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

In last year’s Native Title Year in Review, we expressed the opinion that 2016 “looks to be a most interesting year for native title law”. We were indeed correct. Not since the Wik decision in 1996 has there been such significant new case law.

The past 12 months have seen:

• the first judicial assessment of native title compensation – in the historic Timber Creek case native title holders were awarded over $3.3 million in compensation for the impact of land grants and the construction of public works on their determined native title rights;

• the Full Federal Court’s rejection of long established Indigenous land use agreement (ILUA) registration practices – after years of negotiations between native title claim groups and the State of Western Australia, the Court found that several of the South West Settlement ILUAs were unregistrable (despite having been authorised at claim group meetings), because of missing signatures. This result has called into question hundreds of ILUAs that have already been registered by the National Native Title Tribunal and caused the Federal Parliament to rush through urgent legislation to address the uncertainty; and

• decisions which have broadened the description of native title rights and provided more guidance on issues of validity or invalidity of mining and other interests granted or renewed since the Native Title Act 1993 (Cth) commenced.

From an Ashurst perspective, our team has remained at the forefront of these developments. We are now the only firm in Australia ranked in Band 1 in native title in Chambers Asia-Pacific and have maintained this ranking since 2007. We have been practising in the area from the time of Mabo, some of our team were personally involved in the Wik appeal to the High Court, and we remain involved in most of the country’s most complex native title matters.

We expect 2017 to be another eventful year in native title law.
2016 Fast Facts

- 27 Determinations that Native Title exists
- 0 Determinations that Native Title does not exist
- 3 New Compensation Claims filed
- 81 Area Agreement ILUAs registered
- 24 Body Corporate ILUAs registered
- 17 New Native Title claims filed

Source: National Native Title Tribunal, 9 February 2017
Native title compensation appeal heard in February 2017

**GRIFFITHS v NORTHERN TERRITORY OF AUSTRALIA (NO. 3)**
[2016] FCA 900

In a landmark decision handed down on 24 August 2016, the Federal Court ordered the Northern Territory Government to pay $3,300,261 to the Ngaliwurru and Nungali Peoples as compensation for the impact of land grants and public works on their native title (*Griffiths v Northern Territory of Australia (No.3) [2016] FCA 900*) (*Timber Creek*).

This was the first ever judicial assessment of native title compensation in Australia.

As anticipated, the Northern Territory, the Commonwealth and the native title holders each filed notices of appeal and cross appeal. South Australia, the Yamatji Marlpa Aboriginal Corporation and Central Desert Native Title Services also intervened in the appeal. The appeal was heard by the Full Federal Court in Darwin in the week of 20 February 2017.

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THE COMPENSATION DECISION

Timber Creek is a small town in the Northern Territory, located on the Victoria Highway 285 km west of Katherine. The Ngaliwurru and Nungali Peoples hold non-exclusive native title over the town area, following their successful claim in 2007. In 2011, they filed a native title compensation application pursuant to the Native Title Act 1993 (Cth) (NTA) for compensation for the effect of around 60 land grants and public works on their native title rights and interests.

The compensation claim had three elements: economic loss, interest on economic loss, and non-economic loss.

ECONOMIC LOSS – $512,000 PAYABLE

The Court valued the native title holders’ economic loss at 80% of the freehold value of the relevant land at the time of extinguishment and ordered that $512,000 be paid for this component.

Justice Mansfield made it clear that exclusive native title should be valued the same as freehold title. However, there must be some deduction where there are only non-exclusive rights. His Honour determined that the deduction in this case should not be great, because prior partial extinguishment had not resulted in meaningful restriction on the native title holders’ use and enjoyment of the land and the native title rights were very substantial. His Honour concluded by noting that the decision on the amount of the deduction was an intuitive one, not a matter of careful calculation.

INTEREST – $1,488,261

The Court ordered the payment of $1,488,261 for simple interest on the economic loss component of the compensation from the time of the extinguishment mostly in the 1980s until the date of judgment, calculated on a simple interest basis in accordance with Federal Court Practice Note CM16. This figure is almost three times the economic loss because of the approximately 30 years since the compensable acts took place.

Although the Court rejected the native title holders’ arguments for compound interest in this case, Justice Mansfield noted that there was nothing precluding the Court from awarding compound interest if that was appropriate in order to secure fair compensation on just terms.

His Honour considered the evidence of the native title holders’ previous financial dealings and was not satisfied that they would have made the most beneficial use of the money if it had been awarded to them at the time of the compensable acts, such that compound interest was not necessary to provide compensation on just terms.

OBSERVATIONS

The relevance of the freehold value of the land was tested in the appeal and the Full Court will be required to consider the methodology for calculating economic loss in some detail. This component of the compensation award was appealed by all parties on a number of grounds. Arguments were presented to increase the award to 100% of freehold (the native title holders) and to decrease the award to 50% of freehold (the Commonwealth).

In its appeal, the Northern Territory asked the Full Court not to value the native title rights and interests by reference to a percentage of freehold value. It argued for a valuation methodology that uncouples the economic value of native title from those aspects of the value of freehold that do not relate to the enjoyment of native title. This argument was rejected by the trial judge.

