28/6/2012	Combined Mandingalbay Yidinji Gunggandji Yarrabah Towers ILUA	QI2011/060	AA	QLD	Government Tenure resolution Communication
28/6/2012	Combined Mandingalbay Yidinji Gunggandji Yarrabah Local Government ILUA	QI2011/057	AA	QLD	Government
28/6/2012	Combined Mandingalbay Yidinji Gunggandji Yarrabah Blockholders ILUA	QI2011/054	AA	QLD	Tenure resolution
28/6/2012	Combined Mandingalbay Yidinji Gunggandji Yarrabah DOGIT Transfer ILUA	QI2011/055	AA	QLD	Tenure resolution
29/6/2012	Saibai Island Health	QI2012/040	AA	QLD	Access Terms of Access

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

6. Native Title Determinations

The Native Title Research Unit within AIATSIS maintains a determinations summary which provides hyperlinks to determination information on the Austlii, NNTT and ATNS websites.

In June 2012, **8** native title determinations were handed down.

Short Name (NNTT)	Case Name	Date (NNTT)	State	Outcome	Legal Process	Type
Amungee Mungee Pastoral Lease	*Jackson v Northern Territory of Australia* [2012] FCA 664	27/06/2012	NT	Native Title Exists in Parts of the Determination Area	CONSENT DETERMINATION	CLAIMANT
Mungabroom Pastoral Lease	*Raymond v Northern Territory of Australia* [2012] FCA 667	27/06/2012	NT	Native Title Exists in Parts of the Determination Area	CONSENT DETERMINATION	CLAIMANT
Shenandoah Pastoral Lease	*Jackson v Northern Territory of Australia* [2012] FCA 668	27/06/2012	NT	Native Title Exists in Parts of the Determination Area	CONSENT DETERMINATION	CLAIMANT
Ucharonidge Pastoral Lease	*Raymond v Northern Territory of Australia* [2012] FCA 669	27/06/2012	NT	Native Title Exists in Parts of the Determination Area	CONSENT DETERMINATION	CLAIMANT
Kalala Pastoral Lease	*Ellaga v Northern Territory of Australia* [2012] FCA 670	27/06/2012	NT	Native Title Exists in Parts of the Determination Area	CONSENT DETERMINATION	CLAIMANT
Vermelha Pastoral Lease	*Wavehill v Northern Territory of Australia* [2012] FCA 671	27/06/2012	NT	Native Title Exists in Parts of the Determination Area	CONSENT DETERMINATION	CLAIMANT
Beetaloo Pastoral Lease	*Raymond v Northern Territory of Australia* [2012] FCA 683	27/06/2012	NT	Native Title Exists in Parts of the Determination Area	CONSENT DETERMINATION	CLAIMANT
Town of Daly Waters No.3	*Albert v Northern Territory of Australia* [2012] FCA 673	27/06/2012	NT	Native Title Exists in Parts of the Determination Area	CONSENT DETERMINATION	CLAIMANT

7. Registered Native Title Bodies Corporate (RNTBC)

The Native Title Research Unit within AIATSIS maintains a RNTBC summary document which provides details about RNTBCs in each State/Territory including the RNTBC name, RNTBC type (agent or trustee) and relevant native title determination information.

Additional information about RNTBCs 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.

8. Public Notices

The *Native Title Act 1993* (Cth) requires that native title parties and the public must be notified of:

- proposed grants of mining leases and claims;
- proposed grants of exploration tenements;
- proposed addition of excluded land in exploration permits;
- proposed grant of authority to prospect; and
- proposed mineral development licences.

The public notice must occur in both:

- a newspaper that circulates generally throughout the area to which the notification relates; and
- a relevant special interest publication that is published at least once a month, which:
  - caters mainly or exclusively for the interests of Aboriginal peoples or Torres Strait Islanders; and
  - is circulated in the geographical area of the proposed activities.

