AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES
NATIVE TITLE RESEARCH UNIT

WHAT'S NEW IN NATIVE TITLE
NOVEMBER 2012

1. Case Summaries

Brown (on behalf of the Ngarla People) v State of Western Australia [2012] FCA 1082

5 November 2012, Extinguishment of native title rights, Federal Court of Australia – Perth, WA
Mansfield, Greenwood and Barker JJ

In this appeal, the Full Court of the Federal Court concluded that the Ngarla People's native title rights over an area subject to mining leases ML235 and ML249 in Western Australia (the Mt Goldsworthy leases) had not been extinguished. In a 2:1 majority decision (Mansfield J dissenting), Greenwood and Barker JJ upheld the Ngarla People's appeal and dismissed the respondents' cross-appeal.

In 1964, Western Australia entered into the Mt Goldsworthy Agreement (the Agreement) with joint venture parties to develop iron ore mining in the Pilbara. Pursuant to the agreement, the joint venture parties obtained two mining leases in 1966 and 1973, which were granted for 21 years with with an 'indefinite right of renewal'. Rights under the mining leases were assigned to the current joint venture parties BHP Billiton Minerals Pty Ltd, Itochu Minerals & Energy of Australia Pty Ltd, and Mitsui Iron Ore Corporation Pty Ltd.

The Ngarla People's non-exclusive native title rights were recognised in a consent determination in May 2007 over an area of approximately 4,500 square kilometres at De Grey Station in Western Australia, designated as Determination Area A. The parties agreed to continue mediation in relation to Determination Area B, which partially overlapped with the Warrarn Application and with land covered by the Mt Goldsworthy leases.

In 2012, the Federal Court recognised the Ngarla People's non-exclusive rights over Determination Area B. However, the primary judge identified two preliminary issues that needed to be addressed before a successful consent determination could be made:

1. Whether the grant of the Mt Goldsworthy leases gave the joint venturers a right of exclusive possession, such that any native title rights in the area were wholly extinguished; or
2. Whether the Ngarla People's non-exclusive native title rights continued to exist, but due to inconsistency with the Mt Goldsworthy leases, were either extinguished or suspended for the duration of the mining leases.

These issues were dealt with by applying common law principles of extinguishment, as the Mt Goldsworthy leases pre-date both the *Racial Discrimination Act* and *Native Title Act* regimes.

At first instance, Bennett J found that the joint venturers did not have a right to exclusive possession over the whole of the leased area. However, her Honour concluded that the rights granted under the Mt Goldsworthy leases were inconsistent with native title and had the effect of extinguishing the Ngarla People's non-exclusive native title rights in the specific areas where they had been exercised. Both of these findings were challenged on appeal.

Exclusive possession

Greenwood and Barker JJ concluded that the joint venturers enjoy a right of exclusive possession in the whole of the leased areas for the purposes of the Agreement, even if activities are only conducted at selected places within the lease area at a particular time.

However, after taking into account the reservations in the Agreement, the majority judges held that the joint venturers' rights were limited. They did not have a right to exclude all others for all purposes, as provisions in the Agreement contemplated that third parties could continue to use facilities operated by the joint venturers; that the state might issue mining leases to other parties in the area; that third parties pass over the area; and that the joint venturers would rehabilitate the area upon completion. The tenure obtained by the joint venturers was therefore secure, but for limited duration and for limited purposes.

Mansfield J delivered a dissenting judgment, in which he upheld the primary judge's decision on this issue. His Honour concluded that the joint venturers enjoyed no right of exclusive possession over the whole area. Although they had the right to occupy the area for the purposes of the agreement, it was not intended that they would exercise their rights over the totality of the lease area or that they could exclude third parties from areas where mining was not taking place.

Inconsistency of incidents test

Greenwood and Barker JJ concluded that there was no clear and plain intent to extinguish all native title rights in the lease area. They held that the joint venturers' rights to exclusive possession have a 'temporal element.' As Greenwood J observed, it is not inevitable that the joint venturers will continue to renew the leases; instead, they may choose to abandon them, or may exhaust iron ore deposits in the area, or in seeking a new mineral lease, need to comply with the future act provisions of the *Racial Discrimination Act* and *Native Title Act*. Due to this temporal inconsistency between the two sets of rights, Greenwood and Barker JJ concluded that the exercise of the joint venturers' rights had the effect of preventing the exercise of native title rights by the Ngarla People, for as long as the joint venturers continue to hold the rights.

By contrast, Mansfield J agreed with the primary judge's decision and concluded that the Ngarla People's native title rights were extinguished in the developed sections of the lease area. The Ngarla People's native title rights continue to exist in the non-developed sections, but may be extinguished in the future if further mining operations are carried out.

Conclusion

A majority of the Federal Court recognised the Ngarla People's non-exclusive native title rights in a determination area subject to the Mt Goldsworthy leases. However, the majority ordered that the Ngarla People are prevented from exercising these rights for as long as the joint venturers continue to hold rights under the Mt Goldsworthy Agreement and leases.

Straits Exploration (Australia) Pty Ltd & Anor v Kokatha Uwankara Native Title Claimants & Ors [2012] SASCFC 121

5 November 2012, Review of future acts decision, Supreme Court of South Australia – Adelaide, SA
Kourakis CJ, Gray and Stanley JJ

In this decision, the Full Court of the Supreme Court of South Australia upheld an appeal by Straits Exploration and ordered that the decision of the Environment, Resources and Development Court (ERDC) be set aside and re-made by another judge.