NON-ECONOMIC LOSS – $1.3 MILLION PAYABLE

The Court ordered the Northern Territory to pay an in globo sum of $1,300,000 for non-economic loss (caused by a loss of traditional attachment to the land).

Justice Mansfield began his consideration by noting that it was not in dispute that the Commonwealth and the Northern Territory disputed the native title holders’ arguments for compound interest on a number of grounds, but accepted that simple interest is payable.

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Secondly, Justice Mansfield held that a parcel by parcel approach to assessing non-economic loss was not appropriate and that an in globo assessment was necessary. This was because “one cannot understand hurt feelings in relation to a boxed quarter acre block...” (at [325]).

The Court adopted the evidence and findings in the hearing of the original native title claim about the native title holders’ relationship with the claim area. This included evidence from elders and anthropological experts about significant sites and the travels of major Dreamings through the claim area. The Court particularly noted the strong and compelling evidence about several events that had (or would have) harmed or interfered with Dreamings or sites. Justice Mansfield noted (at [350] and [351]), “loss of and damage to country caused emotional, gut-wrenching pain and deep or primary emotions... This gut wrenching feeling was accompanied by anxiety.”

OBSERVATIONS

Awarding compensation for non-economic loss is the most important element of the Timber Creek decision because the NTA provides no guidance on this topic.

There was no challenge in the appeal to the award of an additional sum for intangible loss by way of a payment as solatium. Further, the Commonwealth did not dispute that an award of solatium can properly be made on an in globo basis, without separate allocation of monetary amounts to particular compensable acts in respect of particular lots.

However, both the Commonwealth and the Northern Territory appealed this component of the decision on the basis that the amount of $1.3 million for non-economic loss was excessive. The Northern Territory submitted that an award of 10% of the economic loss component would be appropriate ($93,848) and the Commonwealth argued for approximately $5,000 per parcel ($215,000). In particular, they argued that Justice Mansfield wrongly inflated the magnitude of the loss, took into account the impact of acts that occurred before the compensable acts took place, and acts that took place on land unaffected by the compensable acts. The native title holders did not appeal this component of the decision, but disputed the respondents’ arguments to decrease the award.

DAMAGES FOR INVALID FUTURE ACTS

The native title holders claimed damages from the Northern Territory under general law for three invalid future acts, namely the grant of three freehold land parcels in 1998 without compliance with the NTA’s future act validation process, over land where the native title holders held non-exclusive native title rights and interests.

The native title holders sought compensation on alternative bases: either damages in lieu of an injunction (based on an entitlement to seek injunctive relief to protect the right to negotiate) or damages for wrongful occupation and use of the land (ie an action in trespass at common law).

Justice Mansfield declared that the three freehold grants were invalid future acts and valued the damages by reference to 80% of the freehold value of the three lots at the time of the grants in 1998, namely $19,200 (plus interest). The Court ordered the Northern Territory to pay damages totalling $48,597 (comprising $19,200 for economic loss and $29,397 for interest). There was no separate component for solatium.

OBSERVATIONS

Justice Mansfield gave few reasons for his decision to award damages by reference to the freehold value of the lots; it was not one of the bases for damages claimed by the native title holders.

The Northern Territory and the Commonwealth appealed the findings on this point, arguing that (among other issues), as a matter of law the invalid future acts had no impact on native title and could not give rise to a claim for damages. The Commonwealth further argued that the measure of damages was not appropriate because the native title holders’ rights did not come to an end and the principles of finality of litigation did not operate in this case. The Northern Territory argued that an action in trespass is not available where only non-exclusive native title was held.
KEY POINTS TO NOTE

The Full Court will no doubt take some months to hand down the appeal decision, and regardless of the outcome, an application for special leave to appeal to the High Court of Australia is likely.

It will be some years before we hear the final word on the assessment of native title compensation at Timber Creek and the rest of Australia. However, the appeal, and any future High Court appeal, will do little to alter the enormous impact of this decision for Commonwealth, State and Territory Governments and the private sector. Regardless of the ultimate ruling on the assessment of compensation, this issue is real and will soon crystallise for many stakeholders.

If a small area like Timber Creek (about 1.26km²) triggers a compensation liability of $3.3 million, then the liability for pockets of extinguishment in the large native title land holdings in Western Australia, South Australia, Queensland and the rest of the Northern Territory could be significant.

Three new compensation claims have been lodged in Queensland since Timber Creek, and we anticipate the lodgement of more claims after the appeal decision is handed down.

The Commonwealth, States and Territories are largely liable for native title compensation, but this liability may be “passed on” to third parties in some circumstances (either by legislation or contractually).

The Timber Creek decision did not address the assessment of compensation for acts that do not wholly extinguish native title (e.g., mining and petroleum tenements and many types of leases) or acts that grant only a short term interests. It is not known whether compensation for such acts will be based on market rental or some other formula related to freehold value.

The Timber Creek decision will, of course, be a reference point for parties negotiating native title agreements in the future. The recognition of heritage impacts as giving rise to compensation loss is likely to drive the most significant change in parties’ expectations.
Procedural requirements of the Native Title Act – they do matter after all?

*NARRIER v STATE OF WESTERN AUSTRALIA* [2016] FCA 1519

The Federal Court found that the Tjiwarl people hold native title rights and interests to approximately 13,600 square kilometres of land in the western desert region of Western Australia. The determination resolves the Tjiwarl #1 and Tjiwarl #2 native title claim proceedings.

