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Native Title Year in Review

May 2016

Foreword

Welcome to the Ashurst review of Indigenous land law developments over the last 12 months. In this review we look back at recent key cases and developments in native title and discuss their implications for proponents.

Despite the continued down turn in the resources industry, there has still been an abundance of activity in native title and Aboriginal cultural heritage matters.

From an Ashurst perspective, 2015 was a busy year for our Indigenous land law team. We have assisted our clients across the continent in unique and complex native title matters including some of the largest value settlements in the iron ore fields of Western Australia, expansion of coal projects in New South Wales, settlement of longstanding disputes in South Australia, complex consent determinations in Queensland and mining agreements in the Northern Territory.

We were also honoured to again be named Band 1 in native title in Chambers Asia-Pacific/Chambers Global. We have maintained this reputational ranking every year since 2007.

The survey of cases in the last year serves to demonstrate that native title remains a contested field. However, there have been some fine achievements, with longstanding and controversial claims finally resolved. We have seen the recognition of the Yandruwandha Yawarrawarrka as native holders in the Cooper Basin in South Australia and the Barkandji People as native title holders in far western New South Wales. Over in the west, the South West settlement was finalised (other than the final ILUA registration phase). The fact that these claims, with so many complex third party issues, were able to be creatively resolved shows the maturing of the native title system. Looking forward, we expect the much anticipated compensation phase to gain more traction. The Timber Creek compensation claim promises to finally deliver some case law regarding how native title compensation is to be assessed. 2016 looks to be a most interesting year for native title law.

We hope that you find this review useful.

Band 1 in Native Title

CHAMBERS ASIA-PACIFIC, 2007 – 2016

Tony Denholder
Co-head, Native Title
Brisbane
T +61 7 3259 7026
tony.denholder@ashurst.com

Geoff Gishubl
Co-head, Native Title
Perth
T +61 8 9366 8140
geoff.gishubl@ashurst.com

Clare Lawrence
Partner
Melbourne
T +61 3 9679 3598
clare.lawrence@ashurst.com

Gavin Scott
Partner
Brisbane
T +61 7 3259 7231
gavin.scott@ashurst.com

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A go-to firm for advice on complex native title mandates. With its broad geographical reach, the firm is well positioned to provide high-quality advice on projects and claim proceedings throughout the country.

CHAMBERS ASIA-PACIFIC, 2016

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A leading position in the space and extensive experience in handling a wide spectrum of native title and cultural heritage matters. Has a strong national footprint and acts for a number of resource industry heavyweights.

CHAMBERS ASIA-PACIFIC, 2015

Validity of tenure and extinguishment

1

Full Court finds mining leases valid in Ngadju appeal decision

State of Western Australia v Graham on behalf of the Ngadju People [2016] FCAFC 47

The Full Federal Court has unanimously confirmed the validity of almost 300 mining leases, initially found to be invalid in a determination of native title made in favour of the Ngadju People in November 2014.

The Court held that dealings in the mining leases, including their excision from the *Nickel Refinery (Western Mining Corporation) Agreement Act 1968* (WA) (the Refinery State Agreement) and subsequent re-grants, were valid and where required, followed *Native Title Act 1993* (Cth) (the Native Title Act) processes.

STATE AGREEMENTS AND THE MINING ACT 1978 (WA)

Fundamental to the ultimate decision of the Full Court were the findings in relation to the rights granted under the relevant mining leases and the interaction between the Refinery State Agreement and the *Mining Act 1978* (WA) (the Mining Act).

The Full Court held that the Refinery State Agreement did not constitute the statutory source of power required to enable the State grant of the mining tenements. Consistent with authority, the Full Court confirmed that the language of the Refinery State Agreement was such that it took effect as a contract only, and accordingly could not confer rights to grant tenements. The Full Court found that the relevant leases were granted pursuant to the *Mining Act 1904* (WA) (the Old Mining Act). This meant that when the Old Mining Act was replaced in 1982, the transitional provisions under Schedule 2 of the new Mining Act took effect so that:

- the State Agreement tenements became "deemed" mining leases under the new Mining Act;
- the mining leases therefore became "all minerals" leases; and
- the contractual arrangements that applied to the leases under the Refinery State Agreement continued unaffected.

FUTURE ACT PROCESSES: APPLICATION OF SS 24IB AND 24IC OF THE NATIVE TITLE ACT

Once the character of the relevant leases was determined, the Full Court considered whether the subsequent dealings in those tenements had been dealt with properly under the Native Title Act. This included the excision of the leases from the Refinery State Agreement, and the subsequent re-granting of those leases under Schedule 2 of the Mining Act.

Importantly, the Full Court held that the excision of leases from the Refinery State Agreement did not "transform" the leases in any way, and accordingly, native title was not affected in the requisite sense.

In relation to the subsequent re-grant of those leases pursuant to Schedule 2 of the Mining Act, the Full Court considered the application of both sections 24IB and 24IC of the Native Title Act. Although ultimately the Court found that section 24IB did not apply, it provided some useful commentary, including that:

- the discretion of the Minister to refuse applications for re-grants of mining leases, meant that the application for such could not be considered the "exercise of a legally enforceable right" under section 24IB(a);
- an application under Schedule 2 of the Mining Act could also not be considered as giving effect to an "offer, commitment, arrangement or undertaking" under section 24IB(b), because there was no corresponding offer, commitment, arrangement or undertaking as to whether or not the mining lease would ultimately be granted. That is, there was no causal relationship between the application and the grant, that would satisfy this requirement; and
- an "offer, commitment, arrangement or undertaking" may involve something less than a right, although a "justified expectation" may not be sufficient.

The Full Court held that the re-grant of the leases was validly done in accordance with section 24IC. In doing so, the Full Court made some useful observations that:

- proprietary rights are not simply rights to use land in a particular way, particularly given that section 24IC applies to every type of lease, licence, permit or authority; and
- in considering whether the future act confers additional rights, it is relevant to consider the rights conferred by the lease immediately prior to the re-grant, not as originally granted.

DRAFTING DETERMINATIONS TO DEAL WITH INVALID INTERESTS

As a final consideration, the Full Court looked at the wording of the determination that dealt with invalid interests.