Straits Exploration and its joint venturer, Kelaray Pty Ltd, hold an exploration licence covering approximately 295 square kilometres of land on and around Lake Torrens and Andamooka Island in South Australia. They sought to negotiate a native title mining agreement with native title claimants, including the Kokatha Uwankara People, as is required under the South Australian future act regime. This attempt was unsuccessful and in August 2010 Straits and Kelaray applied to the ERDC for a determination, which would authorise them to conduct exploration by drilling on land subject to the registered native title claim.

The Kokatha Uwankara Native Title group lodged a native title claim over land and waters bounded by Lake Torrens, Stuarts Creek, East Well Outstation and Barker Range in 2010. They opposed the future acts application, arguing that Lake Torrens and the area of Andamooka Island are of 'religious significance' for them and Western Desert people more generally.

In January 2011, the ERDC made a determination against Straits and Kelaray, placing particular weight on the native title claimants' longstanding opposition to mining and the prime importance of the land to the Kokatha Uwankara People. The appellants appealed against this decision. They argued that the primary judge had misconceived his role and dealt with the facts at trial as a judicial determination, rather than an administrative decision. Further, they contended that the judge denied Straits and Kelaray procedural fairness and failed to address criteria that he was required to consider under the *Mining Act 1971* (SA).

On appeal, Kourakis CJ held that the primary judge failed to consider the strong evidence that the Kokatha Uwankara's native title rights had been extinguished by the prior grant of the Bosworth Pastoral Lease and the creation of the Lake Torrens National Park. According to Kourakis CJ, where a native title application has been registered but not yet determined by the Federal Court, the weight which native title rights are given by an administrative decision must reflect the strength of the evidence of these rights. In this case, the primary judge assumed that the Kokatha Uwankara People's native title rights existed, but did not take into account the prima facie case that these rights had been partially or totally extinguished.

Further, Kourakis CJ, Gray and Stanley JJ accepted the appellant's argument that the District Court Judge denied Straits and Kelaray procedural fairness. They held that the primary judge made findings about Straits and Kelaray's breach of the exploration licence, which could potentially give rise to a criminal sanction and vicarious liability, without giving them express notice and the opportunity to present evidence and make submissions. This was regarded as a particularly serious breach of procedural fairness, due to the legal and commercial implications for the appellants and their officers and employees.

Kourakis CJ, Gray and Stanley JJ also considered that the primary judge had misunderstood his role under section 63S of the *Mining Act 1971* (SA). Determinations under section 63S are purely administrative decisions, which must take into account broad policy considerations, can be overruled by the Minister and, when registered, have the effect of a contract between the parties. Instead of exercising this administrative power, the primary judge conducted the hearing as though it were a judicial process, including making findings which would penalise Straits and Kelaray for past conduct, and therefore fell into jurisdictional error.

On the basis of these grounds of review, all three judges held that the primary judge's decision should be set aside and remitted to another judge of the ERDC for determination.

Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal [2012] FCA 1215

7 November 2012, Review of native title registration test, Federal Court of Australia – Sydney, NSW
Cowdroy J

In this decision, the Federal Court dismissed an application for review by the Numbahjing Clan, on the ground that its native title application did not meet the criteria for registration in section 190B of the *Native Title Act*. The claim is located in Lake Torrens region in the north of South Australia.

Pursuant to section 190B, the Registrar of the Native Title Tribunal must be satisfied that a native title application fulfils statutory criteria in the NTA before the claim can be registered. In 2011, the Registrar determined that the Numbahjing Clan's native title application did not satisfy section 190B(5)(b), because it did not contain sufficient evidence about the traditional laws and customs observed by the Numbahjing Clan or details of the link between the Clan and the wider Bundjalung Nation. As a result, the Registrar concluded that the application also did not meet the requirements of section 190B(5)(c) which requires that the claim group has continued to hold native title in accordance with those traditional laws and customs; section 190B(6) that there is a prima facie case; and section 190B(8) that at least one member of the claim group currently or previously had a traditional physical connection with the land and waters. The Tribunal therefore rejected the application.

The Numbahjing Clan applied to the Federal Court to have this decision reviewed. The claim group commissioned an anthropological report to address the original factual deficiencies and advise on whether the applicant had a native title claim. According to the report, the Bundjalung Nation is part of the Yugembeh-Bundjalung group of dialects, which consists of a number of clans, including the Numbahjing Clan. The Numbahjing Clan is the relevant landholding group in the area of the Lower Richmond River in New South Wales, based on regionally-held law and custom.

However, the Federal Court held that this report did not comply with Practice Note CM7, relating to evidence by expert witnesses, and section 55 of the *Evidence Act 1995* (Cth). Cowdroy J observed that the Federal Court has on several occasions complained about the poor preparation of expert reports in native title matters. In this case, there were problems of insufficient citations in the report and a failure to distinguish between factual findings and assumptions on the one hand and the author's opinions and conclusions on the other. Cowdroy J stated that these deficiencies do not prevent the Court from taking the report into evidence, but the Court may decide to give the report little weight.

In the Numbahjing Clan's application, the applicants asserted that the Registrar should have considered evidence of the traditional laws and customs of the Numbahjing Clan, not of the wider Bundjalung Nation. Cowdroy J acknowledged that it is often difficult to determine the level of society which is the reference point in a native title application, but it is necessary to look to the level of society which establishes the traditional laws and customs. His Honour affirmed that the emic view of society (how members of the group perceive their societal organisation) may be important in this inquiry. Linguistic differences between groups and internal subdivisions of a society do not necessarily prove that the group comprises separate societies for the purpose of native title.