**FUTURE ACTS INVALID BECAUSE OF FAILURE TO COMPLY WITH THE NTA’S PROCEDURAL REQUIREMENTS**

The main issue in dispute in this case related to whether certain grants and renewals were valid future acts. This required the Court to decide whether compliance with the procedural requirements in the future act regime of the NTA is a precondition to a future act having force and effect against native title. The issue turned on the effect and application of the Full Federal Court decision in *The Lardil Peoples v Queensland* [2001] FCA 414 (*Lardil*).

Although the relevant comments were obiter dicta, *Lardil* was considered authority for the proposition that compliance with the procedural requirements in Division 3 of Part 2 of the NTA (other than those in Subdivision P relating to the right to negotiate) does not condition the validity of a future act.

The approach noted in *Lardil* was not followed. It was held that, as a precondition for a future act having force and effect against native title interests, compliance with the requirements set out in each Subdivision (including procedural requirements) is necessary. In so finding, the Court held that several grants were invalid for failure to comply with these requirements.
SPECIFIC FINDINGS ABOUT GRANTS – MIXED OUTCOMES

The Court considered the validity of a range of interests (in so far as they affect native title), with mixed outcomes for the interest holders:

- the renewal of pastoral leases in 2015 (which occurred across the State) was valid under section 24ID of the NTA;
- the grant of miscellaneous licences under the Mining Act 1978 (WA) (Mining Act) to search for groundwater was invalid. The Court found that because the Mining Act was not legislation that relates to the management or regulation of surface or subterranean water, the grants were outside scope of future acts able to be validated by section 24H of the NTA (which had been relied upon by the State to grant the licences); and
- the grant of Mining Act licences for the purpose of a “powerline”, “powerline road”, “pipeline road” and “road” was invalid because of non-compliance with the notification/objection process applicable to mining infrastructure under section 24MD(6B) of the NTA.

RIGHT TO ACCESS AND TAKE RESOURCES FOR ANY PURPOSE, INCLUDING COMMERCIAL PURPOSES

The Court followed the decision of the Full Court in Western Australia v Willis on behalf of the Piki People [2015] FCAFC 286 (see our 2015 Native Title Year in Review) and found that the native title rights and interests included the right to access and take resources for any purposes, including commercial purposes.

KEY POINTS TO NOTE

The Court’s willingness to depart from the comments in Lardil cast doubt as to whether the Full Federal Court decision has the significance attributed to it. The interpretation in Lardil has been accepted practice for more than a decade. The decision raises questions as to the validity of leases and licences granted and works constructed for public benefit in all States and Territories.

It is not yet known whether the State or one of the respondent parties will appeal on the Lardil point (or any other issue).

In the meantime, it is important to note that it was accepted that the licences were not impugned under the general law and were not invalid in the sense of having no legal effect at all. They are only invalid in so far as they affect native title. Accordingly, they could still be recorded in the determination of native title.
Key Full Court decisions of 2015 – High Court refuses special leave

STATE OF WESTERN AUSTRALIA v GRAHAM ON BEHALF OF THE NGADJU PEOPLE AND BANJIMA PEOPLE v STATE OF WESTERN AUSTRALIA & ORS (NO 2)

HIGH COURT REFUSES TO CONSIDER NGADJU APPEAL

We reported on the Full Federal Court decision in State of Western Australia v Graham on behalf of the Ngadju People [2016] FCAFC 47 in our 2015 Native Title Year in Review.

In that decision, the Full Court 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 Ngadju People’s application for special leave to appeal was dismissed by the High Court on 14 October 2016.

HIGH COURT REFUSES SPECIAL LEAVE APPLICATION IN BANJIMA CASE

We reported on the Full Federal Court decision in Banjima People v State of Western Australia & Ors (No 2) [2015] FCAFC 171 in our 2015 Native Title Year in Review.

In that decision, the Full Federal Court confirmed that the claimants can have the benefit of section 47B, which allows the Court to disregard prior extinguishment of native title land in certain circumstances, despite the existence of a current exploration licence at the time the claim was made.

The State of Western Australia sought special leave to appeal this point to the High Court. In a hearing on 28 July 2016, the High Court dismissed the application for special leave on the grounds that there was insufficient prospects of success.
Established principles governing execution of ILUAs rejected

**MCGLADE v NATIVE TITLE REGISTRAR [2017] FCAFC 10**

The Full Federal Court’s decision in *McGlade v Registrar National Native Title Tribunal [2017] FCAFC 10* (*McGlade*) rejects established principles around the execution of Indigenous Land Use Agreements (ILUAs). The Full Court held that an “area” ILUA requires all named applicants in a claim to execute an agreement. There is no exception for situations where members of the applicant group have died or lost mental capacity.

**BACKGROUND**

For many years, the State of Western Australia has been negotiating an alternative settlement arrangement to resolve the numerous overlapping native title claims that cover the Perth CBD, metropolitan area, and the South West of Western Australia. Those negotiations ultimately resulted in a commercial deal being struck with the native title claimants, in which the traditional owners would agree that native title does not exist in the South West of WA, in exchange for a significant package of financial and non-financial benefits. Six area ILUAs were negotiated and executed pursuant to resolutions made at authorisation meetings in early 2015, and the State applied to the National Native Title Tribunal (NNTT) for their registration.