Although no findings were ultimately made on this point (the argument was the subject of a cross-appeal brought by the Ngadju People that was dismissed), the Court did note that the determination must set out the relationship between the relevant rights and interests, and the simple repetition of the terms of section 227 of the Native Title Act is not particularly helpful to that relationship.

On this basis, the language put forward by the miners and the Commonwealth was preferred by the Court, and is set out at paragraph [157] of the judgement. This may provide some practical guidance and precedent for parties drafting determinations in the future, where some interests are found to be invalid for native title purposes.

KEY POINTS TO NOTE

- The decision is potentially important for holders of mining tenure that have been granted under or pursuant to a State Agreement in Western Australia.
- While the decision should not lead to any practical changes to the way in which native title affects day to day mining operations, it is particularly relevant where State Agreements may expire, and mining operations are to continue under the auspices of the Mining Act only.
- The decision is a good reminder for companies that currently operate under State Agreements to be mindful of the way in which interests held under those agreements are dealt with. If a wrong step is taken in the process the native title consequences may be significant.

The Ngadju People have filed an application for special leave to appeal to the High Court.

2

Presumption of regularity relied upon to find that public road extinguished native title

Doyle on behalf of the Iman People #2 v Queensland [2016] FCA 13

On 22 January 2016, the Federal Court handed down an important decision concerning extinguishment of native title by acts of the Crown. Broadly, the case focused on two key issues:

- whether an area of land was duly dedicated and established as a public road under the relevant legislation in force in the late 19th and early 20th centuries; and
- whether the past act regime of the *Native Title Act 1993* (Cth) (Native Title Act) and *Native Title (Queensland) Act 1993* (QNTA) could operate to validate the grant of leases which had been surrendered before that regime came into effect in 1994.

PRESUMPTION OF REGULARITY FILLS DOCUMENTARY GAPS FOR ROAD DEDICATION

The first issue turned on the extent to which the presumption of regularity (ie a presumption that procedural steps have been properly performed) could be relied upon in order to infer that certain events actually occurred so as to establish a public road. If the presumption could be relied on, the road would have been duly dedicated and native title would have been extinguished.

The problem in this case was that the State could not produce evidence to show that all of the steps in the statutory process had been followed in relation to the particular road. The State relied on the presumption of regularity to fill in the "evidentiary lacuna". The Applicant argued that the presumption of regularity was limited to a presumption that steps that were prerequisites to the exercise of a statutory power had been taken, and did not apply to conditions subsequent to the exercise of that power.

Reeves J did not consider that the presumption of regularity was intended to be limited in this way. His Honour cited the following maxim (from Broom's Legal Maxims, 10th ed (1939) at 642) with approval:

> *"... where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution. In these cases the ordinary rule is that everything is presumed to be rightly and duly performed until the contrary is shown."*

The Court found it was possible to draw the inference that the relevant statutory process had been followed, and that the area of land had in fact been dedicated as a public road. Native title had therefore been extinguished.

THE "PAST ACT REGIME" CAN VALIDATE LEASES ALREADY SURRENDERED BEFORE THE NATIVE TITLE ACT CAME INTO EFFECT

The Applicant separately argued the "past act" regime in the Native Title Act could not operate to validate the grant of leases which had been surrendered before the Native Title Act came into effect.

The Court rejected this argument. It found the combined effect of the Native Title Act and QNTA was to validate the grant of the leases as "past acts" notwithstanding that the leases had been surrendered sometime before the Native Title Act and QNTA came into effect.

In February 2016, the Applicant applied for leave to appeal on this issue.

KEY POINTS TO NOTE

- The Court's restatement of the presumption of regularity gives assistance to those seeking to demonstrate extinguishment of native title based on patchy historical records.
- The presumption of regularity will not fill all evidentiary gaps. The Court's willingness to make inferences of prior dealings from secondary evidence is likely to be explored further in 2016. Validity challenges to otherwise extinguishing tenures are becoming common.
- The Applicant's position on the scope of the Native Title Act's validation provisions challenged some common assumptions.
- If leave to appeal is granted, and the Full Court finds that a tenure must be current in 1994 to have the benefit of the Native Title Act validation provisions, approaches to assessing prior extinguishment will need to change.
- Such an outcome also raises the question of whether native title holders will be able to claim compensation for unlawful impacts on native title by invalid (and unvalidatable) tenures.

3

Application of section 47B to exploration licences

Banjima People v State of Western Australia & Ors (No 2) [2015] FCAFC 171

HIGH COURT MAY CONSIDER APPLICATION OF S47B IN 2016

Section 47B of the *Native Title Act 1993* (Cth) (Native Title Act) operates to disregard historical extinguishment in areas that were vacant Crown land at the time the native title claim was made.

This is subject to several conditions, including that *"... the area is not covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth, a State or a Territory, under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose".*

Whether an exploration licence, granted under the *Mining Act 1978* (WA) was a "*permission or authority ... under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose*" was tested by the Full Court of the Federal Court, on the State of Western Australia's appeal of the Banjima People's native title determination.

The State, unsuccessful in its attempt to overturn the trial judge's ruling that the existence of an exploration licence is not an exception to the application of 47B, has now sought special leave to appeal the Banjima determination to the High Court of Australia.

THE STATE'S ARGUMENTS AND THE JUDGEMENT OF THE FULL COURT AND TRIAL JUDGE

On appeal from the decision of Barker J at first instance, the Full Court of the Federal Court rejected the State's submission that exploration licences fell within the exceptions listed in section 47B.

The Full Court upheld the trial judge's ruling that exploration licences did not meet the exclusionary criterion of section 47B, because:

- **(exclusive use for a particular purpose)** the requirement in section 47B that any permit or authority must require the use of the land for certain purposes must necessarily preclude the grantee using it for other purposes, and must preclude the use by third parties operating under a different grant or right; and
- **(mandatory use)** the requirement in section 47B that any permit or authority must require the land to be used for certain purposes requires that the land must be used, or *positively requires* use.

The Court considered that neither of these characteristics apply to exploration licences. Consequently, the application of section 47B applied to vacant Crown land at the time the Banjima People's claim was lodged ensuring any historical extinguishment was disregarded, and in effect, the Banjima People were entitled to exclusive possession of each of the relevant unallocated crown land parcels.