In this case, Cowdroy J accepted the Tribunal's decision that the relevant society is the Bundjalung Nation. His Honour took into account the Numbahjing Clan's application and affidavit evidence, and concluded that members of the Numbahjing Clan view themselves as part of the Bundjalung Nation and see their connection to the land as derived from the traditional laws and customs of the Bundjalung Nation. Cowdroy J discounted the weight given to the anthropological report and held that its conclusions on the source of traditional laws and customs was not factually based.

Ultimately, the Federal Court upheld the Tribunal's finding that the application did not satisfy section 190B(5), due to the lack of evidence regarding the pre-sovereignty laws and customs according to which native title is held. Cowdroy J drew attention to the observations in the anthropological report, which state that although there is extensive evidence about the Yumgembeh-Bundjalung language and society as a whole, there is limited evidence about the Numbahjing claim area. His Honour also noted that there is little evidence in the application or anthropological report about the connection between John Jack Cook, the apical ancestor of the claim group, and the wider pre-sovereignty Bundjalung and Numbahjing societies.

Cowdroy J dismissed the application for review, and concluded that the Numbahjing Clan had failed to demonstrate that its current laws and customs are traditional, as is required by section 190B(5)(b), and its application also failed to meet the requirements of sections 190B(5)(c) and 190B(6) NTA.

Hughes on behalf of the Eastern Guruma People (No 2) v State of Western Australia [2012] FCA 1267

20 November 2012, Consent determination, Federal Court of Australia – Kings Lake, Tom Price, WA
Bennett J

In this consent determination, the Federal Court recognised the native title rights and interests of the Eastern Guruma people over the Tom Price township in the Pilbara region of Western Australia.

The Eastern Guruma application was originally lodged with the National Native Title Tribunal in 1997. In 2007, approximately 8,700 square kilometres of the Eastern Guruma application was the subject of a determination of native title: *Hughes on behalf of the Eastern Guruma People v State of Western Australia*. The town of Tom Price (the Part B area) was ordered to continue in a separate negotiation process.

All parties accepted that the requisite physical, spiritual and cultural connection of the Eastern Guruma people with the determination area exists and there was evidence to support that connection. The outstanding evidentiary issue in negotiation, as far as the state was concerned, was the extent to which s 47B of the *Native Title Act* might apply. Section 47B provides that if a claim area is not the subject of a Crown dedication that the area is to be used for public purposes, and one or more members of the claim group occupy the area, then any past extinguishment is to be disregarded. The determination area is largely comprised of unallocated Crown land which has been the subject of historical grants of special leases that extinguish native title. The State was satisfied that there were a total of 27 sub-areas within the determination area where s 47B applied to disregard prior extinguishment of native title.

The parties reached an agreement pursuant to s 87 and 94A of the *Native Title Act* that non-exclusive native title rights exist in relation to the determination area, including: the right to enter and remain on the land, camp and erect temporary shelters; the right to hunt, fish, gather, take, use and exchange the resources of the land and waters; the right to take and use water; the right to engage in ritual and ceremony; and the right to care for, maintain and protect sites and areas of significance. The parties also agreed to negotiate in good faith on matters relating to the proposed expansion of the developed urban area within the determination area. Bennett J emphasised that this decision does not grant native title; it recognises what has been long held.

The applicants nominated Wintawari Guruma Aboriginal Corporation RNTBC as the relevant Prescribed Body Corporate to hold native title on trust.

Murphy on behalf of the Jinibara People v State of Queensland [2012] FCA 1285

23 November 2012, Consent determination, Federal Court of Australia – Brisbane, Qld
Reeves J

In this consent determination, the Federal Court recognised the native title rights and interests of the Jinibara people to more than 700 square kilometres of land and waters.

The determination area stretches from the Blackall, Conondale and D'Aguilar ranges to parts of the Sunshine Coast and the Brisbane River. It is the first native title determination in southeast Queensland. As the Applicants did not nominate a prescribed body corporate to be trustee, the Court determined that native title is to be held by the native titled holders under the determination and the Jinibara People Aboriginal Corporation is the prescribed body corporate for the purposes of the *Native Title Act*.

This determination recognises the non-exclusive native title rights of the Jinibara People, including the right to hunt, fish, participate in ceremonies and be buried on the land. The determination also recognises exclusive possession rights over 1.38 square kilometres of land, described in Part 1, Schedule 1 of the determination.

Areas subject to a previous exclusive possession act, including public works and historical tenures, were wholly excluded from the determination area. The nature and extent of the interests of the State of Queensland, a number

of local governments, and the general public in relation to the determination area are identified in Schedule 4. The Federal Court also recognised the interests of the parties under the Deed of Agreement between the Jinibara People Aboriginal Corporation, the Applicant and the State of Queensland which provides for the exercise of native title rights and interest in selected protected areas.

Although the Jinibara application was originally lodged in 1998, it was refined a number of times to remove overlaps and correct errors in mapping descriptions. The area that remained the subject of the Jinibara application was last amended on 26 October 2012. The parties then reached agreement under s.87 of the *Native Title Act* on the term of a proposed consent determination.

Justice Reeves acknowledged that the determination area had been subject to rapid European settlement in which local Indigenous people were initially retained as station workers and later moved out of the area to designated Aboriginal settlements. His Honour commended the applicants' tenacity notwithstanding this history and made the departing point that the orders of the Court do no grant native title but recognise the pre-existing native title that the Jinibara People have long held.

***Levinge on behalf of the Gold Coast Native Title Group v State of Queensland* [2012] FCA 1321**

23 November 2012, Application for leave to withdraw claim, Federal Court of Australia – Brisbane, Qld
Reeves J

The Court in this case did not allow the Gold Coast Native Title Group to withdraw its native title claim, meaning that the claim will continue towards trial in June 2013.

