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

WHAT'S NEW IN NATIVE TITLE
OCTOBER 2012

1. Case Summaries

***McLennan on behalf of the Jangga People v State of Queensland* [2012] FCA 1082**
9 October 2012, Consent Determination, Federal Court of Australia – Glenden, Queensland
Rares J

In this consent determination, the Federal Court recognised the native title rights and interests of the Jangga People in an area spanning approximately 20,350 square kilometres in Central Queensland. The native title will be held in trust by the Bulgunna Aboriginal Corporation, as the relevant Prescribed Body Corporate.

The claim was first filed in 1998 on behalf of the Jangga People. They applied for recognition of their native title rights and interests over an area west of Mackay, between the Leichhardt Range and Great Dividing Range. Respondents in this case were the State of Queensland, the Charters Towers, Isaac and Whitsunday Regional Councils, Ergon Energy Corporation, QCoal Pty Ltd, Talbot Group Exploration Pty Ltd, Xstrata Coal Queensland Pty Ltd, Colinta Holdings Pty Ltd and a number of pastoralist interests.

Rares J recognised the Jangga People's exclusive native title rights over an area described in Part 1, Schedule 1, and their non-exclusive rights over water within the same area. His Honour also recognised the following non-exclusive native rights in relation to the land and waters in Part 2, Schedule 1: the right to travel over and access the area; camp and live temporarily in the area; hunt, fish and gather on the land and waters; take, use and exchange natural resources; take and use water; conduct ceremonies; be buried and bury native title holders; maintain and protect sites of particular significance; teach on the area; hold meetings; and light fires for domestic purposes, but not for the purpose of hunting or clearing vegetation.

These native title rights are subject to the terms and conditions of 44 Indigenous land use agreements (ILUAs) reached between the applicants and the respondents. The Federal Court also recognised the extent of other

interests subsisting in the determination area, including the rights of 61 pastoral, permit and leaseholders under the *Land Act 1994* (Qld) and the rights in relation to the use and management of the Wilandspey Conservation Park and the Blackwood National Park.

Pursuant to section 87 of the *Native Title Act 1993* (Cth) (NTA), the Court has the power to make a native title determination, if parties reach a written agreement, certain conditions are met, and the Court is satisfied that this is an appropriate order to make. Rares J emphasised that because consent determinations are reached without a formal trial to test the merits of an applicant's claim, it is important that all parties properly consider the proposed determination. In particular, the State Government should play an active role and carefully scrutinise any claim for native title to 'protect the interest of the whole community that it represents.' There must also be sufficient evidence to satisfy the Court that the consent determination has a 'substantive and real foundation.'

Rares J held that there was sufficient evidence to justify the parties entering into the agreement. His Honour was swayed by the applicant's detailed and lengthy anthropological connection report and expert evidence, and the fact that the State had reviewed this evidence and completed a satisfactory analysis of the land and waters affected by the determination. Furthermore, Rares J was satisfied that the determination met the statutory requirements of sections 87(1)(c) and (2) NTA, because the application was valid, each party was legally represented, detailed submissions were given and ILUAs were negotiated with all affected parties.

The Federal Court congratulated the parties on achieving a 'mutually satisfactory result,' which will ensure that the Jangga People's rights and interests will be protected by both their own system of law and the order of the Federal Court.

***Wik and Wik Way Native Title Claim Group v State of Queensland* [2012] FCA 1096**

11 October 2012, Consent Determination, Federal Court of Australia – Aurukun, Queensland
Greenwood J

By consent, the Federal Court recognised the Wik and Wik Way Peoples' native title rights and interests over lands and waters in the western and inland areas of Cape York Peninsula. The native title is to be held by the Ngan Aak Aboriginal Corporation RNTBC as the relevant Prescribed Body Corporate.

This decision is the fifth and final determination of the remaining part of the Wik and Wik Way Peoples' native title claim. The applicant first sought a declaration of native title in 1993 over an area of 28,000 square kilometres of land, which included a range of tenures and other interests. In *Wik Peoples and Thayorre People v Queensland* (1996) 187 CLR 1, a majority of the High Court held that the granting of pastoral leases under Queensland legislation did not necessarily extinguish all native title rights and interests in the claim area.

The native title claim was divided into several parts. On 3 October 2000, Drummond J determined in favour of the Wik and Wik Way Peoples in relation to Part A, which consisted of unallocated Crown land or lands that had only ever been subject to forms of title granted for the benefit of Aboriginal People. The remaining Part B area comprised land and waters held under seven pastoral leases and four mining leases. In 2004, two consent determinations were made by Cooper J over approximately 12,530 square kilometres of the claim area. In 2009, the Court made a positive determination in relation to other areas of land and waters within the claim area. The present proceeding relates to the remaining Part B claim and consists of 4,500 square kilometres of inland land and waters.