Although the ILUAs had been signed in conformity with the relevant meeting resolutions, not all persons who jointly comprised the registered native title claimant in each claim had executed the agreements, either because they were deceased or for other reasons. In the case of one ILUA, a person did not sign the agreement until after it was lodged for registration. When the proposed registration of those ILUAs was publicly notified by the NNTT, multiple persons made formal objections about the registration of four of the ILUAs.
THE DECISION – ALL SIGNATURES ARE NEEDED AND THE AGREEMENTS CANNOT BE REGISTERED

The key issue raised by these proceedings is whether an area ILUA can be registered if not all individuals who jointly comprise the relevant registered native title claimant (or “applicant”) have signed the ILUA, including if one of those individuals was deceased at the time of the execution of the agreement.

In addressing these issues, the Full Court overturned the decision of Justice Reeves in QGC Pty Ltd v Bygrave (No 2) (2010) 189 FCR 412 (Bygrave). Bygrave was authority for the proposition that, provided it is properly authorised, an ILUA can be registered if at least one of the persons named as applicant for the relevant claim was a party to the ILUA.

The Full Court held that an area ILUA requires all named applicants in a claim to execute the agreement. There is no exception for situations where members of the applicant group have died or lost mental capacity. This issue, and the issue of dissident applicants, cannot be avoided by resolutions passed at an authorisation meeting. The only way forward is to replace applicants following the process in section 66B of the NTA.

WIDE RANGING CONSEQUENCES

- **Validity of existing ILUAs and acts done under their authority:** The decision casts doubt on the validity of ILUAs that have been registered since 1998 in circumstances where not all of the registered native title claimants signed the agreement, whether because they were deceased or incapacitated or simply refused to sign. It also creates significant uncertainty and risk with respect to any tenures granted, activities done or benefits provided under the authority of those ILUAs.

- **Deceased applicants:** ILUAs missing the signatures of deceased registered native title claimants have been accepted for registration by the NNTT for nearly 20 years. The McClade decision means that this should not have occurred and casts doubt on the validity of hundreds of ILUAs (many more than the reported 126 problematic ILUAs registered since Bygrave).

- **Consent determinations subject to registration of ILUAs:** The decision also casts doubt on the effectiveness of consent determinations of native title that are expressed to be conditional on the registration of accompanying ILUAs that are missing signatures. ILUAs are often negotiated as part of the settlement of a native title determination application between the native title holders and the parties affected by the claim (eg pastoralists, energy and infrastructure providers, and local government). If any of these ILUAs is missing the signatures of registered native title claimants, the impact for the relevant native title holders and their registered native title body corporate as well as the legal implications for all dealings by the native title holders since that time (eg through their prescribed bodies corporate) would also need to be considered.

- **Impact on right to negotiate agreements and the RTN process:** There is a risk that this decision could equally apply to right to negotiate (RTN) agreements for the purposes of section 31 of the NTA that in some cases are also missing the signatures of all registered native title claimants. The decision calls into question the validity of those RTN/section 31 agreements and the grants or acts done under them and raises a question about whether, going forward, the parties are able to comply with the obligation to negotiate in good faith where there is a deceased member of the registered native title claimant.
KEY POINTS TO NOTE

The Federal Government moved swiftly to create a legislative fix and introduced the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (Cth) on 15 February 2017. The Bill was referred to the Senate Legal and Constitutional Affairs Committee, which recommended on 20 March 2017 that the Bill be passed with 2 minor amendments.

The Bill is intended to:

- retrospectively validate registered ILUAs that do not comply with *McGlade* and by implication all tenures granted and acts done under those ILUAs;
- allow for the registration of ILUAs lodged for registration before *McGlade* that do not comply with *McGlade*; and
- change the requirements for who must be a party to future ILUAs to reverse the rule in *McGlade*.

For future ILUAs, the Bill allows the native title claim group to decide who among the applicants will be a party to the agreement. They can either nominate particular applicants or decide that the agreement needs to be signed by a majority of the applicants.

If enacted in its current form, the Bill will resolve the problem for existing ILUAs and actions taken in reliance on them (including the risk to consent determinations). However, it will not address the impact of the *McGlade* decision on RTN/section 31 agreements or the RTN process. Submissions to the Senate Legal and Constitutional Affairs Committee called for the Bill to be amended to resolve this problem, but it is not known whether this will occur (or whether the Bill will be enacted at all).

The next parliamentary sitting period is between 20 and 30 March 2017. If the Bill is not passed then, there will not be another opportunity for Parliament to consider it until mid-June 2017.

In the meantime, proponents should review existing ILUAs and RTN/section 31 Agreements to consider whether all of the necessary parties have executed the agreement. If not, they should consider the implications, the contractual effect of the agreement and the validity of any tenures granted in reliance on the agreement.
Full Court confirms retrospective validation works

DOYLE ON BEHALF OF THE IMAN PEOPLE #2 v QUEENSLAND [2016]
FCAFC 189

We reported on Doyle on behalf of the Iman People #2 v Queensland [2016] FCA 13 in our 2015 Native Title Year in Review.