In 2011 the Gold Coast claimants provided a connection report to the states of Queensland and New South Wales in support of its native title claim. Queensland indicated that it was unable to accept that the claimants could establish the necessary connection to the claim area. In early 2012 the parties agreed to set the matter down for trial in June 2013, and the Court made orders setting out a timetable towards that trial.

In August 2012 the claimants applied to the Court to extend the deadlines in this timetable and to postpone the 2013 trial date. They said that they did not have the resources to prepare for a trial or comply with the other milestones on time. The claimants were not represented by a native title representative body, and had been unable to raise the necessary funds to obtain legal and other assistance. The Court refused to cancel the trial dates, but granted extensions on some of the upcoming deadlines. In September 2012 the claimants missed the first of these extended deadlines, and shortly afterwards they applied for permission to discontinue the proceedings entirely. The applicants for the Gold Coast claim made it clear that they intended to file a new claim at a later time when they had found sufficient resources to properly prepare for trial.

The state of Queensland proposed that if the claim group were allowed to discontinue the proceedings, it should be prevented from filing a new claim unless certain conditions were met. Reeves J said that such a proposal would be inappropriate, because it would infringe the claimants' right to access the Court's jurisdiction under the *Native Title Act.* There was no suggestion that the claimants were vexatious litigants or that filing a new claim would constitute an abuse of process.

Reeves J found that on the evidence before him there was no way of knowing whether the claim group as a whole agreed with the decision to discontinue the claim. Reeves J also considered that justice would not be served by further delaying the resolution of this claim (which had been on foot for many years). His Honour decided not to exercise his discretion to allow the proceedings to be discontinued.

***Peterson on behalf of the Wunna Nyiyaparli People v State of Western Australia* [2012] FCA 1335**

23 November 2012, Application for joinder, Federal Court of Australia – Perth, WA
Barker J

The Court in this case allowed BHP Billiton Minerals Pty Ltd to become a respondent party to the Wunna Nyiyaparli people's claim.

When native title claims are lodged, the Native Title Registrar publishes public notifications so that people whose interests may be affected by the recognition of native title can decide whether or not to become involved with the proceedings. In response to the filing of the Wunna Nyiyaparli claim, BHP applied to become a respondent party on the basis that it has applied for several exploration tenements in the claim area.

The Court outlined the legal principles for determining such applications. Section 84 *Native Title Act* states that a person may only become a party to a native title claim if their 'interest may be affected by a determination in the proceedings'. In this context, 'interest' is not limited to the narrow definition set out in s 253 (which is restricted to legal rights, interests or estates in the land or waters) but instead covers a much more broader range of interests. So long as a person has an interest that is clearly defined, substantial, and greater than the interests of general public, and if that interest would be directly affected by the recognition of native title, then the person may joined as a respondent.

Applications for exploration tenements will not by themselves necessarily meet these criteria – they do not guarantee that the applicant will be granted the tenement, and particularly if they are in their early stages they may be merely 'speculative' or 'nebulous'. If, however, applications are well advanced and they form part of a substantial ongoing presence in the area, they may constitute a sufficient interest to justify joining the explorer as a respondent.

At the time of this decision, BHP's applications were at different stages in the application process: three had been notified as falling under the expedited procedure, one was subject to the right to negotiate process, and one was yet to be notified. Four of the tenements had complied with all Western Australian statutory requirements and were only waiting for processes under the Native Title Act to be completed. The Court heard evidence about BHP's operations in the region and its plans for expansion – this evidence included activities of other companies in the BHP group. The Court also noted that the Wunna Nyiyaparli claimants had lodged expedited procedure objections for two of the tenement applications.

Barker J found that, on the basis of these facts, BHP had a sufficient interest in the area to justify it joining the claim as a respondent.

***Puenmora v State of Western Australia* [2012] FCA 1334**

27 November 2012, Consent determination, Federal Court of Australia – Perth, WA
Gilmour J

In this consent determination, the Federal Court recognised the native title rights and interests of the Wanjina-Wunggurr Community in respect of a small area of land and waters in the northern Kimberley region in Western Australia.

In *Neowarra v Western Australia* the Federal Court found that the member of the Wanjina-Wunggurr Community, consisting of the Ngarinyin, Wunambal and Worrorra peoples and countries, constituted a single society. In 2011 the Federal Court made a determination of native tile over approximately 25,913 square kilometres of land and waters in favour of the Wanjina-Wunggurr Community: *Goonack v State of Western Australia*. Part of the Wanjina-Wunggurr Uunguu application (excluded area) was ordered to remain in mediation. The reason for the omission of the excluded area was to allow for a new application (Wanjina-Wunggurr Uunguu B application) to be filed over the excluded area to take advantage of the application of s 47B of the *Native Title Act*.

The parties agreed that s 47B of the *Native Title Act* applies to disregard prior extinguishment in relation to the determination area, a small area of unallocated Crown land and an easement previously the subject of a special lease. Gilmour J was satisfied that the procedural requirements under section 87 of the *Native Title Act* had been met in relation to the determination area.

Gilmour J recognised the Ngurrara people's exclusive native title rights over the determination area and their non-exclusive rights over intertidal areas and water within the same area. The applicant nominated the Wanjina-Wunggurr (Native Title) Aboriginal Corporation RNTBC as the relevant Prescribed Body Corporate to hold native title on trust.

***Kogolo v State of Western Australia* [2012] FCA 1332**
***May v State of Western Australia* [2012] FCA 1333**
27 November 2012, Consent determination, Federal Court of Australia – Perth, WA
Gilmour J
In this consent determination, the Federal Court recognised the native title rights and interests of the Ngurrara people in respect of Determination Area B (*Kogolo*) and Determination Area C (*May*), located in the Great Sandy Desert in the Kimberley region of Western Australia.