Greenwood J recognised the following non-exclusive rights of the Wik and Wik Way peoples in the determination area: to access and move about the area; take and use natural resources for non-commercial purposes; maintain and protect significant sites; maintain springs and wells to ensure the free flow of water; conduct ceremonies and cultural activities; hunt and gather; and teach the physical and spiritual significance of sites and places.

The Court also recognised other interests in the determination area which will prevail over native title rights in the event of inconsistency, including specific pastoral leases; rights of the Cook Shire Council; and rights under five

Indigenous land use agreements. Further, the Court recognised that native title rights had been wholly extinguished in some parts of the determination area due to the construction of permanent pastoral improvements.

Greenwood J accepted the applicant's detailed anthropological reports and was satisfied that all procedural requirements under section 87 of the *Native Title Act 1993* (Cth) had been met. His Honour described the consent determination as a 'proud day for the Wik and Wik Way Peoples' and acknowledged the concerted efforts of the parties involved. Emphasising the importance of having parties with a common interest represented by professional advisers in negotiations and mediation, Greenwood J encouraged the Commonwealth to extend funding for groups such as pastoral lessees.

***Mortimer v Land Development Agency* [2012] ACTSC 158**

19 October 2012, Application for an Injunction, Supreme Court of the ACT – Canberra
Burns J

In this matter, the Supreme Court of the ACT dismissed an application by Mr Mortimer for an interlocutory injunction.

Mr Mortimer sought an interlocutory injunction to prevent a proposed sub-division of land in Lawson by the Land and Development Agency, until his common law native title rights had been determined. He argued that the Commonwealth could not prove valid extinguishment of his native title rights and claimed equitable relief under the *Human Rights Act 2004* (ACT), asserting that recognition of his common law native title rights had been ignored due to his race. Mr Mortimer sought to have the hearing transferred to the Federal Court, as it concerned constitutional and native title matters.

In response, the Land Development Agency contended that Mr Mortimer's application should be struck out, on the basis that he had failed to satisfy the requirements of an injunction, native title rights over the land in Lawson had been validly extinguished, and there were no substantial issues to be tried before the Federal Court.

The Supreme Court affirmed that an applicant must satisfy two requirements to obtain an injunction: (1) that they have a prima facie case for relief, and (2) that the inconvenience or injury the plaintiff would suffer if an injunction were refused would outweigh the injury the defendant would face if the injunction were granted.

The Court held that Mr Mortimer failed to satisfy the first requirement in this case, as any alleged native title rights over the land had been extinguished when the land was sold by the Crown to a private land owner in 1833 and 1836 in a grant of fee simple. Burns J drew support from *Fejo v Northern Territory* (1998) 195 CLR 96, where it was stated that a grant in fee simple is the equivalent of full ownership of the land and will extinguish native title rights.

The Supreme Court held that Mr Mortimer had not demonstrated that he had a prima facie case and that the application for an interlocutory injunction should be refused.

***Fazeldean on behalf of the Thalanyji People (No 2) v State of Western Australia* [2012] FCA 1163**

23 October 2012, Application to dismiss native title application for abuse of process, Federal Court of Australia – Perth, Western Australia
Barker J

The Federal Court dismissed an application by the State of Western Australia, contending that the Thalanyji People (No 2)'s native title claim should be struck out due to abuse of process or failure to satisfy the registration test.

In September 2008, the Thalanyji People's native title rights and interests were recognised in a consent determination (*Hayes on behalf of the Thalanyji People v State of Western Australia* [2008] FCA 1487 (*Thalanyji No 1)).* The Court made a determination of native title in accordance with the agreement between the parties to exclude: land subject to the overlapping Puutu Kunti Kurrama and Pinikura (No 2) application; land and waters

seaward of the low water mark; and certain lands and waters in the north-eastern coastal component of the application. The north-eastern component was excluded, because it was acknowledged that existing ethnographic evidence did not support a determination in favour of the Thalanyji People and suggested that it was most likely the traditional territory of the Nhuwala People. In the Thalaynji People's second native title application, filed in May 2010, the claimants claimed native title rights and interests over this area.

The State of Western Australia brought an application to dismiss the native title claim on two alternative grounds: (1) that the application constituted an abuse of process of the Court pursuant to rule 26.01(1)(d) of the *Federal Court Rules 2011* (Cth); or (2) that the application had failed the registration test and there is no reason why the application should not otherwise be dismissed, pursuant to section 190F(6) of the *Native Title Act 1993* (Cth) (NTA).