The decision focused on two important issues:

• evidentiary standards for proving extinguishment of native title by acts of the Crown; and
• whether the past act regime in the NTA and Native Title (Queensland) Act 1993 (QNTA) was in fact effective to validate tenures that had terminated before the commencement of the NTA in 1994.

The native title holders’ lodged an appeal from the Court’s finding on the second issue. They argued that the past act regime could not operate to validate the grant of leases which had been surrendered before that regime came into effect.

The Full Federal Court rejected the argument and dismissed the appeal. It confirmed the trial judge’s finding that the combined effect of the NTA and QNTA was to validate the leases at the time of their grant. It was immaterial that the leases had been surrendered before the validation provisions were enacted in 1994. The surrenders did not alter the historical fact that the grants occurred.

The State sought costs against the unsuccessful appellant, which is the subject of our article on page 24 on “Unreasonable conduct aside, unsuccessful parties not at great risk of costs orders”.
Power to make a negative determination of native title in claim proceedings confirmed

*CG (DECEASED) ON BEHALF OF THE BADIMIA PEOPLE v STATE OF WESTERN AUSTRALIA* [2016] FCAFC 67

The Badimia People’s native title claims were dismissed by the Federal Court in March 2015 because the native title claimants did not meet their onus of proving a sufficient connection with the land to make out their claims (*CG (Deceased) on behalf of the Badimia People v State of Western Australia* [2015] FCA 204). After hearing submissions from the parties, the Federal Court made a determination that native title does not exist (see *CG (Deceased) on behalf of the Badimia People v State of Western Australia (No.2)* [2015] FCA 507).
The native title party appealed the final determination, arguing that the Federal Court did not have power to make a negative determination in response to a claimant application, and that if the power did exist, it should not be exercised in this case.

The Full Court comprised five judges (instead of the usual three), because the native title party argued that an earlier Full Court decision in Wyman on behalf of the Bidjara People v State of Queensland [2015] FCAFC 108 (Bidjara) on this issue was wrongly decided.

The Full Court dismissed the appeal and confirmed the correctness of the earlier decision in Bidjara. It rejected the native title party's argument that a negative determination (ie a determination that native title does not exist) can only be made after a non-claimant application. The Full Court said that, “If the Court is satisfied that all potentially competing claimants for the recognition of native title in respect of the claim area have participated in the hearing, and all failed, a negative determination could be made if the Court is satisfied that there is no native title that can be recognised and protected” [at 66].

On the issue of the Court’s exercise of its discretion not to make a negative determination in the particular case, the Full Court noted the lack of evidence to support any reformulated claim or a claim by a differently constituted claim group.

KEY POINTS TO NOTE

In this appeal, the native title party sought to overturn a previous Full Court decision about whether, when a native title claim is not successful, the Court has power to determine that native title does not exist (as opposed to simply dismissing the application). This issue is important because a dismissed application does not prevent future claims or remove the area from the operation of the future act regime in the NTA.

There have only been a handful of litigated native title claims over the last 20 years that have resulted in a determination that native title not exist (Some examples are – Yorta Yorta (Victoria), Bodney (Perth), Larrakia (Darwin), Yugara and Turrbal (Brisbane) and Bidjara and related claims (Queensland)).

In contrast, the Federal Court in Wongatha in 2007 (Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No.9) [2007] FCA 31) (Wongatha) simply dismissed the claims on the basis that the “claimant group” was really associations of people created to mount native title claims, and could not demonstrate that they had the requisite “connection” as a group. In dismissing the claim, the Court left it open for the differently formulated groups to make future claims and continue to benefit from the future act procedures in the NTA. The decision was controversial at the time, both because of the cost of the trial (it took 100 days and included 149 witnesses and >10,000 pages of written submissions and expert reports) and the size and location of the claim area (160,000 km2 in the Goldfields region of Western Australia). Some people felt that the effort involved meant that there should be a certain outcome.

As a result of the Wongatha Court’s decision simply to dismiss the claim, the Yilka people were able to progress their claim to trial and obtained a determination recognising their native title in mid-2016. We discuss that decision in our article on page 18 on “Yilka applicants succeed in later claim with narrowed extinguishment findings”.

Yilka applicants succeed in later claim with narrowed extinguishment findings

*MURRAY ON BEHALF OF THE YILKA NATIVE TITLE CLAIMANTS v STATE OF WESTERN AUSTRALIA (No.5) [2016] FCA 752*

On 29 June 2016, the Federal Court determined that both the Yilka and Sullivan claimants had made out their respective claims to hold native title over four Aboriginal reserves and the Yamarna pastoral lease near Laverton in Western Australia, notwithstanding the previous dismissal of similar claims over the area in 2007 in Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No.9) [2007] FCA 31 (Wongatha). The decision runs to almost 800 pages and deals with numerous issues concerning connection and extinguishment, as well as claims for abuse of process and the operation of associated defences. Of particular note are the Court’s findings on extinguishment in relation to roads and the circumstances in which such extinguishment is to be disregarded, and on the recognition of exclusive native title rights to water.