In 2007 the Federal Court made a determination of native tile over approximately 77,810 square kilometres in favour of the Ngurrara people: *Kogolo v State of Western Australia*. The parties to the 2007 proceeding agreed that an area (referred to as Determination Area C) would be excluded from the determination and remain in mediation. The application was amended to exclude the determined areas and the Ngurrara application then remained on foot, but only consisted of the excluded area (Determination Area B). A new application, the Ngurrara #2 application, was then filed in 2008 in relation to this same area (Determination Area C). The applicant sought leave to discontinue the original Ngurrara application, which Gilmour J in part set aside. As a result, two determinations were made over areas described as Determination Area B and C. These areas comprise Aboriginal Reserves and portions thereof.

The parties agreed that s 47A of the *Native Title Act* applies such that any extinguishment of native title by the creation of the reserves comprising Determination Area C is to be disregarded. Gilmour J was satisfied that the procedural requirements under section 87 of the *Native Title Act* had been met in relation to both Determination Area B and C.

Gilmour J recognised the Ngurrara people's exclusive native title rights over Determination Area B and C and their non-exclusive rights over water within the same area. The applicant nominated Yanunijarra Aboriginal Corporation RNTBC as the relevant Prescribed Body Corporate to hold native title on trust.

2. Legislation

Native Title Amendment Bill 2012

The Bill reforms three areas of the *Native Title Act*:

1. First, it clarifies the meaning of negotiating in 'good faith' and makes associated amendments to the 'right to negotiate' provisions;
2. Second, it allows parties to agree to disregard historical extinguishment of native title in areas set aside for the preservation of the natural environment, such as parks and reserves; and
3. Finally, it broadens the scope and streamlines processes for voluntary Indigenous land use agreements (ILUAs).

- view the Bill and the explanatory memorandum
- view the second reading speeches

Tax Laws Amendment (2012 Measures No. 6) Bill 2012

This Bill amends 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). The amendments will apply retrospectively from 1 July 2008.

- view the Bill and the explanatory memorandum
- view the second reading speeches
- view the joint media statement issued by Nicola Roxon MP, Attorney-General, Minister for Emergency Management and David Bradbury MP, Assistant Treasurer, Minister Assisting for Deregulation

Aboriginal Heritage Protection Bill 2012 (Tas)

The Tasmania Minister for Environment, Parks and Heritage, Brian Wightman, has launched a six week public consultation process on new Aboriginal heritage legislation. The new legislation:

- provides an integral role for the Aboriginal community in managing their own heritage

- provides clear processes and statutory timeframes for developments, appeal rights, as well as an effective enforcement system
- removes the arbitrary cut-off year of 1876 for recognising Aboriginal heritage
- co-ordinates approval processes with the Land Use Planning and Approvals Act, as well as other planning systems

The draft Aboriginal Heritage Protection Bill 2012 as well as a range of explanatory materials have been released:

- view the Bill and the explanatory guide
- view the second reading speech
- view the fact sheets
- view the summary of proposed regulations
- view the frequently asked questions

People with an interest are urged to provide comments and suggestions. The public consultation period is open until **14 December 2012**. In addition, public information forums will be held in November and December in various locations around the state.

Traditional Owner Settlement Amendment Bill 2012 (Vic)

This Bill makes a number of amendments to the Traditional Owner Settlement Act 2010 (Vic), significantly:

- to clarify the definition of traditional owner group and the relationship between certain agreements entered into in relation to a traditional owner group;
- enable land use activity agreements to specify certain standard conditions and include a wider range of permits, licences and agreements
- provide that a land use activity on land within an alpine resort cannot be a negotiation or agreement activity;
- allow natural resource agreements to include commercial uses of natural resources by traditional owner groups;
- provide for Orders to authorise some commercial uses of flora and forest produce by traditional owner groups;

View the Bill, the explanatory memorandum and second reading speech.

3. Policy

Indigenous Land Use Agreement Policy Principles

The ILUA Principles are a formal statement of the Australian Government's agreed policy in native title dealings. They represent the basis upon which the Australian Government operates when engaging in ILUA negotiations and are part of a broader Australian Government objective to enhance the ability of Indigenous communities to leverage economic development opportunities from their native title rights and interests. Specifically, the ILUA Principles:

- set out the Australian Government's requirements regarding the provision of financial and other benefits through ILUAs, including giving appropriate emphasis to financial probity issues
- require departments to minimise the impacts of their activities on native title
- encourage departments to develop creative benefits packages which enable native title holders to leverage their native title for economic development.

The ILUA policies are available for download on the Attorney General's Department website.

4. Indigenous Land Use Agreements

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 September 2012, **no** ILUAs were registered with the National Native Title Tribunal.

5. 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 September 2012, **5** native title determinations were handed down.

Short Name (NNTT)	Case Name	Date (NNTT)	State	Outcome	Legal Process	Type
Jinibara People	*Murphy on behalf of the Jinibara People v State of Queensland* [2012] FCA 1285	20/11/2012	Queensland	Native title exists in the entire determination area	Consent determination	Claimant
Eastern Guruma - Area B	*Hughes and Ors on behalf of the Eastern Guruma People (No 2) v State of Western Australia* [2012] FCA 1267	20/11/2012	Western Australia	Native title exists in parts of the determination area	Consent determination	Claimant
Uunguu - Area B	*Puenmora v State of Western Australia* [2012] FCA 1334	27/11/2012	Western Australia	Native title exists in parts of the determination area	Consent determination	Claimant
Ngurrara 2 - Area C	*May v State of Western Australia* [2012] FCA 1333	27/11/2012	Western Australia	Native title exists in the entire determination area	Consent determination	Claimant
Ngurrara - Area B	*Kogolo v State of Western Australia (No 3)* [2012] FCA 1332	27/11/2012	Western Australia	Native title exists in the entire determination area	Consent determination	Claimant

6. Registered Native Title Bodies Corporate

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.

