

Franks and Lester for the Plains Clans of the Wonnarua People v National Native Title Tribunal [2011] FCA 1530; Franks and Lester for the Plains Clans of the Wonnarua People v National Native Title Tribunal (No 2) [2011] FCA 1531

19 December 2011

Federal Court of Australia, Sydney

Jagot J

In the first judgment, the applicant sought leave for an extension of time to file an appeal against a decision of the National Native Title Tribunal. The Tribunal had decided that the mining parties that had been negotiating with the Wonnarua people native title claimants, had negotiated in good faith as required by the *Native Title Act 1993*. The native title claimants sought to appeal this decision on the basis that the Tribunal should have held a hearing and allow cross-examination of witnesses, but instead made a decision on the papers alone. The time limit for filing an appeal had elapsed and so the native title claimants needed to apply for an extension of the time limit.

Jagot J considered six factors relevant to the decision whether or not to grant the extension: whether or not there was an acceptable explanation for the delay in filing the appeal; any other action the applicants had taken; any prejudice to other parties that the delay would cause; any other effects on other persons; the merits of the substantial application; and fairness. His Honour held that there was no acceptable explanation for the delay, and also that the substantive case was not particularly strong. Accordingly, no extension of time was granted.

In the second judgment, the Wonnarua native title claim group appealed to the Federal Court from a decision of the National Native Title Tribunal. The Tribunal had decided that a mining lease was to be granted without any conditions. The Tribunal had made that decision without holding a hearing.

The question of whether the Tribunal was to make a decision on the papers or by way of a hearing was discussed at a directions hearing in June 2011. At that directions hearing, the Wonnarua people's lawyer proposed that the Tribunal consider whether or not the future act should be done, and then hear further evidence and submissions on any conditions to be imposed. The Tribunal decided that this course was not open to it, and noted that there was no material before it that related specifically to conditions to be imposed should the mining lease be granted. Asked what further material about conditions he would seek to provide, the Wonnarua lawyer said 'Well I haven't

got any other evidence at the moment but I am instructed that I should be in a position of having further evidence in terms of putting a value on what would be destroyed [should the mining lease be granted]'. The Deputy President of the Tribunal said that it was 'one of these matters I think where, I'll have to determine whether the future act be done or not be done. Full stop.' From the Wonnarua lawyer's responses to this, the Tribunal took him to be consenting to that course of action.

On appeal, the Wonnarua lawyer argued that the Tribunal had misunderstood what he had been agreeing to, and further that the Tribunal had not specifically asked itself whether the matter could adequately proceed on the papers without a hearing. Jagot J examined the transcript of the Tribunal directions hearing and concluded that the Tribunal had clearly considered the merits of proceeding without a hearing, proposed adopting that course of action, and given the Wonnarua people's lawyer an opportunity to raise objections or concerns. In addition to this, Jagot J found that the notice of appeal was inadequate. The notice of appeal stated the question of law to be determined on appeal by the Federal Court: 'Whether in making the [decision of 24 June 2011] the Tribunal erred in law in determining that the... grant of Mining Lease 351 may be done without conditions'. Jagot J found that this was not a question of law, and therefore did not present a valid ground of appeal under s 169 *Native Title Act 1993*. For that reason, the Court did not have jurisdiction to determine the appeal. The appeal was dismissed.

Legislation and Policy

Commonwealth

Prescribed Bodies Corporate Amendment Regulations

The Native Title (Prescribed Bodies Corporate) Amendment Regulations 2011 ('the Amendment Regulations') were registered on 14 December 2011 and are now in operation. The Amendment Regulations are made under the *Native Title Act 1993* (Cth) and implement a number of recommendations concerning the structures and processes of Prescribed Bodies Corporate (PBC). These recommendations originate from a review of the native title system conducted in 2005 and can be found in the [Structures and Processes of Prescribed Bodies Corporate Report](#) (the 'PBC Report').



The Amendment Regulations are designed to improve the effectiveness of the post-determination management of native title by PBCs. The Amendment Regulations will amend the existing regulations to improve the flexibility of the PBC governance regime by:

- enabling an existing PBC to be determined as a PBC for subsequent determinations of native title;
- removing the requirement that all members of a PBC must also be the native title holders (where agreed by the native title holders);
- clarifying that standing authorisations in relation to particular activities of a PBC need only be issued once; and
- subject to certain exceptions, including native title holder consent, allowing PBCs to substitute their own consultation requirements in relation to native title decisions rather than follow the requirements in the regulations;
- provide for the transfer of PBC functions in circumstances where there has been failure to nominate a PBC, where a liquidator is appointed, or where a PBC wishes this to occur; and
- enable PBCs to charge a fee for costs incurred in providing certain services and set out a procedure for review by the Registrar of Indigenous Corporations of a decision by a PBC to charge such a fee. The Registrar will be required to give written reasons for an opinion about a fee charged by a PBC.

The Amendment Regulations are registered on the Federal Register of Legislative Instruments and are available at the following link.

- [Native Title \(Prescribed Bodies Corporate\) Amendment Regulations 2011](#)

An information sheet providing more detailed guidance material on the Amendment Regulation can be accessed via the link below.

- [Native Title \(Prescribed Bodies Corporate\) Amendment Regulations 2011 Information Sheet](#)

Consultation on Native Title (Consultation and Reporting) Determination 2011

The *Native Title Amendment Act (no. 1) 2010* inserted subdivision 24JA into the Native Title Act 1993. This subdivision created a new native

title process for the timely construction of public housing and infrastructure in communities on Indigenous held land which is, or may be, subject to native title.