To access the most recent public notices visit the NNTT website or the Koori Mail website.

9. Native Title in the News

The Native Title Research Unit within AIATSIS publishes Native Title in the News which contains summaries of newspaper articles and media releases relevant to native title.

10. Native Title Publications

***Respecting rights, Delivering development: forest tenure reform since Rio 1992*, Rights and Resources Initiative, May 2012**

This report looks at the role of indigenous peoples and local communities in the management of forests – a specific objective set at the 1992 Rio Summit – and finds that there has been remarkable progress. The authors contend that the amount of forest recognised as owned or controlled by indigenous peoples and forest communities has increased, as well as the amount of legislation recognising local peoples' forest and land rights. These findings are drawn from case studies from China, Brazil, India, Nepal, Cameroon and Mexico. This report finds that clear property rights for local people have played a central role in enabling countries to achieve national-level forest restoration. The recognition of rights has also clearly played a key role in saving and strengthening many indigenous peoples and forest communities. Available on Rights and Resources Website.

Hon Michael Kirby AC CMG, *Lowitja O'Donoghue oration: Of constitutions, interventions and other melancholy tales*, Adelaide, 29 May 2012

In delivering the annual Lowitja O'Donoghue Oration at the University of Adelaide, Mr. Kirby called for greater political action and judicial activism to achieve change. Despite the progressive decisions taken by the High Court on land rights under *Koowarta*, *Mabo* and *Wik*, it was difficult for Indigenous people to obtain economic benefits from native title, Mr. Kirby said. 'It has been problematic to prove; expensive to litigate; contested by powerful interests in the mining and extractive industries; and divisive within the indigenous communities themselves. Given the dimension of the disadvantages still so clearly faced by urban, regional, rural and remote communities of Aboriginal Australians, why should economic benefits accrue to a comparative few just because of the chance consideration of provable ancestry?,' he said. Available for download here.

Dr Bryan Keon-Cohen AM QC, *Native title 20 years on: Time for reform*, Right Now, 3 June 2012

Bryan Keon-Cohen appeared as junior counsel in *Mabo (No 1)* & *Mabo (No 2)* from 1982-92. In this article he reflects on gains and losses in the native title process 20 years on. 'What, if anything, has the past 20 years revealed about the ability of Australia's social, political and legal systems to accommodate change, especially the notion that our Indigenous citizens enjoy traditional property rights, not by the largesse of governments and parliaments, but by the more profound nature of common law?' he writes. Available on Right Now website.

Professor Jon Altman, *Q&A: Resource rights 'can close the gap'*, 3 June 2012

Jon Altman, Professorial Fellow at the Centre for Aboriginal Economic Policy Research at Australia's National University, says a key way to close the gap between Indigenous and non-Indigenous Australians is to deliver full commercial and property rights – including to minerals – when a native title determination or successful land rights claim is made. Available on SBS website.

Sean Brennan, *Unlocking native title*, Inside Story, 14 June 2012

The system needs attitudinal change as much as it needs Attorney-General Nicola Roxon's proposed legislative reforms, writes Sean Brennan. 'To interpret her choice and understand the amendment package it helps to put the current debate in a twenty-year perspective... There were high hopes for political and economic empowerment in the wake of Mabo, particularly if Australia's political and business leaders had opted for a consensual, negotiation-first approach to redefining relationships with Australia's first peoples. From the outset, however, negotiation took a back seat to legislation and litigation.' Available on Inside Story website.

Simon Davis, *Collaborative land use planning and development on Aboriginal settlements in Western Australia: A case study*, Native Title Symposium, University of Western Australia, 21–22 June 2012

This case study suggest that native title and heritage matters are usually put by planners in the 'too hard' basket – not least because negotiating those matters can be complex and take time. As a result, until recently, native title has not been adequately addressed in the planning and development of Aboriginal settlements. The author suggests that the Western Australia Government's introduction of the new State Planning Policy provides a formal means to address this through a firm policy mandate to better facilitate collaborative approaches to planning with native title parties, namely registered claimant groups or Prescribed Bodies Corporate. Available for download here.