In relation to the first ground, the State contended that the question of whether the Thalanyji People held native title rights and interests in the claim area was resolved in the first consent determination and it would be an abuse of process to re-litigate this issue. Even if the Court did not dispose of the issue then, the Thalanyji People should have used the opportunity in the first consent determination to make a claim over the area. Furthermore, the State argued that there is a strong public interest in the efficiency, finality and integrity of judicial decision-making.

The applicants submitted that the decision to exclude the north-eastern component was based in part on expediency, in order to resolve as much of the claim as was possible at the time. While the State was unpersuaded by the strength of connection materials existing at the time, it did not rule out the possibility that native title rights and interests might continue to exist and be asserted in the future. The applicants emphasised that they had obtained new anthropological evidence showing that it is most likely that the Thalanyji (No 2) claim area has always been Thalanyji territory.

The Court was not prepared to accept the State's arguments that the exclusion of the northeast component from the original consent determination had the legal effect of preventing the Thalanyji People from making a native title application over the area in the future. Barker J considered it particularly important that this was a negotiated outcome and there had been no contested hearing or final determination concerning rights over the excluded area. Although it appeared strange that the applicants authorised the Thalanyji (No 2) claim the day before the first consent determination, there was nothing to disclose bad faith on their part. For these reasons, the Court was not prepared to dismiss the applicant's claim for abuse of process.

The State also sought to dismiss the application under section 190F of the *Native Title Act*, which allows the Court to dismiss an application that fails the registration test and the Court is satisfied (a) that has not been amended and is not likely to be amended in a way that would lead to a different outcome; and (b) there is no other reason why the application should not be dismissed. The Thalanyji (No 2) application was not accepted by the Register because it did not meet the NTA conditions with regard to: identification of the native title area; factual basis for the claim; prima facie case; physical connection, and; identity of claimants.

Barker J emphasised that in determining whether the application is likely to be amended in a way that would lead to a different outcome, the Court is looking for 'a real chance… more than a mere possibility.' The Court will have regard to the reasons why the application was originally refused and consider whether proposed amendments are likely to lead to a different outcome upon reconsideration. It will consider any information put forward by the claim group to overcome the deficiencies in the original application, but will not speculate about what additional information the applicant might supply.

His Honour concluded that the Thalanyji (No 2) application is likely to be amended in ways that reflect the new, preliminary anthropological research and other information set out in affidavits, and that there is a real chance that this information would change the outcome of the registration process. The additional details would provide greater factual particularisation in relation to the basis for the native title claim; discrepancies regarding the claim boundaries; its prima facie case; physical connection; and would involve a new authorisation process.

Ultimately, Barker J dismissed the State of Western Australia's application to have the Thalanyji (No 2) claim struck out, but emphasised that the application might be dismissed in the future, if the anthropological research is not completed in the suggested timeframe, the proposed amendments to the application are not made, and the application again fails the registration test.

2. 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, **4** ILUAs were registered with the National Native Title Tribunal.

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
23/10/2012	Poruma Island Sewerage Scheme ILUA	QI2012/075	BCA	Queensland	Development Government Community
19/10/2012	Kalkadoon Constitution ILUA	QI2012/064	AA	Queensland	Co-management Consultation protocol Community
08/10/2012	Moranbah North Project ILUA	QI2012/065	AA	Queensland	Extinguishment Mining
05/10/2012	Cockatoo Coal Limited and Iman People ILUA	QI2012/060	AA	Queensland	Mining Exploration

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

3. 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, **2** native title determinations were handed down.

Short Name (NNTT)	Case Name	Date (NNTT)	State	Outcome	Legal Process	Type
Wik and Wik Way Native Title Determination No. 4	*Wik and Wik Way Native Title Claim Group v State of Queensland* [2012] FCA 1096	11/10/2012	Queensland	Native title exists in the entire determination area	Consent determination (conditional)	Claimant
Jangga People	*McLennan on behalf of the Jangga People v State of Queensland* [2012] FCA 1082	09/10/2012	Queensland	Native title exists in the entire determination area	Consent determination	Claimant

4. 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.

5. 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.

6. 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.

7. Native Title Publications

Audeyev, S. and P. Ivery, 'Browse LNG Precinct: A Test for Strategic Assessment', *Australian Environment Review,* Vol. 27, No. 9, September 2012, 284

The article provides an overview of the Browse Liquefied Natural Gas Precinct strategic assessment process, reviews the recommendations made by the Environmental Protection Authority of Western Australia, and reflects on the process in light of the benefits of strategic assessments that recent reviews have promoted.

