What's New

Recent Cases

Strickland v State of Western Australia [2010] FCA 272

29 April 2010
Federal Court of Australia, Perth Registry
McKerracher J

The Native Title Registrar did not accept the Maduwongga people's native title application for registration under s 190A of the *Native Title Act*. The Registrar was not satisfied that the applicant was authorised by all members of the claimant group to make an application, that the factual basis for the claim was adequate, that the applicants had established any of the claimed rights and interests, that there was a physical connection with the land or waters covered by the application or that the applicants were not making a claim to the ownership of gas.

In December 2009, McKerracher J had ordered that submissions in relation to the application be filed by the applicant by 19 February 2010 or the Court would proceed to determine the matter without submissions.

As no submissions were filed by that time, McKerracher J was satisfied that the application had not been amended and found no evidence that it would be amended in a way that would lead the Registrar to reach a different conclusion. He therefore dismissed the application.

Rose on behalf of the Kurnai Clains v State of Victoria [2010] FCA 460

14 May 2010
Federal Court of Australia, Melbourne Registry
North J

On 14 May 2010, Justice North dismissed the Kurnai's application for a determination of native title in the Gippsland region of south-east Victoria. The Kurnai application was brought on behalf of a group of people identified as descendants of Larry Johnson and Kitty Perry Johnson, excluding the wider Gippsland Aboriginal community. It came before the Court as alternative mechanisms could not resolve the disagreement over who should be included in the determination.

The Kurnai argued that none of the descendents of Aboriginal people in the Gippsland area, save for the descendents of Larry Johnson and Kitty Perry Johnson, remain as part of a continuing society. Their argument was therefore that none of the identified 25 ancestral sets, recognised as part of the Kurnai society today, form a continuing society. Two particular ancestral sets were examined to highlight the inadequacies of the Kurnai line of argument, and because ancestors from these groups were excluded, the claim could not succeed. Ms Pauline Mullet - self-represented litigant and main spokesperson for the Kurnai case - was unable to satisfy the Court that the remaining individuals as identified by other witnesses and in a report produced by the State should be excluded from the claim, hence it failed.

Brown (on behalf of the Ngarla People) v State of Western Australia (No 2) [2010] FCA 498

21 May 2010
Federal Court of Australia, Perth Registry
Bennett J

Justice Bennett considered the issue of whether the grant of the Mt Goldsworthy mining leases in the Pilbara region of Western Australia effected or gave rise to the extinguishment of native title at common law. The *Native Title Act 1993* does not support an intention to extinguish native title, and therefore the concept of common law extinguishment of native title was relevant. It was agreed that the Ngarla hold native title rights and interests in the relevant land, and therefore the case centred on whether the rights granted by the lease affected the native title rights and interests or whether any inconsistencies arise at all.

The applicants (Brown on behalf of the Ngarla People) argued that mining leases do not extinguish all native title rights and interests, as they were granted by agreement differing from those made under the *Mining Act 1904*. Her Honour applied the 'inconsistency of incidents' test to determine whether the rights of the joint venturers that appeared to conflict with the determined native title rights extinguished them, prevailed over or suspended the exercise of native title. If the leases extinguished native title, there would be no issue as native title cannot be revived.

Her Honour held that the leases had not granted exclusive possession over the whole determination area and therefore not all native title interests had been extinguished. The land in which these rights were extinguished was limited to areas where there was a legal inconsistency between the interests granted by the lease and the continuing interests of the native title holders. This was limited to the areas where there had been development, namely the mines, town sites and associated infrastructure.

***Edwards v Santos Limited* [2010] FCAFC 64**
(4 June 2010)
Full Federal Court of Australia
Stone, Greenwood and Jagot JJ

The Full Federal Court (Stone, Greenwood and Jagot JJ) on 4 June 2010 dismissed the application for leave to appeal a decision of the Primary Judge, Justice Logan, 18 December 2009 (see Native Title Newsletter Nov/Dec 6/2009 for summary of this case). Edwards and others sought leave to appeal the decision which dismissed their application for an injunction which sought to prevent the granting of petroleum leases over their native title claim area.

The decision was affirmed by the Full Federal Court which did not allow leave to appeal for what it considered amounted to an 'advisory opinion'. Edwards and others were native title claimants, so they did not yet have a legal or equitable interest to be protected. The order for Edwards and others to pay costs was also affirmed, as there was no reason why costs should not follow the event.

***Huddleston v Aboriginal Land Commissioner* [2010] FCAFC 66**
(8 June 2010)
Full Federal Court of Australia
Keane CJ, Spender and Barker JJ

The Full Federal Court (Keane CJ, Spender and Barker JJ) on 8 June 2010 overturned a decision of the Aboriginal Land Commissioner to dispose of the Huddleston land claim in the Northern Territory. The Commissioner had disposed of the claim due to the claimants not providing further information relating to their application within a six month period as requested pursuant to s 67A(7) of the *Aboriginal Land Rights (NT) Act 1976*.

The Northern Land Council (NLC) on behalf of the applicants challenged this determination claiming a failure to accord procedural fairness in reaching the decision. The Commissioner emphasised that an extension was possible if satisfied that a genuine effort was being made to provide the information requested. The Principal Legal Officer of the NLC conceded that the Commissioner's requests had been mislaid by staff, however argued that the information requested was extensive and that its legal and anthropological branches were working at capacity in resolving other outstanding claims.