KEY POINTS TO NOTE

- The Full Court in Banjima also applied *Griffiths v Northern Territory of Australia* as it relates to exclusive native title: a traditional custom by which persons were expected to seek permission before entering land – so as to gain spiritual protection – gives rise to exclusive native title rights.
- If Western Australia's appeal in Banjima ultimately fails, more exclusive native title rights are likely to be determined in claims around Australia (or existing claims amended to include those rights).
- Regardless, a clear understanding of the application of section 47B – especially in those areas of Australia where resource exploration and development is well established – is of significant importance to traditional owners and project proponents alike.
- Where exclusive native title is determined to exist, it introduces greater complexity for project proponents navigating the minefield of native title consents, Native Title Act compliance and native title compensation liability.

High Court confirms that military orders do not extinguish native title, but this may not be the end of the matter

Queensland v Congoo [2015] HCA 17

4

In May 2015 the High Court of Australia handed down a split decision on whether native title rights and interests over certain land in north Queensland had been extinguished by the Commonwealth's use and occupation of the land for military purposes during World War II.

The case in question, *Queensland v Congoo [2015] HCA 17*, concerned an appeal from a decision of the Full Court of the Federal Court, in which the Court held that the Commonwealth's possession of the relevant land pursuant to military orders made under regulation 54 of the *National Security (General) Regulations 1939* (Cth) did not extinguish native title rights and interests to that land.

The High Court delivered a split decision (3:3) in five separate judgments:

- French CJ and Keane J (in a joint judgment) and Gageler J concluded that the occupation did not extinguish native title; and
- Hayne, Kiefel and Bell JJ (in separate judgments) each held that it had.

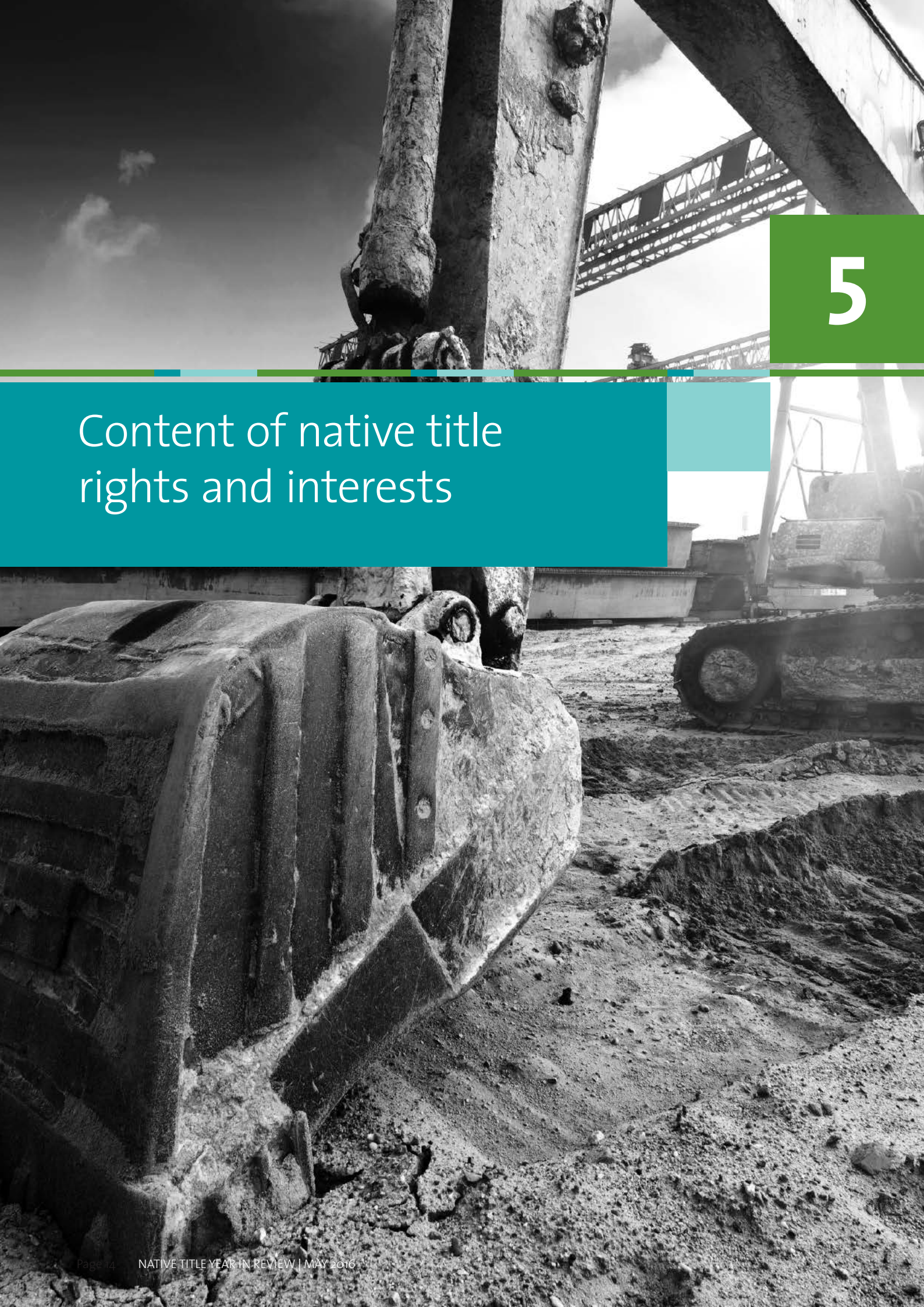
In such cases where the Court is equally divided, section 23 of the *Judiciary Act 1903* (Cth) provides that the decision of the lower court that is being appealed must be affirmed. Accordingly, the appeal was dismissed.

The case confirms that whether native title has been extinguished is based on whether the relevant native title and non-native title rights are inconsistent. Although little was agreed in relation to the application of the inconsistency test on the facts, all judgments accepted the test of inconsistency as the legal test to be applied. As Hayne J noted:

"the determinative question ... is whether the rights granted or asserted are inconsistent with native title rights and interests over the land."