Sandra Pannell, *Beyond the 'Descent of Rights': The Recognition of other Forms of Indigenous 'Rights' in the Context of Native Title Consent Determinations*, Native Title Symposium, University of Western Australia, 21–22 June 2012

The focus of this presentation is upon the ethnographic basis of 'permissive use' and the rights associated with this particular notion. Sometimes called 'usufructuary rights', these rights centre upon Indigenous hunting, fishing, and gathering. Available for download here.

John Taylor, Bruce Doran, Maria Parriman and Eunice Yu, *Statistics for Community Governance: The Yawuru Indigenous Population Survey of Broome*, Native Title Symposium, University of Western Australia, 21–22 June 2012, CAEPR Working Paper 82 / 2012

As the Indigenous rights agenda shifts from the pursuit of restitution to the management and implementation of benefits, those with proprietary rights are finding it increasingly necessary to build internal capacity for post-native title governance and community planning, including in the area of information retrieval and application. This paper presents a case study of an exercise in Aboriginal community governance. It sets out the background events that led the Yawuru Native Title Holders Aboriginal Corporation to secure information for its own needs as an act of self-determination and essential governance, and it presents some of the key findings from that exercise. Available for download here.

Damien Bell and Joy Elley, *Whose heritage?*, 2012

As part of the process to developing the Australian heritage strategy, the Department of Sustainability, Environment, Water, Population and Communities ('SEWPaC') commissioned nine essays to help identify key issues facing the heritage sector. In this essay the authors were asked to address the headline issue 'Whose heritage is it?', and to discuss the nature of the relationship between natural, Indigenous cultural heritage and non-Indigenous (or post-contact) heritage. Available on SEWPaC website.

Putting Free, Prior, and Informed Consent into Practice in REDD+ Initiatives, **The Center for People and Forests, the Institute for Global Environmental Strategies (IGES) and the Norwegian Agency for Development Cooperation (Norad), 2012**

The principle that indigenous peoples and local communities have a right to give or withhold their Free, Prior, and Informed Consent (FPIC) to developments affecting natural resources is not new. However, experience using FPIC in REDD+ implementation is still limited in the Asia-Pacific region, and there are few materials that explain and train practitioners in its concepts and practice. There is still subjective understanding of the terms and requirements of FPIC, influenced by both cultural interpretations and interests. To address this resource gap RECOFTC – The Center for People and Forests – has developed this manual to serve as a practical tool for trainers and facilitators to improve understanding of FPIC among stakeholders at all levels. Available for download here.

Native Title Conference 2012 Papers:

- Keynote Address Papers available on the AIATSIS website.
- Session Papers and PowerPoints available on the AIATSIS website.
- 'Mabo and the Framework of Dominance', Les Malezer, co-chair of the National Congress of Australia's First Peoples for the occasion of the 20th Anniversary of the outcome of the High Court Mabo case, 3 June 2012.

Media releases reviewing legacy of Mabo:

Australian Human Rights Commission

The promise of Mabo is yet to be realised – 1 June 2012
Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda said that amendments to the *Native Title Act 1993* (Cth) introduced into Parliament in February are a step in the right direction, but more is needed to ensure that the *Native Title Act 1993* (Cth) is consistent with the United Nations Declaration on the Rights of Indigenous Peoples in upholding the human rights of Aboriginal and Torres Strait Islander people. See the Commission's website for more details.

The Australian Greens

Greens continue push for native title reform – 2 June 2012
The Australian Greens have pledged to continue efforts to deliver native title reforms as they mark this weekend's twentieth anniversary of the groundbreaking *Mabo* decision in the High Court. 'The Native Title Act which was enacted in response to the High Court decision continues to have many problems which need fixing urgently. The Australian Greens have a bill before the Senate right now to begin the process of improving our Native Title System,' Senator Rachel Siewert, Australian Greens spokesperson on Aboriginal and Torres Strait Islander Issues said. See The Greens' website for more details.