7. 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
- 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
    - 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.

8. 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.

9. Native Title Publications

Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *2012 Native Title Report*, Australian Human Rights Commission, 26 October 2012

The *Native Title Report* is produced each year in accordance with the requirement in the *Native Title Act* for the Aboriginal and Torres Strait Islander Social Justice Commissioner to report on the operation of the Act and the effect of the Act on the exercise and enjoyment of the human rights of Aboriginal and Torres Strait Islander peoples. The 2012 report considers three themes, which are:

- building an understanding of, and respect for, our rights to our lands, territories and resources throughout Australia
- creating a just and fair native title system through law and policy reform
- enhancing our capacity to realise our social, cultural and economic development aspirations

Available for download on the Australian Human Rights Commission website.

Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *2012 Social Justice Report*, Australian Human Rights Commission, 26 October 2012

One of the primary responsibilities of the Aboriginal and Torres Strait Islander Social Justice Commissioner is to report annually on the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples, and to make recommendations on the action that should be taken to ensure that these rights are observed. This responsibility is fulfilled through the submission to the Australian Parliament of an annual Social Justice Report. The *Social Justice Report* focuses on the theme of governance, giving consideration to what enables effective, legitimate and culturally relevant governance in Aboriginal and Torres Strait Islander communities. Available for download on the Australian Human Rights Commission website.

Adrian Fordham & Jerry Schwab, *Indigenous youth engagement in natural resource management in Australia and North America: A review*, CAEPR Working Paper no. 85/2012, October 2012

With the continuing high levels of Indigenous youth unemployment and low levels of school attendance among Indigenous youth, Indigenous communities and education systems are seeking new approaches to increase Indigenous youth participation in education, training and employment. This priority among Indigenous and government stakeholders is not restricted to Australia but also applies internationally among many indigenous peoples. One potential source of employment is the natural resources sector. This paper reviews the wide range of strategies currently being used to encourage Indigenous youth engagement in natural resource management as a way of achieving better educational outcomes and improving employment opportunities. Examples from Australia and North America are presented. Available for download on the CAEPR website.

***Inquiry into the Establishment and Effectiveness of Registered Aboriginal Parties*, Environment and Natural Resources Committee, Parliament of Victoria, 14 November 2012**

Registered Aboriginal Parties (RAPs) are established by the *Aboriginal Heritage Act 2006* (Vic) to act as a primary source of advice and knowledge on matters relating to Aboriginal cultural heritage. The Inquiry – conducted by the Parliament's Environment and Natural Resources Committee – received 70 submissions and heard from 39 speakers at six public hearings. The report provides an overview of the development of a legislative framework for the protection of Aboriginal cultural heritage in Victoria as well as a summary of the approaches of other jurisdictions in Australia and New Zealand. The Report considers:

- the concept of traditional owners and the impact of the native title process
- the current membership structure of the Victorian Aboriginal Heritage Council (VAHC)
- the processes and policies used by the VAHC to appoint RAPs
- the effectiveness of current RAPs
- those areas of the state yet to have RAPs established

Media Releases

Indigenous Land Corporation

Fish River: Australia's first savanna burning project aproved under the Gillard Government's Carbon Farming Initiative – 2 November 2012

The Fish River Fire Project is the first savanna burning project and the first Indigenous project approved under the Federal Government's Carbon Farming Initiative. See the media release for more details.

The Hon Tony Burke MP, Minister for Sustainability, Environment, Water, Population and Communities

Grants to kickstart Indigenous carbon farming businesses open today – 7 November 2012

The Gillard Government's new grants program to support Indigenous land managers establish carbon farming businesses opened on 7 November 2012. Over the next five years the Australian Government will invest $22.3 million to help Indigenous organisations and land managers participate in the Carbon Farming Initiative by providing practical financial support and investing in the development of additional carbon farming methodologies. See the media release for more details.

The Hon Jeanette Powell, Victoria Minister for Aboriginal Affairs

Registered Aboriginal Parties report tabled – 15 November 2012

Minister for Aboriginal Affairs Jeanette Powell welcomed the report of the Inquiry into the Establishment and Effectiveness of Registered Aboriginal Parties (RAPs), tabled in Parliament yesterday. 'The Victorian Coalition Government is committed to the protection of Aboriginal cultural heritage and we will be working through the reports findings and recommendations concerning the role of RAPs in the Aboriginal Heritage protection system,' Mrs Powell said. See the media release for more details.

Yamatji Marlpa Aboriginal Corporation (YMAC)

Native title agreement recognises the importance of water – 19 November 2012

The Kurama and Marthudunera (K&M) native title group today announced the signing of an agreement with Iron Ore Holdings Ltd (IOH) over their Buckland Project in the Pilbara region of Western Australia. It is the Pilbara's first native title agreement to provide payments in respect of the use of water and clearance of native vegetation, giving an incentive for IOH to minimise their impact on the environment. See the media release for more details.

The Hon Michael Mischin, Western Australia Attorney General

Tom Price native title claim resolved – 20 November 2012

Attorney General Michael Mischin has welcomed the Eastern Guruma Part B native title determination, which resolves the native title claim of the Tom Price town site. This determination by the Federal Court recognised the Eastern Guruma People hold non-exclusive native title rights in parts of Tom Price. See the media release for more details.

