

As to the question of overlap, Reeves J stated that the relevant question was whether, on a *prima facie* basis, the interests claimed by the Yugarapul individuals could be affected by the Turrbal claim. Such a question does not involve entering into factual disputes about the correctness of the Yugarapul individuals' claims – otherwise, the judge 'would be placed in the paradoxical position of having to determine one of the factual issues in dispute in the substantive proceedings for the purposes of determining whether or not the applicants should be joined as respondents to contest that very factual issue'. On the basis of affidavits attesting to the boundaries of the Yugarapul people's lands, Reeves J found that there was a *prima facie* case for an overlap between the areas claimed, and therefore the native title rights and interests claimed by the Yugarapul individuals could be affected by the determination of the Turrbal application.

The application to be joined could not succeed, however, because the Yugarapul individuals were attempting to be joined as representatives of the Yugarapul people rather than in their personal capacities, and were doing so in order to obtain a positive determination of native title, rather than merely defensively asserting their native title rights and interests to protect them from erosion. Reeves J held that in order to be joined in that capacity, the Yugarapul individuals would have to make their own native title application under ss. 13 and 61 of the Act, with evidence that they had been duly authorised by the Yugarapul claim group. In any case, Reeves J indicated that, even if the application to be joined was made merely in a personal and defensive capacity, he would nevertheless have declined to exercise his discretion to join the Yugarapul individuals as respondents. This was because of the fact that the Turrbal claim was already set down for trial, and had been on foot for thirteen years, such that the introduction of new parties at this late stage would disrupt the progress of the matter toward resolution. Importantly, members of the Yugarapul people had known of the Turrbal application as far back as 1998, and the Yugarapul individuals offered no explanation for their lateness in applying to become respondents.

Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations (No 2) [2011] FCAFC 110

25 August 2011

Full Court of the Federal Court of Australia, Sydney NSW

Keane CJ, Lander and Foster JJ

The Dunghutti Elders Council (Aboriginal Corporation) RNTBC had challenged the validity of a notice issued by the Registrar of Aboriginal and Torres Strait Islander Corporations requiring the Council to show why it should not be put under special administration. Flick J in the Federal Court dismissed that challenge (*Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* [2011] FCA 370), and the Full Court of the Federal Court dismissed an appeal against Flick J's decision. The present judgment dealt with an application by the Council to re-open the Full Court's decision. The Council argued that the Full Court had failed to deal in its judgment with one of the arguments raised in the notice of appeal. The Court dismissed the application to re-open the judgment, on the grounds that the relevant argument had not been raised before Flick J, had not been advanced at the hearing of the appeal, and in any case was without merit. The outcome is that the Council's challenge to the validity of the Registrar's notice has been unsuccessful. Accordingly, if the Council now fails to show why it should not be put under special administration, the Registrar may decide to do so.

Legislation and Policy

Native Title Respondent Funding Scheme

The Native Title Respondent Funding Scheme (NTRFS) provides financial assistance to native title respondents under s.213A of the *Native Title Act 1993* (Cth) (NTA). This scheme does not provide assistance for native title claimants. Applications for assistance are assessed against the [scheme's guidelines](#).

Review of the NTRFS

The existing 26 statutory and non-statutory financial assistance schemes administered by the Attorney-General's Department will be consolidated into one scheme that will cover the cost of disbursements in a wide variety of legal matters. This new scheme will commence on 1 July 2012. The NTRFS (including funding for native title officers) will be affected by these changes.

The Attorney-General's Department will be developing a revised interest test to determinate eligibility for respondent funding in native title matters. Current funding arrangements for native title officers will also be reviewed. The Attorney-General's Department has engaged an independent consultant to conduct a review of native title respondent and native title officer funding. Please see the [terms of reference](#) for the consultancy for further detail. For further information on the review, please refer to the [frequently asked questions document](#). There is an opportunity to provide written input by email to NTRFSreview@ag.gov.au. The deadline for written submissions is 30 September 2011. For further information see the Attorney-General's Department website: http://www.ag.gov.au/www/agd/agd.nsf/Page/Legal_aid_FinancialassistancebytheAttorney-Generalinnativetitlecases

Native Title Amendment (Reform) Bill 2011

On 12 May 2011 the Senate referred the Native Title Amendment (Reform) Bill 2011 for inquiry and report. Submissions closed on 29 July 2011. Twenty-seven public submissions have been received by the Legal and Constitutional Affairs Legislation Committee. The Committee reporting date is 3 November 2011. Visit the Legal and Constitutional Affairs Legislation Committee website to download these submissions: http://www.aph.gov.au/Senate/committee/legcon_cte/native_title_three/submissions.htm.

Native Title Publications

AIATSIS Publications:

- Williams G, '[Recognising Indigenous peoples in the Australian Constitution: What the Constitution should say and how the referendum can be won](#)', Vol. 5, No. 1, Native Title Research Unit, AIATSIS, 2011, p. 1-16.

Abstract:

The Commonwealth government has made a commitment to a referendum on constitutional recognition of Australia's first peoples. In a series of two papers, *Land, Rights, Laws: Issues of Native Title* will explore where native title might fit into this debate. In the first paper, senior constitutional scholar George Williams provides an overview of the challenges facing constitutional change and the options for reform, and assesses what is required to achieve change, such as bipartisanship, popular

education, and popular ownership. In the paper to follow, native title specialist Sean Brennan will outline five possible areas of constitutional change and discuss their practical implications for native title.

- Bauman T & Macdonald G (Eds.), '[Unsettling anthropology: the demands of native title on worn concepts and changing lives](#)', Native Title Research Unit, AIATSIS, Canberra, 2011.

Abstract:

This collection arose from a workshop for anthropologists in July 2010, Turning the Tide: Anthropology for Native Title in South-East Australia. Held at Sydney University and co-convened by the University of Sydney and the Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, the workshop addressed issues of native title anthropology in what is often referred to as 'settled' Australia. In these areas, native title — as a form of justice and recognition for Indigenous peoples — has proven a particularly frustrating experience. The title of the workshop recalled the various Yorta Yorta native title decisions in Victoria, and Olney J's quoting of Justice Brennan in *Mabo (No 2)* (1992, at [60]): 'when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared'.

Modelling the connection of native title claimants to their land in ways that are acceptable to the adversarial native title context is a challenge for native title anthropologists. They are faced with embedded and static notions of tradition that in the face of at least half a century of national and international anthropological debates and theory, but which have received little attention in the native title sector. The book includes issues such as naming of groups, the significance of descent from deceased forebears, the constitution of society, ways of approaching Aboriginal land tenure, processes of group exclusion and inclusion, changing laws and customs, and the scale of native title groups

Other Publications:

- Amnesty International, '[The land holds us: Aboriginal peoples' right to traditional homelands in the Northern Territory](#)', Amnesty International, August 2011.