**BACKGROUND**

The Yilka claim was preceded by the Cosmo Newberry claim, which was filed in 1997 and dismissed in 2007 by the Federal Court in Wongatha, along with the Wongatha claim and several other claims overlapped by the Wongatha claim. As noted earlier in this review, the fact that these claims were simply dismissed rather than determined in the negative left it open for the relevant groups to bring future claims over the area. As a result, the Yilka claim was lodged in 2008 over the same area as the Cosmo Newberry claim, and the Sullivan claim was later lodged in 2011 over much the same area as the Yilka claim. Given the overlap, both claims were heard together. The State of Western Australia opposed both claims.

**ABUSE OF PROCESS**

The State’s primary argument was that the claims were attempts to re-litigate matters already determined in Wongatha, and that the claims should therefore be permanently stayed or dismissed on the basis that they constituted an abuse of process or were contrary to the principles of *res judicata*, *issue estoppel* or *Anshun* estoppel. The Court dismissed the State’s arguments, primarily on the basis that many of the claimants were not parties to the previous litigation, but also because there were important differences between the present claims and the earlier claims, and the earlier claims had failed on jurisdictional grounds rather than their substantive merits. The Court found that there was no risk of conflicting judgments or improper purpose, but there would be manifest unfairness in not permitting the Yilka and Sullivan claims to proceed and be determined on their substantive merits.
CONNECTION

The State also opposed the claims on grounds of connection, raising numerous issues with respect to the identification of the claim groups, the basis on which native title rights are said to be possessed, and the assertion of continuous connection to the whole of the claim area. As indicated above, the Court was ultimately satisfied that the claimants had made out their claims to hold native title over the claim area. In doing so, the Court observed that there were multiple pathways to connection, which can be established through birth, long association and the holding of ritual status rather than just common ancestry, and that claims can be made by a group of individuals on a representative basis.

EXTINCTION

The topic of extinguishment gave rise to significant disagreement between the parties, particularly in relation to roads and rights to water in exclusive native title areas.

ROADS

The State initially identified and led evidence in relation to only two roads within the claim area, and otherwise contended for the generic exclusion of all other roads shown on maps and plans on the basis that they are public works and thereby wholly extinguished native title. While the claimants accepted that native title had been extinguished to the areas of the two roads identified, they contended that any extinguishment must be disregarded where those roads traversed any of the Aboriginal reserves, by virtue of section 47A of the NTA. The claimants also objected to any generic exclusion of roads for which the specific area is not identified and for which there was no specific evidence as to the status of the area as a road. The Court accepted the claimants’ submissions, stating that any generic exclusion, “...will be too vague and likely to lead to confusion and uncertainty in the future”.

In this context, the State was permitted to reopen its evidence to provide additional material as to the circumstances of the creation of other roads for which extinguishment assertions were made. Ultimately, the Court accepted the State’s submissions that the two roads initially identified constituted public works and wholly extinguished native title, subject to the application of section 47A, but found there was insufficient evidence to support the dedication of the other roads at common law.

In a departure from previous decisions, the Court found that section 47A did apply to disregard extinguishment by the creation of roads where the roads fell within the one of the Aboriginal reserves. In doing so, the Court distinguished the Full Court’s decision in Erubam Le (Darnley Islanders) (No 1) v Queensland (2003) 134 FCR 155 that section 47A does not apply to compel the disregarding of the extinguishment brought about by public works because the public works in that case could not be properly characterised as the creation of a prior interest in land. In Yilka, the Court found that the establishment of the roads did create prior interests, specifically the enforceable right of free passage in members of the public and the vesting of the roads in the relevant Road Board and, as such, section 47A of the NTA required their extinguishing effect to be disregarded.

WATER

Both claimants claimed exclusive rights to areas of lands and waters where there has been no extinguishment of native title or where any extinguishment must be disregarded. The State argued that because at common law there are no rights of property in water, at least in relation to flowing or subterranean water, the common law cannot recognise any native title that amounts to ownership of such water. Accordingly, only non-exclusive native title rights may be recognised in relation to waters within the claim area.

The Court disagreed with the State on this point, noting the distinction in common law between rights of ownership in relation to the area which holds the water and rights in the water itself (riparian rights), and stating that, “...the proposition that water itself is not amenable to private ownership is different to State’s submission that only non-exclusive rights may be recognised in relation to waters within the claim area”. The Court further stated that, “...while the water itself might be subject to a common law regime, the area in which the body of water is situated may be amenable to a right of exclusive possession at common law”.

The Court observed that a native title right of exclusive possession is not relevantly inconsistent with the statutory limitations on use of particular kinds of water under the Rights in Water and Irrigation Act 1914 (WA) (Rights in Water Act). The Court found that because the claimants can use water from the claim area in exercise of their right of exclusive possession without breach of the Rights in Water Act and without abrogating rights vested in the Minister under that Act, there is no extinguishment of the exclusive right, although their exercise may be limited under statute or at common law.
KEY POINTS TO NOTE

Roads: Justice McKerracher considered that any extinguishment occasioned by roads is confined to the alignment of the roads as and when they were created, and commented that he is not aware of any statutory justification to allow the extinguishment to travel with the moving alignment. His Honour did not address the obvious follow up question of the legal basis of roads which have moved outside their original alignment – a reasonably common scenario in rural and remote Australia.

