

Best of the best

A paper entitled *Native Title Agreement-Making: Law and Practice and Learning from Experience*, presented by Graeme Neate President, National Native Title Tribunal, has been awarded "Best Paper" of the Melbourne 30th Annual conference.

Two awards are made for papers delivered at the National Conference each year, one for presentation which is announced at the end of the conference, and one for best paper which is made some time after the conference in order that the judging panel have ample opportunity to carefully study each of the thirty-five or so papers.

In his paper Graeme Neate noted that the Native Title Act expressly favours agreed outcomes, and in recent years

there has been a demonstrable increase in the numbers of agreements reached. Mr Neate analysed practical aspects of agreement-making and considered in particular, where agreement-making fits into the native title scheme, some obstacles to agreement-making and finally, some tips on what makes sustainable agreements, particularly in the resources sector.

It is an outstanding paper and will of course be reproduced with other papers in the 2006 *AMPLA Yearbook*; order forms are available at www.ampla.org



Graeme Neate

Wongatha – a question of framing?

Harrington-Smith v Western Australia (No 9) [2007] FCA 31

Marshall McKenna, Hunt & Humphry

The decision of his Honour Justice Lindgren in *Harrington-Smith v Western Australia (No 9) [2007] FCA 31* was delivered on 5 February 2007 at Kalgoorlie.

The result, in simple terms, is that the *Wongatha* application and all the native title applications that overlapped with it were dismissed.

The key issues in the decision are:

- All native title claims have been dismissed to the extent that they apply to the *Wongatha* claim area – largely on the basis that the rights asserted in the applications were on a "group" basis whereas the evidence suggested rights to be held on an "individual" or perhaps "small group" basis;
- His Honour decided that all claims lack authorisation, meaning that the overlapping claims are vulnerable to strike out on that basis;

- He proceeded on the basis that the Western Desert Cultural Bloc ("WDCB") could be a relevant society but did not have to reach a conclusion on this point;
- The western boundary of the WDCB relevantly falls along a line travelling north/south through Menzies and Lake Darlot, meaning that in the context of the case, those claims affecting land to the West of that line could not succeed. Somewhat anomalously, his Honour decided that the claims lying west of the line should thus be dismissed, but I think that there are good grounds to assert that he ought to have determined that there was no native title west of that line.

Some consequences of the decision are:

- Respondents to the native title applications may be able to appeal or cross-appeal, seeking a result that

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From the President



Observing the various sessions and functions at last year's national conference, I found myself wondering (again) what it is that drives us as legal practitioners in resources and energy.

The prospect of fame and glory – advancement to partnership or senior managerial positions, recognition in our chosen fields – certainly; decent remuneration and a decent (or indecent) lifestyle, probably; but most of all, exposure on a daily basis to the rich and infinitely varied areas of the law that we know as energy and resources, with an infrastructure project thrown in every now and then.

The occasional confidentiality agreement aside, what stimulates us most of all is the variety, the day-to-day and year-to-year variability of the challenges that face us in our work. Eight years ago coal seam gas was a pipe dream; five years ago, carbon credits trading lay in the realms of fantasy (until the paper by Martijn Wilder

and Paul Curnow at the 2005 conference brought home just what advances had occurred); and two years ago carbon geo-sequestration was a wild and technically improbable fancy. One can only wonder what lies around the corner.

Add to this the enthusiasm and new ideas that our younger members are bringing to AMPLA at all levels, and the outlook for AMPLA is assured.

AMPLA is redefining its role – in the last two years it has taken a significant role in developing precedent model contracts for the legal industries that it represents. I strongly urge you all to continue to contribute to that process.

Martin Klapper
President

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there be a determination of no native title in all or part of the area the subject of the dismissed applications;

- All of the native title applicant groups whose claims overlapped with *Wongatha* are potentially vulnerable to a strike out under section 84C of the Native Title Act.
- The judgment is an invitation for further claims to be made over all or parts of the area the subject of *Wongatha*.
- The future act regime under the Native Title Act must be complied with in future as his Honour's judgment does not conclude that there is no native title over the claim area. However, there is some degree of complexity with this proposition as the status of the dismissed claims may change again if an appeal is instituted and is successful. In the meantime, there is a question of what form (if any) of "stay" could preserve the right to negotiate to the claim groups whose claims now stand dismissed.