Attorney-General's Department/FaHCSIA

Marking two decades of land rights and progress for Indigenous Australians – 3 June 2012
The 20th anniversary of the *Mabo* decision is a timely reminder for everyone to reflect on how far the native title system has come and the significance native title continues to hold for Indigenous and other Australians, Minister Roxon said. Minister Macklin said native title provides an opportunity to deliver real and lasting benefits for Indigenous people. See the Attorney-General's website for more details.

National Congress of Australia's First Peoples

Open letter to the Prime Minister – 30 May 2012
National Congress of Australia's First People ('Congress') published an open letter to the Prime Minister calling for action on the current state of land rights and the *Native Title Act 1993* (Cth). Congress Co-Chair Les Malezer said that although the *Mabo* High Court decision set a legal high watermark, it has sadly never been fully realised: 'The Native Title Act has not met the expectations of our peoples or protected and enhanced our property rights.' Mr. Malezer has called for a national conversation between indigenous people and the federal government.

Other media releases:

National Native Title Tribunal ('NNTT')

Tribunal Sydney Office Relocation Information – 14 June 2012
Please note the new address of the Tribunal's Sydney office:

Level 16, Law Courts Building
Queens Square
Sydney NSW 2000
GPO Box 9973
Sydney NSW 2001

See the NNTT website for more details.

National Water Commission ('NWC')

Advancing Indigenous access to Australia's water – 20 June 2012
National Water Commission CEO Mr James Cameron has called for Australia's states and territories to meet their commitments under the National Water Initiative by providing Indigenous Australians with access to water resources for cultural and economic purposes. See the NWC website for more details.

Federal Government

Indigenous Peoples and Local Communities Land and Sea Managers Network – 21 June 2012
In a joint media release Prime Minister Julia Gillard and Minister for the Environment and Sustainability Tony Burke announced a new program to link Indigenous expertise and modern technology to improve the way we manage our environment globally. Australia has joined with Brazil, Norway and New Zealand to form the Indigenous Peoples and Local Communities Land and Sea Managers Network. The program will help share ancient environmental traditions with communities across the globe to create an internationally-focused network of Indigenous land and sea managers. See the Department of Sustainability, Environment, Water, Population and Communities website for more details.

Federal Government

Public consultation opens for next phase of Caring for our Country – 21 June 2012
The Federal Government has invited the community to help shape the next phase of Caring for our Country by participating in a new round of public consultation. Environment Minister Tony Burke and Agriculture Minister Senator Joe Ludwig today released 'An Outline for the Future', which sets out the broad framework for the next five years of Caring for our Country and will form the basis for community feedback over the coming eight weeks. See the Department of Sustainability, Environment, Water, Population and Communities website for more details.

Audio News and Podcasts:

ABC Radio National

Native title 20 years on – 30 May 2012
Professor Marcia Langton from Melbourne University, and Professor Ciaran O'Faircheallaigh from Griffith University, canvass whether native title legislation has delivered on its promise for Indigenous people.
Listen to this program on the ABC website.

ABC AM

20 years since Mabo, Islanders still fighting – 1 June 2012
Reporter Natalie Poyhonen travelled to Thursday Island, the home of the late Eddie Mabo, the guiding force for the successful native title claim two decades ago. Islanders are now committed to changing a ruling made in March 2012 that found that native title rights do not extend to taking fish or other aquatic life for sale or trade. Islander leaders remain frustrated that 20 years on the process for recognition remains complex and costly.
Listen to this program on the ABC website.

ABC AM/The World Today

Native Title not living up to expectations – 4 June 2012
The Federal Government is under increasing pressure to make it easier and faster for traditional owners to prove they have a connection to the land. The National Congress of Australia's First Peoples has said the system has not lived up to the expectations set by the *Mabo* ruling. It is joined by the Greens and independents in calling for significant changes to the *Native Title Act 1993* (Cth).
Listen to programs on this topic on the ABC website and The World Today website.