Nonetheless, the split decision of the High Court and the differing reasons expressed throughout the five judgments demonstrate that there is no "one size fits all" approach to the application of the test of inconsistency, and that the determination of whether native title rights and interests have been extinguished is a question that must be answered on the facts of each individual case.

The effect of the split decision is that the central legal question in the case remains unresolved by the High Court. The Full Federal Court decision stands as the highest authority on the point for the moment. Given the expansive areas of land across Australia subject to World War II military orders, it is possible that the effect of such orders may be litigated again in the High Court in the future.



5

Content of native title rights and interests

An expanded bundle of rights? Full Court upholds Pilki decision and confirms the right to take resources for commercial purposes

State of Western Australia v Willis on behalf of the Pilki People [2015] FCAFC 186

The law in Australia has been slow to recognise native title rights and interests for commercial purposes. However, the Full Federal Court recently upheld a decision of North J to recognise the rights of the Pilki People to access and take resources for any purpose (including a commercial purpose) in the *State of Western Australia v Willis on behalf of the Pilki People* [2015] FCAFC 186.

The decision has implications for a number of pending native title determinations which have been awaiting the Full Court's decision (including the *Birriliburu* and *Ngurra Kayanta* claims, also in the Central Desert regions). The decision may also signal applications to vary existing native title determinations, to remove limits preventing native title holders from exercising commercial rights.

REASONS FOR THE DECISION

The Full Court found that although there was no direct evidence that pre-settlement the Pilki People took resources for commercial purposes, this did not preclude a finding that the Pilki People held such a right pursuant to their traditional law and custom.

The factors that supported the existence of this right included:

- The Pilki People were entitled to take the resources of the area for non-commercial purposes, including to satisfy social, cultural, religious, spiritual and ceremonial needs.
- The Pilki People observed traditional laws and customs, and believed they were entitled to take the resources of the area for any purpose.
- There were limited natural resources in the claim area itself, which was likely the reason for the lack of evidence of trading. However, there was a long history of trading in the Western Desert region (which encompassed the Pilki claim area), and a major trading route passed nearby.
- There was no evidence that the Pilki People were prohibited from taking the resources of the area for commercial purposes.

Considering these factors together, the Full Court found there was no reason to draw a distinction between "commercial purposes" and "non-commercial purposes", and accordingly, the decision by North J to recognise the right of the Pilki People to access and take resources for any purpose was upheld.

KEY POINTS TO NOTE

- While the decision in *Pilki* does provide a precedent, native title claimants seeking a similar recognition of commercial rights will still need to adduce sufficient evidence to demonstrate that the right was either exercised pre-settlement, or was recognised by traditional law or custom.
- Importantly for other interest holders, although the recognition of the right to take resources for commercial purposes raises the potential for conflict (particularly with the rights of mining tenement holders), this risk should not arise in circumstances where the right to minerals has already been validly extinguished and third party interests have been validly granted.
- It remains to be seen whether the recognition of commercial native rights as held in the *Pilki* decision will trigger the recognition of similar rights for other claimants, and ultimately, whether native title holders will use those rights to derive greater economic benefit.

Compensation

6

Extinguishment decision spells the end of the Gibson Desert compensation claim, but we could finally see a compensation decision in 2016 in the Timber Creek claim

Ward v State of Western Australia (No 3) [2015] FCA 658

BACKGROUND

The Traditional Owners of the Gibson Desert Nature Reserve (Claimants) commenced proceedings in 2012 to seek a determination of compensation under the *Native Title Act 1993* (Cth) (Native Title Act).

The Claimants alleged that prior to the creation of the Gibson Desert Nature Reserve in 1977, the Claimants held exclusive possession native title to the claim area, including the right to control use of and access to the claim area. Although this contention was not initially in issue, the State of Western Australia amended its defence in 2014 to allege that the 1921 grant of an oil licence over the claim area extinguished exclusive native title rights.

SUBMISSIONS

The State and Commonwealth argued that the rights granted under the oil licence were inconsistent with the native title right to control use of and access to the claim area, and therefore wholly extinguished exclusive native title to the claim area. This argument relied primarily on the inconsistency of rights test laid down in *Ward* [2002] HCA 8 at [82], and confirmed in *Brown* [2014] HCA 8.

The Claimants relied on *Akiba* [2013] 250 CLR 209 to argue that the grant of the oil licence merely regulated the exercise of the native title right to control access to or use of the land.

FINDINGS

After finding that the oil licence had been validly granted, Barker J found that the statutory right granted by the oil licence was the exclusive right to bore and search for oil, complemented and supported by a right to occupy. His Honour found that these rights were inconsistent with the native title right to control the use of and access to the claim area and, as such, this exclusive right was wholly extinguished.

This finding proved fatal to the compensation claim, because the event that would have triggered the most significant compensation (ie the extinguishment of exclusive native title) occurred prior to 1975 when compensation rights began (by virtue of the *Racial Discrimination Act 1975* (Cth)).

The Claimants elected not to pursue the claim for compensation for the extinguishment of the remaining non-exclusive native title which occurred by the creation of the Gibson Desert Nature Reserve in 1977, and discontinued the proceedings in August 2015.

KEY POINTS TO NOTE

- This decision would have been the first compensation determination under the Native Title Act. After all these years, we are still waiting for the first judgment about how native title compensation is assessed.
- However, the hearing of Timber Creek compensation claim (*Allan Griffiths and Lorraine Jones on Behalf of the Ngaliwurru and Nungali Peoples & Northern Territory Of Australia*) commenced in February 2016, with final submissions due to be heard from 20-29 April 2016 in Darwin. For information about its status, along with orders and interlocutory judgements, click here.
- Mansfield J's decision in Timber Creek promises to finally deliver some case law regarding how native title compensation is to be assessed, and is eagerly awaited by claimants and respondents alike.

7

Future act developments

Not everyone will sign the Agreement? The Tribunal can help

Aston Coal 2 Pty Ltd, ICRA MC Pty Ltd and J-Power Australia Pty Ltd and Another v Gomeroi People [2015] NNTTA 40

In September 2015, the National Native Title Tribunal (Tribunal) made a determination relating to the grant of a mining lease in New South Wales in circumstances where a majority of the members of the Applicant for a claim group agreed to the grant, but where a formal agreement could not be executed (Whitehaven Determination).