The Court has in a sense made a non-decision. The case, subject to appeal, conclusively determines the proposition that the claims on foot in the proceeding were not authorised. It is (highly) persuasive authority that the claims could not be made out in any event. (It appears that his Honour's *ratio* is that the claims are not authorised. It follows that if he is correct in that conclusion, the balance of his decision is *obiter*.) The decision does not determine whether there is or is not native title over all or some of the area. That is left as an open question.

However, the decision does suggest that the appropriate level of claim is on the basis of "individual" or "small group" rights (as opposed to the communal level at which the failed applications were pitched). As is well known, *Wongatha* was a consolidation of a number of previous overlapping claims over parts of the area. It may be that the direction the judge is pointing is back to a series of smaller claims.

Of course, his Honour has also raised some very fundamental questions. His decision leaves open the issue of whether any claim can be formulated for this region. Under section 13 and section 67, the Native Title Act requires all claims to be heard and determined at one time. Practically, that means that it is impossible to determine native title on the basis of individual rights that may change over time and which might be held by a number of persons.

Conclusions

Perhaps the problem is one of framing the claims to reflect both the evidence and the requirements of the Native Title Act. Or perhaps (as hinted at by his Honour in his summary of the decision), the only solution is political.

Note: A fuller discussion of the case will appear in the next issue of the *Australian Resources and Energy Law Journal*.

AMPLA Model Agreements

As foreshadowed by then AMPLA President Gail Owen in the October 2006 *Newsletter*, the various AMPLA Reference Groups consisting of prominent and experienced AMPLA members have been busy producing AMPLA Model Agreements.

There have now been produced and published on the AMPLA website the following AMPLA Model Agreements approved by the Board for comment and use by members:

1. AMPLA Model Mining Services Contract, Version 2, (17 Dec. 06).
2. AMPLA Model Mining Services Contract, Version 2 – Alternative Clauses (3 Dec 06).
3. AMPLA Model Mining Services Contract Version 2 – Coal & Iron clauses, (3 Dec 06).
4. AMPLA Model Mining Services Contract, Version 2 – Optional Clauses (3 Dec 06).
5. AMPLA Model Mining Services Contract – Pre-Contract Assessment.
6. Exposure Draft AMPLA Model Exploration Joint Venture Agreement (Minerals) – 3 party (3 Dec 06).
7. Exposure Draft AMPLA Model Exploration Farm-in Joint Venture Agreement (Minerals) – 2 party (3 Dec 06).
8. Exposure Draft AMPLA Model Farm In Agreement (Minerals) (20 Feb. 07).

The exposure draft documents have been agreed by their various reference groups but have not yet been circulated to the members at large for comment. Each document, before being finally endorsed by the National Board of AMPLA as a model document, is made available for the inspection of members who are encouraged to download and consider their balance and completeness as a model. All comments will receive a response.

Free Member Access to Model Documents

AMPLA financial members are granted a royalty-free licence to use each model document for commercial purposes. Members may also obtain a marked up version of the Contract showing changes which have occurred between Version 1 and Version 2 of the Contract.