The Australian Greens

FMG actions warrant further investigation – 21 November 2012

The Australian Greens have called on the Federal Government to investigate serious claims made about Fortescue Metals Group (FMG) and their influence on the native title and heritage processes in the Pilbara. See the media release for more details.

The Hon Andrew Cripps, Queensland Minister for Natural Resources and Mines

Jinibara People's native title rights recognised – 20 November 2012

On 20 November 2012, the Federal Court recognised the Jinibara People as Native Title holders of land in the Sunshine Coast hinterland. Natural Resources and Mines Minister Andrew Cripps said the determination covered an area of approximately 703 square kilometres of land from the southern end of the Blackall Ranges in the north to Lake Manchester in the south. 'This decision means Australia's legal system formally acknowledges the rights of the Jinibara People to camp, hunt, fish and gather in the area, maintain areas of significance and conduct ceremonies in accordance with their traditional laws and customs,' Mr Cripps said. See the media release for more details.

The Hon Tony Burke MP, Minister for Sustainability, Environment, Water, Population and Communities and the Hon Andrew Powell, Queensland Minister for Environment and Heritage Protection

Indigenous grants program supports sustainable use of marine resources – 23 November 2012

Aboriginal and Torres Strait Islander people and groups involved in the sustainable use of dugong, turtle and marine resources have been invited to apply for a range of grants.

Projects could include:

- maintaining traditional knowledge about sea country
- identifying, recording and maintaining cultural values of sea country
- seagrass monitoring, turtle and dugong monitoring
- educational activities to raise community awareness about managing marine resources and/or Aboriginal and Torres Strait Islander cultural values of sea country
- activities that provide training in other technical skills like natural resource monitoring (sea-grass, turtle, dugong monitoring skills), boat licence attainment etc relating to sea country management

More information including the program's Guidelines, Frequently Asked Questions, Application Form and Expression of Interest Form can be found here. The closing date to submit an Application or Expression of Interest form to the 2012 Indigenous Sea Country Management Grants Program is **14 December 2012.**

The Hon Nicola Roxan MP, Attorney-General, Minister for Emergency Management and the Hon Jenny Macklin MP, Minister for Families, Community Services and Indigenous Affairs, Minister for Disability Reform

Government welcomes social justice and native title reports – 29 November 2012

The *Social Justice Report 2012* and the *Native Title Report 2012* prepared by Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda were tabled in Parliament on 29 November 2012. See the media release for more details.

Audio News and Podcasts

2012 Boyer Lectures: *The Quiet Revolution: Indigenous People and the Resources Boom*

Presenter: Professor Marcia Langton AM, Chair of Australian Indigenous Studies, the University of Melbourne.

Prof Langton looks at the dependency of Aboriginal businesses and not-for-profit corporations on the resources industry and their resultant vulnerability to economic downturns.

Lecture 1: Changing the paradigm: Mining Companies, Native Title and Aboriginal Australians – 18 November 2012

In this first lecture Professor Langton explores the changing relationship between Aboriginal communities and mining companies since the 1993 Mabo agreement and native title legislation, and asks whether this could offer a model for the economic empowerment of all Indigenous people in Australia. Listen to the program on the ABC website.

Lecture 2: From Protectionism to Economic Advancement – 25 November 2012

In her second lecture, Professor Langton examines the confluence of historical, political and social factors which have created entrenched barriers against the economic advancement of Aboriginal people in Australia. Listen to the program on the ABC website.

Lecture 3 - Old barriers and new models: The private sector, government and the economic empowerment of Aboriginal Australians – 2 December 2012

In her third lecture, Professor Langton illuminates the experiences of two Aboriginal communities who are levering economic advancement through agreements with mining companies, and examines why it is that the private sector is leading the way in forging new working models with Indigenous Australia while government policies lag far behind. Listen to the program on the ABC website.

SBS World News Australia

Condemnation over gas hub approval – 19 November 2012

Environmental groups and some Indigenous groups have condemned the Western Australian government's environmental approval of a gas project in the state's Kimberley region. However, a significant number of native title claimants have voted for the project to go ahead. Listen to this program on the SBS website.

ABC Rural

Pilbara native title agreement includes payments for water use – 22 November 2012

Simon Hawkins, CEO of the Yamatji Marlpa Aboriginal Corporation, discusses a native title agreement in Western Australia's Pilbara region which includes payments for the miners' use of water. This is believed to be a first for the region and possibly the state. Listen to the program on the ABC website.

ABC Radio National

Arabana handback – 27 October 2012

After fighting their case for almost 15 years in the courts, the Arabana people have finally won their land back. The handback includes Lake Eyre, and as part of the agreement the Arabana are also now the leaseholders of the remote Finniss Springs pastoral station. Listen to the program on the ABC website.

ABC Radio International

Landmark native title victory in Pilbara – 6 November 2012

The Full Federal Court has ruled the Ngarla people's native title rights have not been extinguished by mining leases and could be reinstated when mining activities have ended. The case involved mining leases at Mount Goldsworthy, where Western Australia's first major iron ore operations began in the 1960s. Listen to the program on the ABC website.

SBS World News Australia

Greater role for Minister in Aboriginal heritage protection – 26 November 2012

A Victorian parliamentary inquiry has recommended the state's Aboriginal Affairs Minister be given a greater say over which Aboriginal groups are tasked with protecting Aboriginal heritage. Listen to this program on the SBS website.

Video Bulletins

James Price Point and beyond

Q&A, ABC Television, 5 November 2012

Panellists: recently retired Australian Greens leader Bob Brown; the Premier of Western Australia Colin Barnett; lawyer and author Hannah McGlade; former Labor Minister for Infrastructure Alannah MacTiernan; and the editor-in-chief of The West Australian Bob Cronin.