Since then, the Tribunal has followed this approach four times[1]. The Whitehaven Determination confirms the power of the Tribunal to make a future act determination in circumstances where parties have reached an in principle agreement that a future act may be done, but cannot gather all the signatures necessary for a formal agreement that complies with the provisions of the *Native Title Act 1993* (Cth) (Native Title Act).

BACKGROUND TO THE WHITEHAVEN DETERMINATION

The Whitehaven Determination related to an additional mining lease required for the development of the Maules Creek Project near Narrabri in New South Wales. The area of the mining lease is subject to a native title claim by the Gomeroi People.

Whitehaven, the Gomeroi People and the State of New South Wales began negotiations in accordance with the right to negotiate process in the Native Title Act in late 2011. In February 2015, after extensive discussions, the parties managed to reach an "in principle agreement" that a mining lease should be granted. However, one of the 18 members of the Gomeroi Applicant refused to sign the agreement.

Whitehaven applied to the Tribunal for a future act determination. Initially, Whitehaven sought a consent determination based on the parties' in principle agreement. However, the Tribunal did not accept that a consent determination was appropriate in the circumstances.

THE TRIBUNAL'S DECISION

The Tribunal first considered whether the in principle agreement of the parties could be characterised as an "agreement" which could be relied upon for the purposes of the Native Title Act to validate the grant of the mining lease. The Tribunal held that it could not: a fully signed agreement was necessary.

In making its determination, the Tribunal took account of a joint submission by all parties that the factors relevant to the making of a future act determination were satisfied. This joint submission provided the basis for the Tribunal to determine that the mining lease sought by Whitehaven may be granted.

KEY POINTS TO NOTE

- The Whitehaven Determination will be of great assistance to parties who are unsure what to do when they have reached an agreement in principle, but cannot formalise this agreement because one member of the Applicant refuses to sign the agreement.
- Parties in these circumstances may apply for an ordinary future act determination (rather than a consent determination) and make a joint submission with the other parties that the criteria for making a future act determination are met.
- This is another example of the willingness of Courts and the Tribunal to ensure that an individual's refusal to participate does not undermine the ability of the group to negotiate and execute an agreement.

1 *Barrick (Plutonic) Pty Limited v Miriam Atkins on behalf of Gingirana and others* [2015] NNTTA 58 (4 December 2015); *Dampier (Plutonic) Pty Ltd v Miriam Atkins and Others on behalf of Gingirana and others* [2015] NNTTA 59 (4 December 2015); *Kallenia Mines Pty Ltd v Gooniyandi Aboriginal Corporation RNTBC and others* [2016] NNTTA 7 (01 February 2016); *Widi Mob v Dene Thomas Solomon & Glenn Frederick Solomon and another* [2015] NNTTA 63 (21 December 2015).

8

Lessons in good faith: Nothing new, just more examples of what not to do!

In 2015, the National Native Title Tribunal (Tribunal) made three determinations finding that applicants for resource authorities had failed to conduct native title negotiations in good faith (*Michael Dowse Collins and Another v Nguddaboolgan Native Title Aboriginal Corporation RNTBC* [2015] NNTTA 13 (25 March 2015); *Rusa Resources (Australia) Pty Ltd v IS (deceased) and Others on behalf of Wajarri Yamatji* [2015] NNTTA 15 (2 April 2015) and *Rusa Resources (Australia) Pty Ltd v Sharon Crowe and Others on behalf of Gnulli* [2015] NNTTA 26 (16 July 2015)).

While the cases do not contain anything new in terms of the applicable legal principles for good faith negotiations, they do provide useful examples of what NOT to do.

Two of the cases involved Rusa Resources (Australia) Pty Ltd, a small petroleum exploration company operating in Western Australia, while the third involved an individual small miner (Mr Collins) in North Queensland. Rusa Resources was represented by a consultant in both the negotiations and determination proceedings, while Mr Collins was self-represented.

In making the determinations, the Tribunal confirmed the following well-established legal principles regarding good faith negotiations:

- the obligation to negotiate in good faith requires the parties to communicate, have discussions and confer – with honesty of intention and sincerity – with a view to reaching agreement;
- the parties are not required to reach any particular stage of negotiations before applying to the Tribunal for a determination, but they cannot simply go through the motions with a closed mind or a rigid or pre-determined position; and
- the question of whether or not a party has negotiated in good faith is one that concerns the quality of the party's overall conduct, and is to be assessed by reference to what the party has done or failed to do in the course of negotiations, and the party's state of mind as manifested by its conduct.

In each of the three cases, it was the proponents' overall conduct during their respective negotiations that formed the basis for the Tribunal's conclusions that they had failed to negotiate in good faith. Nonetheless, there were particular types of behaviour that were key to the Tribunal's findings and which serve as example of what NOT to do in good faith negotiations. For instance:

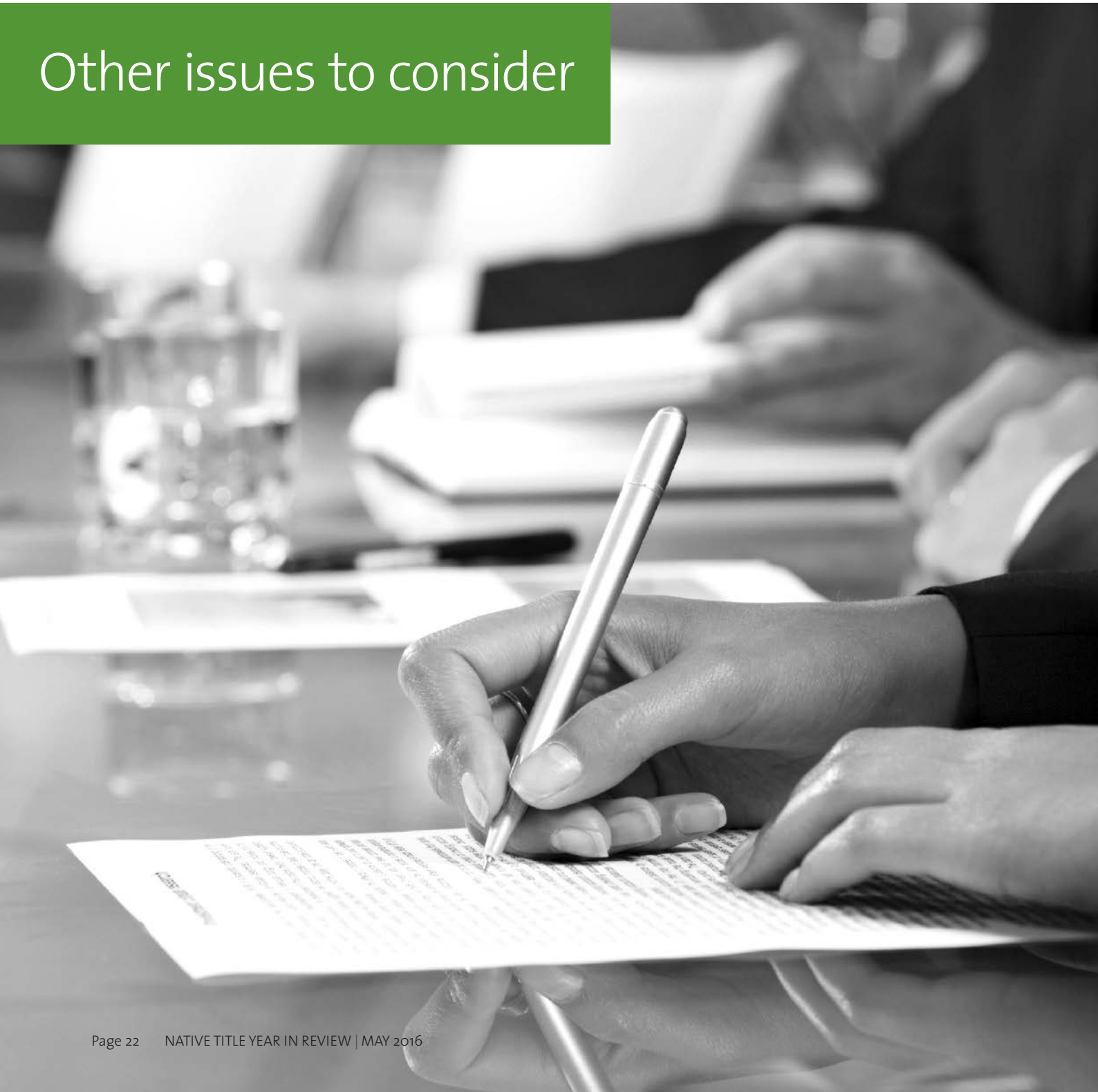
- Rusa Resources failed to provide sufficient information about its proposed exploration program to enable the native title party to assess the impact of the proposed program on its native title rights and interests and participate in negotiations in an informed way.
- Rusa Resources delayed in disclosing its true financial position to the native title party, which coloured the negotiations that followed and led the native title party to expending more resources than they otherwise might have spent.
- Rusa Resources frustrated the negotiations by shifting its position on the native title party's proposed heritage protocol, and risked good faith when it provided a draft agreement with an offer that was conditional upon the native title party fast-tracking negotiations.
- The Tribunal found it was unreasonable for Rusa Resources to apply for a determination the day after it became apparent that the draft agreement required substantial re-drafting, when it should have invested more resources or allowed the native title party time to re-draft the agreement.
- Collins refused to deal earnestly with the native title party on issues of cultural heritage management, and consistently withdrew from agreed terms or unilaterally withdrew offers he had made before the native title party had been able to respond.

KEY POINTS TO NOTE:

- It is important to remember the following points in good faith negotiations:
  - the parties must communicate, have discussions and confer – with honesty of intention and sincerity – with a view to reaching agreement;
  - parties cannot simply go through the motions with a closed mind or a rigid or pre-determined position before applying to the Tribunal for a determination;
- The question of whether or not a party has negotiated in good faith is one that concerns the quality of the party's overall conduct, and is to be assessed by reference to what the party has done or failed to do in the course of negotiations, and the party's state of mind as manifested by its conduct.

9

Other issues to consider



Unfair contracts and small business – what does it mean in the native title context?

THE UNFAIR CONTRACTS REGIME WILL BE EXTENDED TO SMALL BUSINESS ON 12 NOVEMBER 2016

From 12 November 2016, the unfair contacts regime under the Australian Consumer Law and *Australian Securities and Investments Commission Act 2001* (Cth) will be extended to small business contracts. This means that any "unfair term" in a small business contract will automatically be void, with the remainder of the agreement continuing to bind the parties if it is capable of operating without the unfair term. The regime will apply to any "standard form" contracts in a native title context with small businesses which fall below the monetary thresholds.

WHAT TYPE OF CONTRACTS WILL BE COVERED?

A term is "unfair" if it meets three criteria: it would cause a significant imbalance in the parties' rights and obligations, it is not reasonably necessary to protect the legitimate interests of the party advantaged by it, and it would cause detriment (financial or otherwise) if it were relied on or applied.

The regime will apply where:

- **the contract is a standard form contract –** there will be a rebuttable presumption that a contract is a standard form contract unless proven otherwise;
- **at least one party to the contract is a small business when the contract is entered into –** a small business is defined as a business that employs fewer than 20 persons (excluding casual employees, unless they are employed on a regular and systematic basis) – this will capture many Indigenous organisations; and
- **the upfront price payable under the contract is lower than the monetary thresholds –** the upfront price is the consideration under the contract which is disclosed at or before the time the contract is entered into, but excludes any other consideration which is contingent on the occurrence or non-occurrence of a particular event. The prescribed thresholds are as follows:
  - for contracts of 12 months or less – the regime will apply if the upfront price does not exceed $300,000;
  - for contracts of 12 months or longer – the regime will apply if the upfront price does not exceed $1 million.

EXCEPTIONS

The regime does not apply to void a term that sets the "upfront price payable", terms that define the "main subject matter" of the contract, or any term expressly required or permitted by law. There are also some specific exceptions (including for the constitution of a company, and any small business contracts regulated by certain equivalent State or Territory laws).