Brennan, S., 'Section 51(xxxi) and the Acquisition of Property under Commonwealth-State Arrangements: The Relevance to Native Title Extinguishment on Just Terms', *University of New South Wales Faculty of Law Research Series,* No. 45, September 2012

While the Federal Government in Australia must accord 'just terms' to a divestee for 'acquisitions of property', the constitutional situation for sub-national State governments is different. Under flexible State constitutions, the States are understood to have a virtually unlimited power of eminent domain. However recent litigation in the High Court of Australia has emphasised that acquisitions pursuant to Commonwealth-State intergovernmental arrangements can attract the just terms guarantee in the Federal constitution. This is so even though the immediate act of expropriation occurs under State law. The article applies the recent High Court developments reviewed earlier and concludes that the just terms guarantee can apply to native title extinguishment by States under this interlocking arrangement.

McAllister, P. A., *National Days and the Politics of Indigenous and Local Identities in Australia and New Zealand,* Carolina Academic Press, October 2012

This book is a comparative study of national days in Australia and New Zealand. Based on multi-sited ethnographic research, the study shows how Australia Day and Waitangi Day are perceived, affected, resisted, rejected or adapted by indigenous minorities in the two countries, and how they are subjected to variation, modification and interpretation at the local level, outside of the main venues for national celebration. It offers a unique new perspective on national days, until now absent in debates about nationalisms and how they are affected by ethnic and regional diversity. The authorised, state-sanctioned performance of the nation in each case is rejected or contested by alternative performances designed to challenge, negate or modify the effect associated with the conventional or mainstream performances of nation.

McIntyre-Tamwoy, S. and A. Buhrich, 'Lost in the wash: Predicting the Impact of Losing Aboriginal Coastal Sites in Australia', *International Journal of Climate Change,* Vol. 3, No. 1, 2012: 53-66.

Coastal sea level rise, increased storm wash, storm surges and extreme weather events such as tropical cyclones are predicted to impact on the Australian coastline in future years. The emphasis in research activity in Australia has been directed at issues such as coastal planning and impacts on reef ecosystems and tourism. There has been little focus on the potential loss of coastal cultural heritage sites and how this loss could affect community well-being and identity, particularly for Indigenous Australians. While scientists, government and industry form partnerships to tackle emerging climate change issues, Aboriginal perspectives are largely excluded. This paper considers the potential effects of climate change on Australian Aboriginal coastal sites and the impact that this could have on the cultural heritage resource and Indigenous community identity.

Media Releases

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

Jangga People's Native Title Rights Recognised – 9 October 2012

The Federal Court of Australia recognised the Jangga People's native title rights and interests over approximately 11,350 square kilometres of land in Central Queensland. Andrew Cripps said the decision reaffirmed the Jangga People's affinity with their traditional lands around Mount Coolon, Urella and Lake Dalrymple and congratulated the Jangga People 'for achieving this consent determination which can be a stepping stone to a range of economic, cultural and social benefits.' He recognised the efforts of the Jangga People, Queensland Government and other parties in reaching the consent determination and noted that several ILUAs had been negotiated, which 'provide a framework for managing cultural heritage issues, future activities, and use and access arrangements.' See the media release for more details.

South Australia Native Title Services

Koutsantonis attacks Aboriginal rights again – 9 October 2012

South Australian Native Title Services (SANTS) expressed concern at the South Australian Government's plan to promise mining companies speedy heritage approvals on new projects. SANTS CEO, Keith Thomas, stated, 'This Government has clearly demonstrated its attitude to Aboriginal people with recent moves to remove native title rights in relation to petroleum exploration and production in the Cooper Basin and traditional fishing rights on the Yorke Peninsula… The *Aboriginal Heritage Act* was enacted to provide protection to Aboriginal sites, objects and remains so it is disappointing that this government and the mining industry are now discussing changes to this Act without properly consulting with the Aboriginal people of South Australia.' See the SANTS website for more details.

Audio News and Podcasts

ABC Rural

Top End Station Set to Achieve Australian First in Carbon Farming – 24 October 2012

Using pre-season burning from April to May, Aboriginal groups on Fish River Station in Darwin are reducing the number, spread and intensity of fires in the peak season from June to December. This burning draws on traditional fire practices used by indigenous people before white settlement, and could turn out to be a substantial income earner in the carbon offsets market. If it gets the final tick from the regulators, Fish River Station will be the first project in Australia to earn carbon credits from savanna burning under the Federal Government's Carbon Farming Initiative. Listen to the program on the ABC website.