Although the Court held that the Commissioner was entitled to take the view that he was not provided with a sufficient basis to grant an appropriate extension, the common law duty to act fairly and accord procedural fairness prevailed. Therefore the Court rendered the Commissioner's decision to dispose of the claim invalid and of no effect. Further, due to its active support of the Commissioner, the second respondent, the Government of the Northern Territory, was ordered to pay costs.

***Murray on behalf of the Yilka Native Title Claimants v State of Western Australia* [2010] FCA 595**
(11 June 2010)
Federal Court of Australia, Western Australian District Registry
McKerracher J

A number of parties gave notice that they wished to join the proceeding but the applicant claimed that the notices were deficient and shouldn't be accepted. The applicant considered that, as the notices made no reference to a claim to hold native title, they did not trigger the operation of s 84(3)(a)(ii) of the Native Title Act, which allows affected persons to become parties to a native title claim.

Justice McKerracher found that despite the inadequate notices, the parties wishing to join should be permitted to clarify the content of the notices they had provided through further evidence and submissions.

In relation to those parties that had provided further submissions, McKerracher J found that it would be too severe not to allow them to join the proceeding, as the further evidence provided by those parties suggested they ought to be joined. However, he considered that those who had not filed further clarificatory material should not be a party to the proceeding but, if they wished to, would have 21 days to apply through s 84(5) of the Native Title Act, which allows the Federal Court to join parties to proceedings.

He ordered that the parties resubmit the notices with greater clarity so that later in the matter, there wouldn't be a need to rely on affidavit material.

***Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625**
(18 June 2010)
Federal Court of Australia, Brisbane Registry
Dowsett J

See Page 6 for detailed case note.

Gangalidda and Garawa Peoples v State of Queensland and Gangalidda and Garawa People v State of Queensland #2 [2010] FCA 646

(23 June 2010)
Federal Court of Australia, Burketown Registry
Spender J

Justice Spender heard these two consent determinations together and recognised the native title rights of the Gangalidda and Garawa people over 5,810 sq km of land approximately 650 km west of Cairns. This determination included exclusive native title rights over approximately one third of the land and non-exclusive rights over the other two thirds (made up of predominantly pastoral leases).

Their rights in relation to the area of exclusive native title land are the right to possession, occupation, use and enjoyment of that area to the exclusion of all others.

Their rights in relation to the area of non-exclusive rights are: the right to access, to be present on and to traverse the area; to hunt, fish and gather on the area for personal, domestic and non-commercial communal purposes; to take and use natural resources from the area for personal, domestic and non-commercial communal purposes; to camp on the area but not to reside permanently or to erect permanent structures or fixtures; to light fires on the area for domestic purposes including cooking but not for the purposes of hunting or clearing vegetation; to conduct religious and spiritual activities and ceremonies on the area; to be buried on, and bury Native Title Holders on the area; to maintain places and areas of importance or significance to the Native Title Holders under their traditional laws and customs and protect those places and areas by lawful means from physical harm and to share or exchange natural resources from the area for personal, domestic and non-commercial communal purposes.

In relation to water, the Gangalidda and Garawa people have non-exclusive rights to hunt and fish in and on and gather from the water and take, use and enjoy the water for personal, domestic and non-commercial communal purposes.

Being satisfied that a determination in the terms agreed by the parties would be within the power of the Court and that it was appropriate for the Court to do so, Spender J was able to make the consent determination.

QGC Pty Ltd v Bygrave [2010] FCA 659

(23 June 2010)
Federal Court of Australia, Brisbane Registry
Reeves J

QGC Pty Ltd intended to develop a liquefied natural gas project on land that was included in the Iman #2 native title claim. To do so, they negotiated an ILUA over the area with the claimant group. One native title claimant, however, refused to sign and QGC attempted to have the agreement registered nonetheless. Queensland South Native Title Services (QSNTS) applied to be made party to this proceeding.

QGC argued that QSNTS did not have sufficient interest in the case as they were in the same position as any other representative body in Australia and comparatively, held no greater interest in the case. Conversely, QSNTS submitted that they held sufficient interest in the case as they are the representative body responsible for the area that was the subject of the agreement, which gives them a number of relevant responsibilities including facilitation, dispute resolution and agreement-making functions.

Justice Reeves found that as the *Native Title Act 1993* (Cth) requires the relevant representative body to perform certain functions in such circumstances, QSNTS had a 'direct and demonstrable' interest in the proceedings.

QGC also submitted that if QSNTS were joined as a party, a conflict of interest would arise for Mr Hardie (the solicitor on the record in the Iman #2 claim). They suggested that in acting as an agent to QSNTS, he would breach his duty of loyalty to the Iman #2 claimants.

Justice Reeves surmised the Mr Hardie could hold concurrent fiduciary duties and that there was no actual or perceived conflict of interest between the duties Mr Hardie owed to the Iman people as his client and the duties he owed to QSNTS as principal.

In light of the absence of the conflict of interest and the direct interest in the case, Reeves J ordered that QSNTS be made party to the proceedings.