POTENTIAL CONSEQUENCES

In addition to any unfair term being void, both the small business, and regulators including the Australian Competition and Consumer Commission (ACCC), can take action in Federal and State courts to seek an injunction preventing the other party from enforcing the unfair term, and obtain compensation. It remains to be seen what approach the ACCC would take to enforcement under the new regime, but ACCC Chair Rod Sims stated earlier this year "indigenous consumers" are an "enduring priority" for the ACCC.

KEY POINTS TO NOTE

- Businesses that use "standard form contracts" when dealing with "small businesses" have 12 months to ensure that none of the terms of those contracts are "unfair". Any term of a contract made, varied, or renewed after 12 November 2016 that is "unfair" may be declared void.
- The regime applies to standard form contracts with "small businesses" that are worth up to $300,000 (if for a term of less than 12 months), and $1 million for contracts of longer duration. A "small business" is any business with 20 or fewer employees (excluding casual employees, unless they are employed on a regular or systematic basis).
- In a native title context, this may be particularly relevant for "off the shelf" section 31 deeds, Indigenous contracting and business arrangements, and any native title or heritage agreements that are below the monetary thresholds.

The native title team acknowledges the expert knowledge of Justin Jones, Counsel, who has prepared this article for our publication

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You win some, you lose some – costs orders awarded in favour of mining companies and representative bodies

Recently, a number of cases in the Federal Court have involved costs orders being sought, and ultimately awarded, against Indigenous parties in favour of mining companies and representative bodies (*Little on behalf of the Djaku:nde People v State of Queensland* [2015] FCA 287 (Djaku:nde), *Corunna v South West Aboriginal Land and Sea Council (No 2)* [2015] FCA 630 (Corunna), *Burragubba v State of Queensland* [2015] FCA 1163 (Burragubba) and *Woosup on behalf of the Ankamuthi People v State of Queensland* [2016] FCA 351 (Woosup)).

In *Djaku:nde*, Queensland South Native Title Services' (QSNTS) application for costs was unsuccessful. In that case, the applicant group, faced with an adverse registration test decision, chose at the earliest opportunity to discontinue its native title application and sought dismissal. QSNTS (and other overlapping claim groups) made strike out applications and then sought their costs associated with those applications against both the applicants and their solicitor personally. Logan J found against QSNTS's costs application but did note that, had the applicant chosen to persist with the prosecution of the native title claim after receiving the adverse registration test decision, there may well have been a different outcome.

Interestingly, in *Djaku:nde*, Logan J commented that the State should offer assistance to the Court in cost application matters brought by third parties.

In *Corunna*, the South West Aboriginal Land and Sea Council (SWALSC) was successful in its costs application against a self-represented Indigenous litigant, Mr Corunna, who purported to act on behalf of an unregistered native title claim group. Barker J awarded costs in favour of SWALSC on the basis that Mr Corunna pre-emptively commenced proceedings regarding the registration of an ILUA, before even exercising his statutory objection rights, causing SWALSC and the State unnecessary expense.

Barker J observed at [66]:

> *"Mr Corunna exposed himself to the hazards of litigation in that, by bringing an application which has failed, he is liable to meet the costs of the party who has successfully resisted his application".*

Adani Mining Pty Ltd was also successful in securing costs against an Indigenous applicant in judicial review proceedings in *Burragubba*. Mr Burragubba amended his judicial review application under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) to abandon certain grounds for review and amend others. Adani was a respondent to the application because the decision under review related to its operations in Queensland. Adani submitted it had undertaken a significant amount of work preparing to respond to the original grounds for review, and the applicant should be ordered to pay its costs thrown away as a result of the amendment to the application. The Court agreed, finding the spirit or equity of section 85A of the *Native Title Act 1993* (Cth) (Native Title Act) does not apply to proceedings under the ADJR Act that involve contested questions of fact or procedural fairness (rather than the construction of provisions of the Native Title Act).

Recently in *Woosup*, two Indigenous litigants (who were at that time part of the Applicant) sought to adjourn a section 66B application at the date listed for hearing of the matter. The two litigants had not informed the Court of their intention to appear or to seek an adjournment. Greenwood J ordered that the two litigants pay the costs of the applicant group, and various respondent parties (including mining companies) incurred as a result of the late adjournment sought.

These decisions are likely to result in an increase of costs order applications being prosecuted by representative bodies and proponents in 2016.

KEY POINTS TO NOTE

- We have seen an increasing appetite by parties in native title proceedings to seek costs orders against one another when applications of various kinds are unsuccessful.
- It is becoming more palatable for respondent parties to seek costs against Indigenous applicants. Those seeking to commence proceedings do so in the knowledge that there is a real risk of a costs order if they are not successful.
- Time will tell whether these risks will ultimately reduce the amount of litigation around native title related matters.

11

Notice of authorisation meetings: It's as easy as WHO (to invite), HOW (to distribute the notice) and WHAT (the meeting is about)

Doctor on behalf of the Bigambul People v State of Queensland [2015] FCA 581; TJ v State of Western Australia [2015] FCA 818

DOCTOR ON BEHALF OF THE BIGAMBUL PEOPLE V STATE OF QUEENSLAND [2015] FCA 581

In *Doctor on behalf of the Bigambul People v State of Queensland* [2015] FCA 581, the applicant sought orders that the Bigambul claim group be amended, the existing applicant be replaced by an amended applicant, and the amended applicant be granted leave to further amend the claim to exclude certain areas from the claim area.

Reeves J granted these orders, finding that the applicant had complied with the authorisation and notice requirements under the *Native Title Act 1993* (Cth) (Native Title Act). Notice of the meetings at which the orders above were agreed was widely circulated, clearly described the business to be dealt with at the meeting, and was sufficient to enable the claim group members to make an informed decision regarding participation. There was no evidence that members of the claim group were misled by the notice or at the meeting.

TJ (ON BEHALF OF THE YINDJIBARNDI PEOPLE) V STATE OF WESTERN AUSTRALIA [2015] FCA 818

It was a very different story in *TJ (on behalf of the Yindjibarndi People) v State of Western Australia* [2015] FCA 818. Rares J found that the applicant had not complied with the authorisation and notice requirements under the Native Title Act.