Water: the decision demonstrates that exclusive native title rights can be recognised to areas of water, although their exercise may be limited under statute or at common law.

Public works: the State submitted there are so many public works within the claim area that it is difficult to comprehensively identify them all, and sought a form of determination which includes a generic exclusion of public works. Justice McKerracher concluded that he is unable to make any findings about the extinguishing effect of unidentified public works about which no evidence has been brought. His Honour commented:

*Extinguishment of native title is a serious matter, not to be dealt with generically without any evidence. To deal with it generically would leave open the suggestion that there could be a public work which has extinguished native title on any part of the claim area, so that the determination would not satisfy the requirement of section 225 NTA that a determination be 'a determination of whether or native title exists in relation to a particular area'.*

The Court objection in *Yilka* to the generic exclusion of public works and roads is reasonable at one level and reflects recent case law in litigated WA claims. However, it does not sit well with the practice in the consent determinations. There are numerous consent determinations where the parties have been comfortable with the generic exclusion of public works on the basis of their extinguishing effect. It has been a compromise to achieve speedier outcomes and avoid the resources required to identify, document and debate the status of the many public works that undoubtedly exist in most native title claim areas. Theoretically, any real contest as to the existence or otherwise of a public work could be adjudicated by a future court, though the need rarely arises. The uncertainty arising from the generic exclusion of public works will also have impact in the resolution of compensation claims. Works owners may be less keen to assert extinguishment now that the issue of compensation has become more immediate.
Federal Court recognises unrestricted native title right to take resources

RRUMBURIYA BORROLOOLA CLAIM GROUP v NORTHERN TERRITORY [2016] FCA 776

The Federal Court has held that the exclusive native title rights and interests of the Rumburriya People over land and waters in the Northern Territory town of Borroloola include the right to take and use resources for any purpose (Rumburriya Borroloola Claim Group v Northern Territory [2016] FCA 776) (Rumburriya).
THE RIGHT TO TAKE RESOURCES

The main issue in dispute between the Rrumburriya People and the Northern Territory was the extent the Court should recognise the native title right to take resources. The native title claimants argued that the right should be exercisable “for any purpose”. The Northern Territory and the Commonwealth argued the right to take resources should be confined to taking for personal or communal purposes of a domestic or subsistence nature.

The Rrumburriya People presented extensive evidence of their ancestors trading with Macassan People of Indonesia prior to Australian sovereignty. This involved giving the Macassans limited access to the resources of the land and waters for material and useful purposes in exchange for the objects and consumables which they received from the Macassans. It was held that these dealings were of a commercial kind and were not simply part of a ceremonial exchange system.

In light of the above, it was concluded that the right to take resources was not confined to taking for personal or communal purposes of a domestic or subsistence nature. There was no basis for concluding the right was confined at all.

In determining the content of the right to take resources, it was held that the existence of a right under traditional laws and customs is logically separate from the exercise of that right. It was therefore not necessary to prove that activity in conformity with traditional laws and customs had taken place in order to establish a right exists. It was only necessary to prove the existence of traditional laws and customs which gave them such a right. In other words, possession of the right, and not its exercise, was the proper question.

NON-TIDAL FLOWING AND SUBTERRANEAN WATERS

In the Territory, as in the States, the right to the use and control of water is vested in the Crown subject to public rights to take for domestic or stock purposes. It is commonplace in consent determinations to describe native title rights to water as non-exclusive even in areas where exclusive native title is determined in respect of land.

However, consistent with the recent decision in Murray on behalf of the Yilka Native Title Claimants v State of Western Australia (No.5) [2016] FCA 752 (Yilka), the Court took the view that there was no need to limit the Rrumburriya People’s exclusive native title rights in this way. Where exclusive native title rights are otherwise recognised, the Court considered that the Determination should recognise an exclusive right to take and use resources, including water.

The Court was careful to observe, however, that rights with respect to water are nevertheless qualified by the Water Act (NT) which will restrict the enjoyment of the native title right.
KEY POINTS TO NOTE

There may be an increase in the value of native title compensation:
An unrestricted right to take resources from a claim area must arguably be more valuable than a right that is restricted to personal or communal purposes of a domestic or subsistence nature. Accordingly, it is arguable that the value of native title compensation should be greater where there is evidence that such a right existed and was extinguished in circumstances where compensation is in fact payable.

Calls to vary determinations already made?: There have been numerous determinations of native title across Australia where the native title right to take resources has been limited in some manner, usually to personal or communal purposes of a domestic or subsistence nature. This has occurred in both consent and litigated determinations. Rrumburriya has not to date triggered variation applications seeking recognition of an unrestricted right to take resources. The significant evidentiary hurdle is likely to weigh against the reopening of finalised determinations. However, it is likely that native title claim groups will push for unrestricted rights to take resources in the context of future consent determination negotiations. With fresh concern as to compensation liability, the various State Governments are not likely to agree to such rights in the absence of compelling evidence of pre-sovereignty rights.

There is no native title right to take minerals and petroleum vested in the Crown: Regardless of the extent of the native title right to take resources, the right is subject to State and Commonwealth laws. An unrestricted right to take resources, including for commercial purposes, would not include minerals and petroleum which are vested in the Crown.