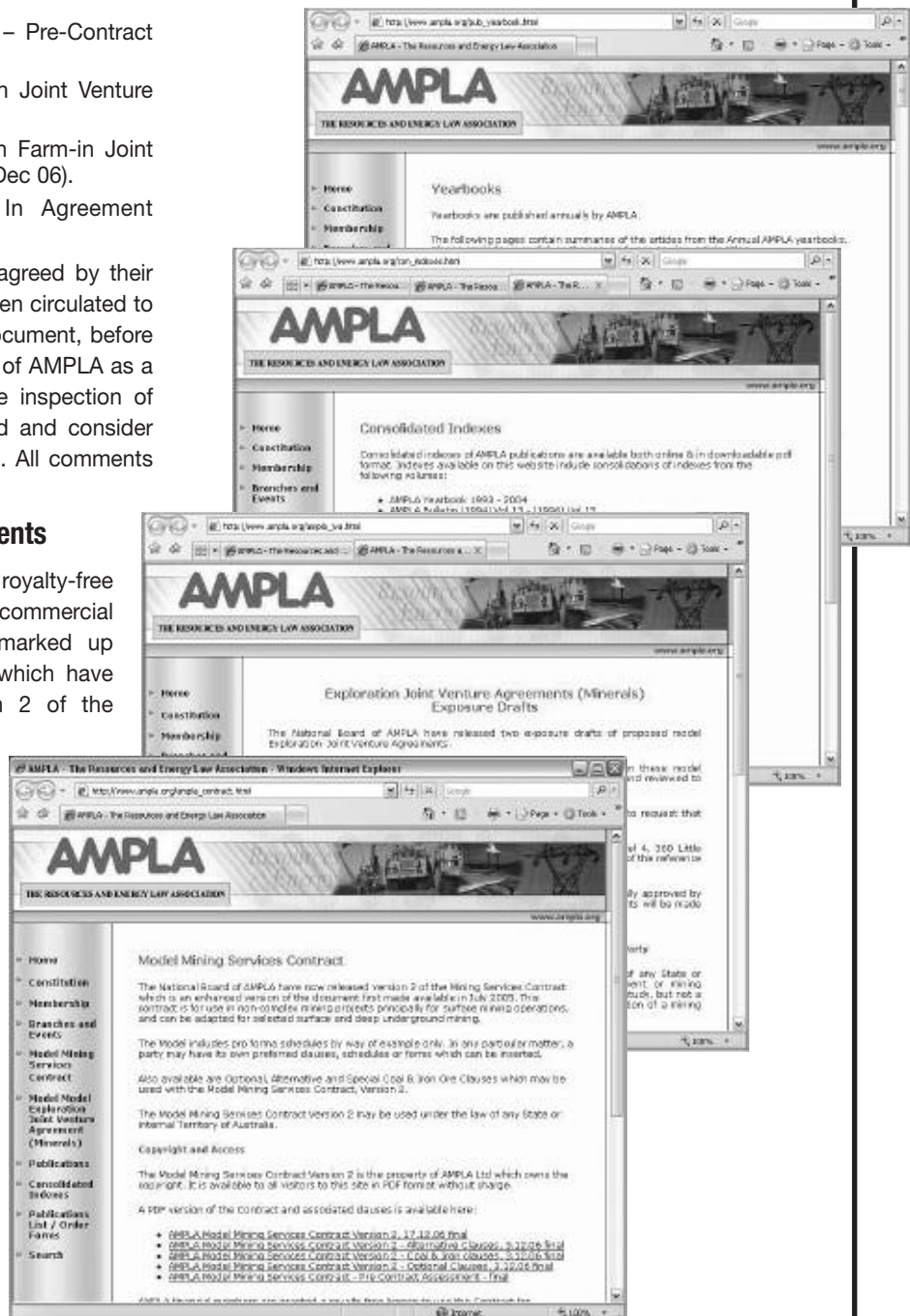
Non-members may use the documents on a similar basis upon payment of a licence fee of \$100.

AMPLA Model Mining Services Contract, Version 2 – in Spanish

Following negotiations between the then Co-Chairs of the Mineral Law Committee of the International Bar Association, Section on Energy, Environment, Natural Resources and Infrastructure Law (SEERIL), being AMPLA Board member Tony Wassaf and Patricia Nunez, of Nunez Munoz & Cia Limitada, Santiago, Chile, an agreement has been signed between AMPLA and the IBA to produce a Spanish Version of the AMPLA Model Mining Services Contract, Version 2.

Work has already commenced on the Spanish Version which will be published and available throughout the world via the AMPLA website.