ABC PM

Indigenous leaders want faster Native Title process – 6 June 2012
Indigenous leaders have expressed frustration over planned changes to the Native Title process announced today by the Federal Government. The Government hopes the native title reforms will make settlements faster, fairer and cheaper. But Indigenous groups contend that some cases are taking so long that elders are dying before any agreement can be reached.
Listen to this program on the ABC website.

Central Australian Aboriginal Media Association

Central Desert Native Title Service Chair and Yindjibarndi Lawyer speaks on Native Title – 13 June 2012
George Irving, Chairman of the Central Desert Native Title Service and solicitor with the Yindjibarndi Aboriginal Corporation shares his opinion regarding ongoing discussions about the push for the 'burden of proof' to be reversed in native title claims. He explains what the native title reforms will mean on a practical level and in basic terms.
Listen to this program on the CAAMA website.

Central Australian Aboriginal Media Association

Continued call for more substantial changes: National Native Title Council CEO Brian Wyatt on CAAMA – 13 June 2012
National Native Title Council ('Council') Chief Executive Brian Wyatt says the council is disappointed that the Federal Government considers it too hard politically to introduce changes to the burden of proof in native title claims. He says the Council wanted a more fundamental shift in the *Native Title Act 1993* (Cth), which would be of greater benefit to Aboriginal people.
Listen to this program on the CAAMA website.

SBS Wold News Australia

Call for stronger native title rights – 29 June 2012
Wayne Bergmann from KRED enterprises, a West Australian organisation dedicated to promoting Aboriginal economic development in the Kimberley region, says native title must be elevated to full property title to enable an Indigenous economy to flourish.
Listen to this program on the SBS website.

Video Bulletins

480: MABO

ABC Indigenous
This five-part documentary celebrates the 20th anniversary of the High Court decision of the *Mabo* case. 480 takes a look back over the history of Land Rights, Mabo the Man and the court case as well as the legacy it has created for Aboriginal and Torres Strait Islander Land Rights.
Watch the documentary

The 2012 Mabo Lecture: Mabo 20 years on - has it changed the nation?

Sir George Kneipp Auditorium Townsville Campus, 1 June 2012
Presented by Professor Henry Reynolds.
Watch the video

Landmark ruling remembered

7.30 NT, ABC, 1 June 2012
7.30 takes a detailed look at the legacy of both the native title decision and the man who came to symbolise the fight for recognition.
Watch the video

Mixed reactions to Native Title changes

SBS World News Australia, 6 June 2012
The government says its changes to the *Native Title Act 1993* (Cth) will speed up the process. Among them are the removal of the tax on native title land and legislating the terms of good faith negotiations.
Watch the video

The Indigenous Quarter

ABC, 10 June 2012
It has been 20 years since the landmark *Mabo* native title decision, a name synonymous with Australia's Indigenous land rights movement. This episode looks at the history of Mabo and some of the more uplifting and inspiring tales of Aboriginal people who are continuing to reclaim their culture.
Watch the episode

Mabo: Life of an Island Man

Film Australia/ABC, 1997
This award-winning documentary tells the private and public stories of a man so passionate about family and home that he fought an entire nation and its legal system.
Watch on iView (expires 13 July 2012)

Newsletters:

South West Aboriginal Land and Sea Council (SWALSC), *Newsletter*, June 2012
Yamatji Marlpa Aboriginal Corporation (YMAC), *Newsletter*, July 2012

Anthropology Online:

- **Anthropology Spotlight** is a new app for iPhones and iPads, released by Wiley-Blackwell. Anthropology Spotlight is an aggregator of information about anthropology conferences and publications internationally, and includes features such as abstracts from journal articles, free sample issues and info about publishing workshops. Click here for more information.
- **ANTS Nest** is an online community for professionals working in the field of native title. The ANTS Nest aims to provide those working in the field of native title an area to communicate with others, and to share resources and information. If you are working in native title, and would like to join the member site, please follow the instructions found here.