This program is about the plan to build a gas hub at James Price Point in Western Australia. Western Australia Premier Colin Barnett has said it will bring development to all Western Australians, including Aboriginal people of the Kimberley. But the $45 billion project has divided Aboriginal land owners and is opposed by environmentalists, like Bob Brown, who believe it will industrialise and destroy one of Australia's most beautiful regions. Watch the video on the ABC website.

Conflicting information, interests and land owners dog FMG

7:30, ABC Television, 20 November 2012
Fortescue Metals Group (FMG) has been caught in disputes over its East Pilbara iron ore operations. This program investigates evidence brought to light by FMG solicitor turned whistleblower, Kerry Savas. FMG stands accused of exploiting divisions in Aboriginal communities, buying the support of traditional owners, and pressuring consultants to write favourable reports. Watch the video on the ABC website.

Aboriginal group Chairman admits FMG ties and frustration

7:30, ABC Television, 28 November 2012
This program follows up the 7:30 report on the 20 November 2012 regarding Fortescue Metals Group (FMG) and their involvement in Yindjibarndi native title affairs. Yindjibarndi Elder Bruce Woodley, Chairman of the Wirlu-Murra Yindjibarndi Aboriginal Corporation (WMYAC) is interviewed.
Watch the video on the ABC website.

Newsletters

- Central Desert Native Title Services, *Country, Culture, Futures*, Volume 1, October 2012
- South West Aboriginal Land and Sea Council (SWALSC), *Noongar Wangkinyiny*, October 2012
- South Australian Native Title Services (SANTS), *Aboriginal Way*, October 2012
- Yamatji Marlpa Aboriginal Corporation (YMAC), *YMAC News*, Issue 19, November 2012

Annual Reports

- Central Land Council, Annual Report 2011-2012
- The National Native Title Tribunal, Annual Report 2011-2012
- Native Title Services Victoria (NTSV), Annual Report 2011-12
- Queensland South Native Title Services (QSNTS), QSNTS Annual Report 2011-12
- South West Aboriginal Land and Sea Council (SWALSC), 2012 Annual Report
- Torres Strait Regional Authority (TSRA), TSRA Annual Report 2011 - 2012

Public Addresses

Tim Wishart, Principal Legal Officer, Queensland South Native Title Services (QSNTS), 'The legislative landscape of native title: An Indigenous service provider perspective', Queensland Law Society Property Law Conference 2012, Brisbane, 28 November 2012

Available on the QSNTS website.

10. Training and Professional Development Opportunities

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.

Native title anthropology: Society, law & practice, undergraduate course
Convenor: University of Adelaide, Adelaide
Date: 21–25 January 2013 (on-campus component)
Further information: please email deane.fergie@adelaide.edu.au

'Adding value and meaning to anthropological mapping in native title research' professional development workshop
Convenor: Centre for Native Title Anthropology, ANU, Canberra
Date: 11–12 February 2013
Further information: please see CNTA flyer or email cameo.dalley@anu.edu.au

Key issues in native title anthropology, professional development course/postgraduate course
Convenor: Centre for Native Title Anthropology, ANU, Canberra
Date: 8–12 April 2013 (on-campus component)
Further information: please email cameo.dalley@anu.edu.au and see http://ippha.anu.edu.au/workshops-and-courses

'So you want to work in native title anthropology?' professional development masterclass
Convenor: Cairns Institute, James Cook University, Cairns
Date: 13–20 April 2013
Further information: please email susan.mcintyretamwoy@jcu.edu.au

Anthropologists and lawyers (title TBC) professional development workshop
Convenor: University of Sydney, Sydney
Date: 2–3 May 2013 (TBC)
Further information: please email gaynor.macdonald@sydney.edu.au

11. Events

Likan'mirri II: Indigenous Art from the AIATSIS Collection

Date of Exhibition: 8 November–16 December 2012
Location: Drill Hall Gallery, Australian National University, Canberra
Enquiries and RSVP: The exhibition is free and open to the public. For enquiries, phone 02 6125 5832.

This exhibition follows on from the 2004 exhibition *Likan'mirri* that was exhibited at the Drill Hall Gallery and showcased a selection of key art pieces from the AIATSIS collection. Guest curator Wally Caruana revisits this resource to make a selection of recently acquired works which are contextualised by rare works from the archive that are of major historical and cultural significance. Many of the works have never before been on public display.

National Native Title Conference 2013: Shaping the Future

Date: 3–5 June 2013
Time: 9am-5pm each day
Location: Alice Springs Convention Centre, Alice Springs, Northern Territory
Enquiries: See http://www.aiatsis.gov.au/ntru/ntc13.html or contact Jennier Jones on (02) 6261 4250 or jennifer.jones@aiatsis.gov.au

In 2013 the Annual National Native Title Conference will be convened by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and the Central Land Council (CLC) on the traditional lands of Lhere Artepe, the traditional owners of the Alice Springs area.

This year's conference theme 'Shaping the Future' is reflected in the following themes:

The *Native Title Act* 20 years on, where to from here?
Native title and social justice
Native title rights and recognition in an international context
Emerging issues in native title

Indigenous governance
Getting the right cultural fit
Taking the long-term view, strategic planning
Building capacity

The Indigenous estate and development options
Planning and investment priorities
Natural resource management
Culture and country

Building a future
Economic and community development
Keeping culture strong
Education and jobs

Call for papers are now open and will close on **4 March 2013**. Please click here to download our call for papers application. AIATSIS is now seeking sponsors for the 2013 National Native Title Conference. Please click here to download the sponsorhip information kit.