To date, in the short time that the Model Agreements have been published on the AMPLA website, there have been nearly 2,000 visits to the Model Agreement page. This demonstrates that the Model Agreements are proving useful to members, and other visitors to the site. It also supports the anecdotal knowledge of the AMPLA office and Board members that the AMPLA Model Agreements are becoming more and more accepted and used in the mining industry. This is especially so for the Model Mining Services Contract for which there appears to be no significant similar document of such advanced sophistication commonly available anywhere in the world.



The Queensland Conservation Council has failed in its attempt to stop the Newlands Coal Mine expansion

by Tony Nunan and Andre Dauwalder, Hopgood Ganim

The QCC recently objected to an application by Xstrata Coal to expand its Newlands Coal Project. The QCC's four main objections were largely related to greenhouse gas emissions and were particularised as follows:

1. the mine will cause adverse environmental impacts;
2. the mine will prejudice the public right and interest;
3. there are good reasons to refuse to grant the mining lease; and
4. the mine is not consistent with the principles of ecologically sustainable development.

To support its objections, the QCC argued that each of these factors would be contravened unless conditions were imposed upon Xstrata to avoid, reduce or offset the emissions of greenhouse gases that are likely to result from the mining, transport and use of the coal from the mine. The implications of this are far-reaching, as it would not only require a relevant consideration of greenhouse gas emissions but would impose considerable obligations upon a coal miner to account for its own emissions and take measures to reduce them.

The QCC led evidence in an attempt to show a causal link between human activities and climate change. A number of witnesses in particular relied on the *Stern Review on the Economics of Climate Change*, which recently received significant media coverage.

In his decision, President Koppenol acknowledged the assertions made in the Stern Review and the *Fourth Assessment Report of the Intergovernmental Panel on Climate Change*. In addition to this, he also gave weight to criticisms published by Professor Robert Carter and Professor Sir Ian Byatt. Not only did he question the accuracy of a number of reports relied upon by QCC's witnesses, but President Koppenol queried the magnitude of global warming itself, when he noted:

"With all respect, a temperature increase of only about 0.45 degrees Celsius over 55 years seems a surprisingly low figure upon which to base the IPCC's concerns about its inducing many serious changes in the global climate system during the 21st century."

In response to the QCC's submission that the Tribunal should consider ESD principles "to mitigate the serious environmental degradation caused by global warming", President Koppenol arrived at the following conclusions:

- There exists a lack of causation between the greenhouse gas emissions of the Newlands Coal Mine and any "serious environmental degradation" caused by global warming and climate change.

- The volume of emissions emitted by the mine, on a global scale, is negligible. Therefore, even complete elimination of emissions from the mine would only have a minimal effect on global warming or climate change.

In addition, President Koppenol decided not to impose any conditions to avoid, reduce or offset greenhouse gas emissions on the basis that the imposition of such conditions would adversely impact upon the economic and social health of Queensland.

It was on this basis that the Tribunal did not accept the four main objections presented by the QCC. Therefore, the Tribunal made the following recommendations to the Minister for Mines and Energy:

- This additional surface area application be granted in whole without any of the conditions sought by the objectors; and

- The related environmental authority (mining lease) application be granted on the basis of the draft environmental authority for the application, without any of the conditions sought by the objectors.

PEOPLE GOING PLACES

Tom Kennedy, formerly of Deacons in Brisbane, is now with Shell Gas & Power in The Hague as a commercial LNG supply manager. **David Berrie**, formerly of WMC, is now Executive Director – Corporate at Summit Resources Limited. **David Stokes**, has moved on from Iluka Resources and is now General Counsel, Gindalbie Metals in Western Australia. **Mark Boydell** rejoins, and **Andre Dauwalder** joins, the Resources, Energy and Infrastructure Group at Hopgood Ganim. **Andrew Komesaroff**, formerly of Corrs Chambers Westgarth, has commenced sole practice as Andrew Komesaroff and Associates at ph (03) 9593 2259. **Peter Glover** has moved from Queensland to Melbourne to join law firm Holman Fenwick & Willan. **Scott McConnell**, previously General Counsel of Roche Mining Pty Ltd is taking the plunge and going to the bar in Queensland, details to be finalised but he is available on mobile 0408 074 287.