In accordance with section 24JAA(16) the Commonwealth Minister is able to set reporting requirements by legislative instrument. Comments are being sought on the draft Native Title (Consultation and Reporting) Determination and the accompanying Explanatory Statement. A discussion paper has been included to assist in facilitating comments.

A copy of the discussion paper is available for download below.

- [Discussion Paper - Consultation and Reporting Determination 2011 \[DOC 58KB\]](#)
- [Discussion Paper - Consultation and Reporting Determination 2011 \[PDF 181KB\]](#)
- [Attachment A - Native Title \(Consultation and Reporting\) Determination 2011 \[DOC 254KB\]](#)
- [Attachment A - Native Title \(Consultation and Reporting\) Determination 2011 \[PDF 144KB\]](#)
- [Attachment B - Native Title \(Consultation and Reporting\) Determination 2011 - Explanatory Statement \[DOC 47KB\]](#)
- [Attachment B - Native Title \(Consultation and Reporting\) Determination 2011 - Explanatory Statement \[PDF 128KB\]](#)

No public consultation sessions will be held. Written submissions are due by 29 February 2012.

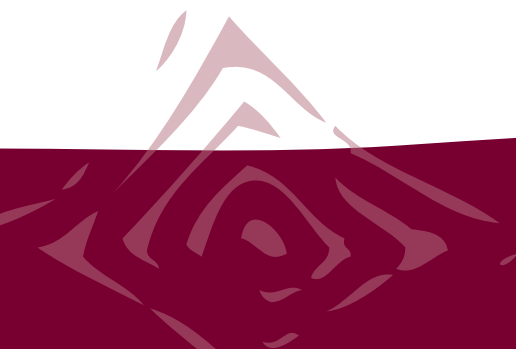
New South Wales

Aboriginal Land Rights Amendment (Housing) Act 2011 No 56

The *Aboriginal Land Rights Amendment (Housing) Act 2011 No 56* was assented on 16 November 2011. The object of this Act is to amend the *Aboriginal Land Rights Act 1983* to facilitate the entering into and management of residential tenancy agreements of less than 3 years, or periodic agreements, by Boards of Local Aboriginal Land Councils where the other parties to the agreements are natural persons.

Further information is available at:

<http://www.legislation.nsw.gov.au/sessionalview/sessional/act/2011-56.pdf>



Queensland

Aboriginal and Torres Strait Islander Land Holding Bill 2011

This Bill repeals the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* and introduces a new Act with the required tools to finalise leasing matters outstanding under the repealed Act. The Bill aligns the new Act with the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991*, now the principal legislation for leasing on Aboriginal and Torres Strait Islander lands, to the extent possible.

The Bill explicitly protects and continues leases and lease entitlements under the repealed Act and provides a number of mechanisms to facilitate resolution of outstanding issues by agreement. The Bill has been referred to a Parliamentary Committee, the Community Affairs Committee, which is required to investigate the Bill and report back to the Parliament by 19 March 2012.

Further information is available at:

<http://www.legislation.qld.gov.au/Bills/53PDF/2011/ATSILandHoldB11.pdf>

Read more about the Bill in the Explanatory Notes available at:

<http://www.legislation.qld.gov.au/Bills/53PDF/2011/ATSILandHoldB11Exp.pdf>

Grants for Traditional Owners caring for the Great Barrier Reef

Traditional owners are encouraged to apply for Sea Country Grants of \$5,000 to \$50,000 to support their environmental initiatives that will improve the resilience of the Great Barrier Reef. Great Barrier Reef Marine Park Authority Chairman Russell Reichelt said a total of \$500,000 in grants were available through the Great Barrier Reef Marine Park Authority's Sea Country Grants Program. Traditional owner groups from the Great Barrier Reef region will have until **17 February 2012** to apply for the grants.

More information is available at:

<http://www.gbrmpa.gov.au/media-room/latest-news/sea-country-partnerships/2011/grants-for-traditional-owners-caring-for-the-great-barrier-reef>

Queensland Pastoral ILUA Template

The Queensland Department of Environment and Resource Management has released at Pastoral ILUA template.

The template is available here:

<http://www.qsnts.com.au/publications/QueenslandPastoralILUATemplate.pdf>

Pastoral leases cover almost 50 percent of Queensland. This template is the result of collaboration between QSNTS, the Queensland Government, the National Native Title Tribunal and pastoralist groups to facilitate native title agreement-making.

Western Australia

Cultural Heritage Due Diligence Guidelines

The Guidelines were developed to identify reasonable and practical measures for ensuring that activities are managed to avoid or minimise harm to Aboriginal sites protected by the *Aboriginal Heritage Act 1972* (WA). For further information about Aboriginal heritage see the Department of Indigenous Affairs webpage about **Section 18 applications**.

The guidelines are available at:

<http://www.nativetitle.wa.gov.au/MediaPublications/Documents/Cultural%20Heritage%20Due%20Diligence%20Guidelines%20November%202011.pdf>

Native Title Publications

Issue papers

- J Altman, 'Reforming the Native Title Act', CAEPR Topical Issue 10/2011.

In this Topical Issue, Jon Altman seeks to explore the ramifications of the Native Title Act Reform Bill, a private Senator's Bill introduced by Senator Rachel Siewert of the Australian Greens.

The PDF version of this paper is available at:

http://caepr.anu.edu.au/sites/default/files/Publications/topical/TI2011_10_Altman%20NTA.pdf

Journals

- W Asche and D Trigger, 'Native title research in Australian anthropology' special edition, *Anthropological Forum*, 21 3: 219-232, 2011.