Access to water: There is surprisingly little native title jurisprudence on rights to water. Rrumburriya and Yilka are starting to change this, but the issue remains under explored. Both cases insist that exclusive native title rights will be limited by statute, so that native title holders, in effect, have no greater right to use water than the public in publically accessible areas. Given that native title holders have the right to be notified under section 24HA of the NTA in relation to the grant of water licences, and an entitlement to compensation, native title holders seem to be well placed to influence decisions by the Crown to allow third parties to use water flowing through an exclusive native title area. Access to water looks to be an issue that will have greater focus in the next few years.
Unreasonable conduct aside, unsuccessful parties not at great risk of costs orders

We reported on a number of costs decisions in our 2015 Native Title Year in Review. As we predicted at that time, there have been further costs applications in 2016 with adverse outcomes for native title parties pursuing unreasonable positions in litigation.

INDIGENOUS LITIGANTS ORDERED TO PAY OPPOSING PARTY’S COSTS

Bropho v City of Perth (No.2) [2016] FCA 1168 (Bropho) and Burragubba v State of Queensland [2016] FCA 1525 (Burragubba) centred on similar considerations. In both cases, the Court ordered the Indigenous litigants to pay the costs of the opposing party. Three factors were explored in each case:

• whether the litigation was in the “spirit” of section 85A of the NTA (which provides that in some circumstances each party bears their own costs);

• whether there had been any unreasonable conduct on behalf of the Indigenous litigants; and

• whether the application was made for public benefit or out of personal interest.

Both cases related to applications under other legislation where the construction of the NTA was only a peripheral issue, such that the “spirit” of section 85A of the NTA had no application. In Burragubba, the applicant’s conduct was found to have wasted time and increased the costs of the other parties.

The Court in Burragubba also found that there was no merit in the argument that the applicant was acting in the public interest rather than pursuing a personal interest. The interests of the group of persons within the native title claim group that he was advancing in these proceedings were “quintessentially personal and private”, no matter how large that group was. Similar findings were made in Bropho.
DENIAL OF INDIGENOUS LITIGANTS’ APPLICATIONS FOR COST ORDERS

In Ward v State of Western Australia (No.4) [2016] FCA 358, the native title party unsuccessfully sought costs against the State in relation to the State’s withdrawal of certain admissions in a compensation application. The Court held that there was no unreasonable conduct by the State that would justify a departure from the rule in section 85A of the NTA that each party bear their own cost in native title claim proceedings.

Similarly, in Banjima People v State of Western Australia [2016] FCAFC 46 the native title party unsuccessfully sought costs against the State in relation to the State’s appeal from the native title determination. The Court noted that in fact both parties had appealed the original native title determination and the appeals were heard together. There was no basis to displace the rule in section 85A of the NTA.

In Gomeroi People v Attorney-General of New South Wales (No.2) [2016] FCAFC 116 the native title party was also unsuccessful in its application for costs against the Representative Body, in relation to its application to be reinstated as solicitor on the record for the claim proceedings. The Full Court held that section 85A of the NTA clearly applied and that there was no unreasonable conduct by the Representative Body that would displace that rule.

STATE UNSUCCESSFUL IN APPLICATION FOR COSTS AGAINST NATIVE TITLE PARTY

The State was unsuccessful in its application for costs against the native title party after the Full Federal Court dismissed the native title party’s appeal in Doyle on behalf of the Iman People #2 v Queensland [2016] FCAFC 189 (see our case note on page 15 on “Full Court confirms retrospective validation works”).

The Full Court refused to order costs (Doyle on behalf of the Iman People #2 v Queensland (No.2) [2017] FCAFC 32) stating that, although there were aspects of the native title party’s conduct of the appeal that were “troubling”, the Court needed to avoid the wisdom of hindsight. The arguments were unlikely to succeed, but not so untenable that it was unreasonable for them to pursue them.

KEY POINTS TO NOTE

The increasing appetite by parties in native title proceedings to seek costs orders against one another has continued in 2016, as we predicted in our 2015 Native Title Year in Review. However, the principle that, barring unreasonable conduct, parties bear their own costs in the native title jurisdiction seems to be holding.

Courts now seem more willing to identify positions taken by Indigenous litigants as without merit or privately motivated. In such circumstances, courts will make adverse cost orders. However, where proceedings require consideration of substantive legal questions, unsuccessful parties are unlikely to have costs ordered against them.
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“They have a very integrated practice, a very broad capacity in understanding the needs of a client.”

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Key contacts

Tony Denholder  
Co-Head, Native Title  
T +61 7 3259 7026  
M +61 419 602 697  
tony.denholder  
@ashurst.com

Geoff Gishubl  
Co-Head, Native Title  
T +61 8 9366 8140  
M +61 419 045 687  
geoff.gishubl  
@ashurst.com

Clare Lawrence  
Partner  
T +61 3 9679 3598  
M +61 409 377 215  
clare.lawrence  
@ashurst.com

Gavin Scott  
Partner  
T +61 7 3259 7231  
M +61 419 768 039  
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 +61 408 957 288  
cheyne.jansen  
@ashurst.com

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

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

Leonie Flynn  
Senior Expertise Lawyer  
T +61 7 3259 7253  
M +61 408 105 249  
leonie.flynn  
@ashurst.com