The "authorisation meeting" held was found not to constitute an authorisation meeting under the Native Title Act. Rather, it was found by Rares J to be merely an "opportunity for people to say something... without any obligation for others to meet or discuss with them the proposed or alternative courses of action open to the group...".

Among other defects, the notice of the "meeting" to authorise the replacement applicant failed to properly identify the persons to whom it was addressed. It did not provide any criterion by which people reading it could identify whether they were a member of the specified claim group (described as "Yindjibarndi #1 native title claim group members" in the notice). Notably, it did not list any of the 31 apical ancestors by which the claim group was identified.

Further, the notice was sent to only half of the claim group members (450 of 870), despite the applicant having the addresses of 170 additional members at the time of sending the notice.

The notice was also defective in that it failed to set out the full text of the resolutions, and did not explain the substantive nature of the result of passing these resolutions.

It was not clear from this notice (or understood even by the replacement applicants themselves) that the effect of passing the proposed resolutions would be to direct the applicants to make a consent determination that would deprive the claim group of the right to control access to the claim area. The notice was long, written in complex English, and contained misleading headings. For these and other reasons, the notice was found to have been calculated to mislead members regarding the nature of the resolutions.

Ultimately, the interlocutory application to replace the current applicant was dismissed.

KEY POINTS TO NOTE

- To satisfy the **authorisation process** under the Native Title Act, any native title claim group wishing to alter its composition must **meet as a whole** and resolve to do this, and then meet again as a reconstituted group to **authorise** an applicant to make a native title claim on its behalf.
- This process requires that all members of the claim group are given fair **notice** of these meetings, and of the business to be discussed at the meetings, to enable them to make an informed decision on whether to participate.

12

International developments: Canadian decision regarding nuisance and Aboriginal title

Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc., 2015 BCCA 154

The Saik'uz and Stellat'en First Nations (Nechako Nations) commenced an action against Rio Tinto Alcan (Alcan) in 2011, claiming in nuisance and for breach of riparian rights, as a result of Alcan's operation of the Kenney Dam in northwestern British Columbia. The Kenney Dam provides water for a power generation facility and was constructed in the early 1950s by Alcan's predecessor. The Nechako Nations alleged the diversion of water by Alcan at the Kenney Dam has had significant adverse impacts on the Nechako River, and they have suffered as a result of these adverse impacts – for example, interference with fisheries resources and negative cultural impacts.

At first instance the chambers judge granted Alcan's application to strike out the notice of civil claim, concluding that a claim in private or public nuisance or for breach of riparian rights, based on asserted but unproven claims to Aboriginal title and rights, had no reasonable chance of succeeding. The action was accordingly dismissed. The Nechako Nations subsequently appealed the strike out to the Court of Appeal for British Columbia.

On appeal the Honourable Justice Tysoe noted the law is clear that Aboriginal title and other Aboriginal rights already exist prior to declaration or recognition, and there was "no reason in principle to require [the Nechako Nations] to first obtain a court declaration in an action against the Province [of British Columbia] before they can maintain an action against another party seeking relief in reliance on their Aboriginal rights". His Honour commented that Aboriginal people "should not be treated disadvantageously in comparison to any other litigant asserting claims for nuisance and breach of riparian rights".

The Court concluded the chambers judge "erred in holding that no reasonable causes of action existed until Aboriginal title and other Aboriginal rights were proven (or accepted by the Crown)". Accordingly, the Court set aside the order striking out the notice of civil claim. The Court also concluded there was a genuine issue for trial with respect to whether a defence of statutory authority alleged by Alcan was applicable.

Alcan applied to the Supreme Court of Canada for leave to appeal, however in October 2015 the Supreme Court of Canada dismissed that application.

KEY POINTS TO NOTE

- The Fraser Institute, an independent think tank, has suggested the decision "opens the door for future Aboriginal title litigation against private parties" and "puts all current and future economic development projects in jeopardy". The decision means First Nations are not required to prove Aboriginal title before bringing damages claims against companies. The Halalt First Nation has subsequently filed civil suits totalling approximately C$2 billion in damages against Catalyst Paper (a paper company based in British Columbia) based on alleged interference with the Halalt's claimed riparian, water and land rights.
- In Australia, the *Native Title Act 1993* (Cth) requires native title to be determined prior to any compensation applications being made. This Canadian decision does add to the recent trend seen in Australia and elsewhere of indigenous groups seeking litigious outcomes to protect culture and heritage impacted by resources projects.

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The most important strength is the continuity of the team. They have a good core group of people.

CHAMBERS ASIA-PACIFIC, 2015

Tony Denholder
Co-head, Native Title
Brisbane
T +61 7 3259 7026
tony.denholder
@ashurst.com

Geoff Gishubl
Co-head, Native Title
Perth
T +61 8 9366 8140
geoff.gishubl
@ashurst.com

Clare Lawrence
Partner
Melbourne
T +61 3 9679 3598
clare.lawrence
@ashurst.com

Gavin Scott
Partner
Brisbane
T +61 7 3259 7231
gavin.scott
@ashurst.com

Lucy Bretherton
Counsel
T +61 7 3259 7121
M +61 412 233 969
lucy.bretherton
@ashurst.com

Nerida Cooley
Counsel
T +61 7 3259 7002
M +61 408 697 484
nerida.cooley
@ashurst.com

Megan Barnett-Smith
Senior Associate
T +61 3 9679 3238
M +61 413 084 776
megan.barnett-smith
@ashurst.com

Andrew Gay
Senior Associate
T +61 8 9366 8145
M +61 439 477 383
andrew.gay
@ashurst.com

Cheyne Jansen
Senior Associate
T +61 8 9366 8738
M +61 439 964 597
cheyne.jansen
@ashurst.com

Joel Moss
Senior Associate
T +61 3 9679 3287
M +61 400 673 015
joel.moss
@ashurst.com

Rebecca Shanahan
Senior Associate
T +61 8 9366 8118
M +61 431 263 404
rebecca.shanahan
@ashurst.com

Libby McKillop
Senior Associate
T +61 7 3259 7529
M +61 403 616 146
libby.mckillop
@ashurst.com

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