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WONGATHA

& Overlapping Claims NEWS

FEBRUARY 2007

Federal Court decision puzzles everyone

The Federal Court decision on the Wongatha claim and the areas of seven other claims that overlap it has left everyone uncertain of just where native title is heading.

After five years, Federal Court judge Kevin Lindgren did not make a decision about whether native title exists in the area. Instead, he dismissed the claims on technical grounds but did not rule out the bringing of further claims in future.

The judge also expressed disappointment that the claims had not been settled through negotiations. The GLSC and the claimants previously made a big effort to reach a negotiated settlement with the State and other parties but the State ended up refusing to continue with the negotiations.

In the judge's view the claims were not properly authorised. He also felt that the evidence did not support the existence of *group* rights and interests held by the various claim groups under traditional laws and customs. He did say, however, that native title rights and interests *may* be held by individuals or small groups. This has left the door open for new smaller claims to be lodged, a concept that had previously been strongly discouraged by the State government and the National Native Title Tribunal.

Government, miners, pastoralists, claimants, lawyers etc, are all puzzled by the decision. Uncertainty about the existence of native title in the north east Goldfields re-



Before the judgement, elder Aubrey Lynch used the Wongatha People's Declaration to make the point that any decision of the Court would not change the fact that the land will always belong to the Wongatha people and they expect others to always treat them as the traditional owners.

mains. In native title cases elsewhere in Australia other Federal Court judges have taken a different approach to that of Justice Lindgren and it is therefore possible that he has got it wrong.

The GLSC and senior barristers that we have engaged have been carefully analysing the judgement and will be providing further advice to the claim groups in regard to their legal options, which include appealing and/or lodging new claims.

Key points of the judgement

Justice Lindgren did not say 'no native title'

What the judge said

He found that the Wongatha, Cosmo Newbery, Wutha, Koara, Maduwongga and Ngalia Kutjungkatja claims did not meet the authorisation requirements of the *Native Title Act*. He said Mantjintjarra Ngalia is different because, unlike the other claims, it was not amended following the introduction of the tough new authorisation requirements that came with amendments to the Act in 1998, and therefore was not subject to those new requirements.

He also said he was not satisfied that native title rights and

interests are held by the large claim groups under traditional law and custom. He therefore dismissed the claims. At the same time, however, he rejected applications by both the Federal and State Governments for him to find that native title does not exist.

What it means

It means that native title could well exist inside the Wongatha area and that the way appears open for people to continue to seek native title rights and interests through the lodging of new claims.

But great care would need to be taken to ensure that any new claims take into account the evidence already given in the Wongatha trial, meet the require-

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ments as set out in the *Native Title Act*, and are in line with previous native title decisions of the courts. Careful consideration and further legal advice is essential.

Mediation

What the judge said

“Several times during the hearing I encouraged the parties to attempt to find a solution by mediation. ... it is to my mind sad that the matter has had to be resolved by an imposed solution.”

What next?

Appeal?

The judgement is being carefully assessed by GLSC solicitors and legal advice is being prepared for what to do next. Decisions will be made in conjunction with the Wongatha and other claim groups. An appeal of the judgement is one option that might be taken.

Right to negotiate

Negative Federal Court decisions on native title normally cause the right to negotiate to cease. So, immediately Judge Lindgren handed down his decision the GLSC asked him to allow the right to negotiate to continue until any appeals that might come were decided.

Unfortunately, the judge declined to do this, instead he did allow a follow-up request from the GLSC – that the right to negotiate continue while the parties work out what they will do next. For this purpose, he directed that there be a 14-day delay in notifying the Registrar of the National Native Title Tribunal about the dismissal of the claims, thereby preserving the right to negotiate for that period. The 14 days has now run out and the GLSC is taking other urgent action to try to maintain the claims’ right to negotiate.

Future claims?

As it stands, the judge’s decision leaves the way open for new and different native title claims to be lodged over the area. However, great care and further advice is needed before taking this step. The GLSC will be talking with the claimants about this option, in light of advice received from senior barristers.

What it means

From before the Federal Court hearings began, the GLSC worked hard to convince the State Government to reach a negotiated/mediated outcome. And while the State kept saying it was strongly in favour of out-of-court settlements, it is now clear that it was never serious with this important claim, preferring instead to have a Federal Court decision. Mediation of the claim came to an abrupt end in late 2005 when the State withdrew from the process after frustrating it for years.

With the non-decision that has been delivered, there is the possibility of many more new claims now coming forward, which could lead to more years of delay and high legal costs. Perhaps now the State Government will finally get serious about negotiating a fair settlement of the claims.

Mediation?

It must be remembered that this month’s decision took the Federal Court five years to arrive at. It cost a lot of money and in some cases created serious tensions between families and different cultural groups. Many elders died before the judge gave his decision. Even now, after the judgment, there remains a lot of uncertainty.

The GLSC has always believed that negotiating claim outcomes, instead of court decisions, is the better way. The Wongatha decision has reinforced that view.

If the State Government is prepared to get serious with negotiation of claim outcomes, instead of fighting them to the very end in the court, as it did with the Wongatha claim, this would be in the best interests of all concerned, including claimants, miners, pastoralists and the Government itself.

Meetings

The GLSC has already held two big meetings with the claim groups – the first immediately following Justice Lindgren’s decision and the second about 10 days later. Another meeting will be held in the near future. Notices will be sent out shortly.

The GLSC is committed to liaising very closely with the claim groups over coming weeks, to help people gain a good understanding of what the decision means and the options for moving forward, so that claimants can make well-informed decisions on what to do next.