ABC Radio National

John Altman on on Aboriginal Culture and Country – 14 October 2012

John Altman explains that Australia's most environmentally sound areas are those owned and cared for by Indigenous communities. He discusses his latest book, *People on Country,* which is a manifesto for the Caring for Country movement. Listen to this program on the ABC website.

SBS World News Australia

Final native title win for Wik peoples – 11 October 2012

Presented by: Santilla Chingaipe

The Wik and Wik Way People of Cape York have been granted native title rights to more than 4500 sq kms of land in far north Queensland, ending a 19 year struggle. The Federal Court granted the fifth and final native title claim over the remaining five pastoral lease areas to the Wik and Wik Way People during a special sitting at Aurukun. Philip Hunter, the lawyer representing the claimants, discusses the decision with Santilla Chingaipe. Listen to this program on the SBS website.

Annual Reports

- Yamatji Marlpa Aboriginal Corporation, 2012 Annual Report

8. 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 Research Scholarship

The Native Title Research (NTR) Scholarship is available to research staff with at least two years' experience working in NTRBs to pursue a full-time Masters or a PhD in a native title related area. The successful NTR Scholarship recipient must agree to:

- work for a minimum of two years at an NTRB or in the native title system in a research role following the completion of a Masters program; or
- work for a minimum of three years at an NTRB or in the native title system in a research role following the completion of a PhD.

More details about the Native Title Research Scholarship is available on the Aurora website. Applications for the 2013 round closed on 26 October 2012.

9. Events

University of Melbourne: In Conversation with Dr Megan Davis

Speaker: Dr Megan Davis, introduced by Professor Dianne Otto and Associate Professor John Tobin
Date: 7 November 2012
Time: 4:00- 6:00 pm
Location: Room 920, Level 9, Melbourne University Law School, 185 Pelham Street Carlton
Registration: Please email law-iilah@unimelb.edu.au.
Topics of the conversation will include the UN Permanent Forum on Indigenous Issues, its prospects and challenges; addressing violence against Indigenous women, including discussion of UNPFII Expert Group Meeting on Violence Against Indigenous Women in New York; issues of Aboriginal self-government in Australia, with particular reference to women's participation and leadership; and reflections on the constitutional referendum.

Likan'mirri II: Indigenous Art from the AIATSIS Collection

Exhibition Opening: Official opening by Russell Taylor, Principal, AIATSIS on Thursday 8 November at 6 pm
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.

Annual ANU Reconciliation Lecture

Speaker: Alison Page
Date: 26 November 2012
Time: 6:00-7:00 pm
Location: Arc Cinema, National Film and Sound Archive, McCoy Circuit, Acton, Canberra
Registration: Please RSVP online or phone Kristian Draxl on 02 6125 1096.
Ms Alison Page is an award-winning designer and Executive Officer of the Saltwater Freshwater Arts Alliance and the National Aboriginal Design Agency, and a descendant of the Walbanga and Wadi Wadi people of the Yuin nation. She will talk about her own identity and family. Passionate about the living definition of culture, Alison will unpack the values at the heart of Aboriginal culture and the many languages that are used through storytelling to express them. Connecting this with the broader process of reconciliation, she will argue why we need to embrace Aboriginal culture and its values as central to our national identity.

Centre for Native Title Anthropology Ocassional Seminar Series: 'Documenting Valuable Heritage or Documenting Heritage Values? Anthropology and Aboriginal Heritage Surveys in Western Australia'

Speaker: Dr Bill Kruse, Chair: Professor Nicolas Peterson
Date: 30 November 2012
Time: 9:30- 11:00 am
Location: Seminar Room 1, Sir Roland Wilson Building, McCoy Circuit, Australian National University, Canberra
In Western Australia, anthropologists have been conducting 'ethnographic' heritage surveys to identify Aboriginal sites since 1972 when the *Aboriginal Heritage Act* (WA) was first passed. Since the early 1990s native title and the mining boom has seen the number of heritage surveys being undertaken in WA increase substantially. A system has evolved where government, industry, Native Title Representative Bodies and traditional owners agree to expedite ethnographic surveys as part of project pipelines to secure land access for mining and other development. This context has seen criticism of all players in the industry along familiar fault lines of pro- or anti-development. This paper focuses on the context and practice of heritage anthropology in WA with a particular emphasis on survey methodology. The question of whether the majority of heritage surveys in fact involve any form of ethnography or research is addressed as well as the argument that anthropological expertise is desperately needed in the WA heritage system.