11. Training and Professional Development Opportunities

Indigenous Research Protocols Workshop

Convenor: The School of Indigenous Australian Studies
Date: 17 August 2012
Time: 8:45am–1:00pm
Location: Building 33, Room 003, SIAS, James Cook University, Townsville
Registration: Registration available on James Cook University website
Cost: $50

The School of Indigenous Australian Studies (SIAS) is offering an Indigenous Research Protocols Workshop which is designed for researchers and/or those wishing to engage effectively Aboriginal and/or Torres Strait Islander Peoples. The aim of the program is to provide participants with the knowledge to be able to apply relevant research protocols and/or ensure that relevant research protocols are applied to promote positive

research outcomes for Aboriginal and Torres Strait Islander peoples, researchers and James Cook University. For more information see the James Cook University website.

The Aurora Project

See the Aurora Project: 2012 Program Calendar for information on training and personal development for staff of native title representative bodies, native title service providers, and RNTBCs.

12. Events

AIATSIS Special Seminar: Savage Anxieties: The Protection of Indigenous Peoples' Human Rights in their Traditional Lands in Contemporary and Historical Perspective

Speaker: Robert A. Williams, Jr.
Date: 27 July 2012
Time: 12:30pm
Location: The Mabo Room, AIATSIS, Lawson Crescent, Canberra, ACT
Seminars are free and open to public.

Throughout the centuries, conquest, war, and unspeakable acts of violence and dispossession have all been justified by citing civilization's opposition to the differences represented by the tribe. Robert Williams proposes a wide-ranging re-examination of the history of the Western world, told from the perspective of civilization's war on tribalism as a way of life. Williams shows us how what we thought we knew about the rise of Western civilization over the "savage" is in dire need of reappraisal.

Native Title Anthropology Pre-conference Assembly

Date: 25 September 2012
Time: 12:30–5:00pm
Location: Abel Smith Lecture Theatre (Building 23), University of Queensland, Brisbane
Registration: Registration is essential and places are limited, so confirm your interest early. To register, or contribute a topic for discussion, please contact Dr Pam McGrath, CNTA Research Officer, pam.mcgrath@anu.edu.au or (02) 6125 5859.

The Centre for Native Title Anthropology (CNTA) at The Australian National University, in partnership with Native Title Research Unit, The University of Queensland and The University of Adelaide, is convening a pre-Australian Anthropological Society (AAS) conference meeting of anthropologists and other research practitioners who work in the area of native title and Aboriginal cultural heritage.

The purpose of this forum is to provide the opportunity for anthropologists and interested others to meet and discuss current issues of practice, theory and policy in the fields of native title anthropology and Aboriginal cultural heritage. This year's assembly will include a panel of experienced practitioners who will discuss elements of applied anthropological practice in the context of native title and resource extraction projects. We encourage you to propose topics for discussion when you register your attendance.

Australian Anthropological Society Conference 2012: Culture and Contest in a Material World

Date: 26-28 September 2012
Location: St. Lucia campus, University of Queensland (UQ), Brisbane, Queensland
Registration: For registration information go to http://www.uq.edu.au/aasconf2012/registration
Cost: ranges between $220 and $450 for full conference registration

The University of Queensland's Anthropology Program will be hosting the AAS Conference for 2012. The 2012 conference takes place in a global context of increasing awareness that lives are interconnected across the globe. The aim of this conference is to prompt discussion of both stable and contested social and cultural forms evident in the multitude of settings being researched in anthropology. This conference will also encourage contributions focused on materiality as well as work that foregrounds idealist approaches to cultural continuities and change. For more information about the 2012 AAS conference see the UQ website.