DISTRICT COUNCIL OF Streaky Bay

Golf Club – Summary of Native Title to Date

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Summary of Native Title Process to Date

Mabo Decision

The 1992 *Mabo vs Queensland (No.2)* High Court decision found that Aboriginal and Torres Strait Islander people had a concept of land ownership prior to colonisation AND that British sovereignty over Australia DID NOT surrender the ownership of all land to the Crown.

Primarily the concept of "terra nullius" (land belonging to no one) was overturned due to this decision as it was acknowledged that the Australian continent was in fact populated by a large number of indigenous peoples at the time of colonisation and that they had existing customary laws, including strong connection the land (the concept is described as "country" by Aboriginal peoples) and thus rights to the land on which they lived (Native Title rights).

What does Native Title Mean?

Native title is the legal recognition that some Aboriginal and Torres Strait Islander peoples have rights to, and interests in, certain land because of their traditional laws and customs.

The rights granted by native title are not unlimited – they depend on the traditional laws and customs of the people claiming title. Other people's interests in, or rights to, the land are also relevant, and usually take precedence over native title. To have native title recognised under the *Native Title Act 1993*, Aboriginal and Torres Strait Islander peoples must prove they have a continuous connection to the land in question, and that they have not done anything to break that connection (such as selling or leasing the land).

Native title can be recognised in different ways. Aboriginal and Torres Strait Islander peoples may be granted the right to live on the land; access the area for traditional purposes; visit and protect important places and sites; hunt, fish or gather traditional food or resources on the land; or teach Aboriginal and Torres Strait Islander laws and customs on the land. In some cases, native title can include the right to own and occupy an area of land or water to the exclusion of all others.

Why is Native Title Important?

Native title is important because dispossession and denial of land was the first act in the relationship between Aboriginal and Torres Strait Islander peoples and Europeans.

The *Native Title Act 1993* is important because it determines how native title interests are formally recorded and recognised. It sets the rules for dealing with land where native title still exists or may exist.

Today, native title has been recognised in more than two million square kilometres of land. Indigenous Land Use Agreements (ILUA) set out arrangements between native title holders and others regarding who can access and use the land in question. These agreements play an important role in making native title work for all Australians. There are currently 967 registered ILUAs in place.

The Wik Decision

The 1996 Wik decision determined that Native Title could, in some circumstances coexist with some types of leasehold (such as pastoral leases). The Wik decision deals primarily with pastoral leases. The decision means:

- a pastoral lease does not confer rights of exclusive possession on the holder of the lease;
- the rights and obligations depend on the nature and terms of the lease;
- where the rights of the lease are in conflict with native title rights, then the rights under the lease will prevail to the extent of any inconsistency; and
- the granting of a lease does not extinguish any remaining native title rights.

A *lease at common law* (such as the lease currently operated by the Golf Club) is the right of exclusive possession and therefore extinguishes Native Title **where that lease has been executed prior to 23 December 1994**.

When was the Wirangu Claim Lodged?

The Wirangu people (and many other groups indigenous to South Australia) lodged their respective claims during the 1990s. For the Wirangu, their claim was made in 1998 with very little movement occurring until recently when Premier Marshall insisted claims commence assessment as natural justice was not being afforded these groups by further delaying a process that has been completed 10-15 years ago in all other States.

See the section on What Council Has Council Undertaken to Date? The finding regarding the Golf Club was handed down on 17 December 2020 and Council has endeavoured to respond as quickly as possible to that finding.

Why was the Golf Club Lease Not Seen as Extinguishing Native Title?

All agreements regarding the Golf Club have been held between Council and the Golf Club as Council acts on behalf of the Crown when given care and control of Crown Land.

In the case of the Golf Club, the land was held under licence (a non-exclusive possession arrangement) until 1994 at which time the Council took to move toward a lease model, primarily for the purposes of moving public liability responsibility from Council to the club, as noted in Judge Charlesworth's decision.

Judge Charlesworth has noted the following issues and therefore has determined that no executed lease existed to extinguish Native Title:

1. A lease appears to have been drawn up in June 1994;
2. A letter dated 14 September 1994 clearly stated the lease had not yet been executed (signed);
3. Council minutes of 18 April 1997 show the lease had not been signed by that date either;
4. No copy of the lease showing a date of execution (date on which signatures were affixed) can be produced by either Council, the Club, nor the Minister;
5. No correspondence can be found from the Club to Council agreeing to the terms of the lease, in-principle or otherwise;
6. The Club was unable to provide evidence Public Liability Insurance was taken out in 1994 which was and remains a requirement of the lease;

7. The Club was not able to provide evidence the Management Committee (established by Council in 1975) was dissolved, nor evidence of when the Incorporated Body (incorporated in 1975) commenced management of the site;
8. Council could not provide evidence they had ceased paying public liability insurance for the club before 23 December 1996; and
9. No evidence was able to be provided by Council nor the Club that the payment of the peppercorn rent was ever requested by Council (this is not the custom of Council to ever request this payment).

There is therefore no evidence (that meets the requirements of the Evidence Act) that a lease was executed prior to 23 December 1996.

Why was the creation of the Golf Course not seen as Significant Works?

This is a little more difficult to understand and part of the reason Council decided to appeal the decision.

There are several matters Judge Charlesworth considers and they are summarised below.

Who carried out the works?

This matter is important because, as the land remains vested in the Crown under Council's care and control, the work had to have been undertaken by, or on behalf of Council.

There are no official Council or Club records regarding the works undertaken and to that end Mr David Lane and Mr John Rumbelow have provided significant affidavits and photographs of the works for Judge Charlesworth to consider.

There are simply no records to show that Council requested the works to be undertaken, no motions to say that Council agreed to them, no letters requesting approval and therefore none providing approval, budget sheets from Council showing they paid for any part of the works, nor that staff were remunerated for undertaking the works. The use of Council equipment such as graders etc is not sufficient evidence as there is no written agreement to the usage, nor any records of hiring the equipment, nor any waiving of a hire fee recorded.

The question might then be why were no records kept? A quote from John Rumbelow's affidavit will explain most clearly:

> *This (the works carried out) was a mostly informal process because it was almost entirely the same people who were on the Management Committee as were running the Gold Club, and many of them were also Councillors or council staff.*

The judge agrees however, that the work meets the definition of "public work" as it is more probable than not that the work was carried out with permission of the Council through its Management Committee up to 1994. It is also true that criminal offences were available that would prevent any person undertaking development on the land without the Council's permission.

Was there major disturbance to the land

Judge Charlesworth considered a number of matters in determining whether "major disturbance" was undertaken in the establishment of the Golf Course.

The meaning of "major disturbance".

For works to be considered a "major disturbance" they must meet several criteria.

1. The works have to be over a significant portion of the land when considered in the context of the size of the land as a whole.
2. The works need to be of a permanent nature – i.e., they should be built with the intent of existing indefinitely.
3. The amount of human effort required to undertake the works cannot be part of the consideration, as the meaning of "major disturbance" applies only to the land.

For the section where Sceale Bay road existed Judge Charlesworth agrees as the road was built prior to 1975 and would extinguish native title through that act alone. The ripping of the road and remediation to be included in the golf course is therefore immaterial to the decision.

Judge Charlesworth has found that "major disturbance" has not been caused to significant areas of the golf course as follows:

1. "…[R]emoval of vegetation or the reseeding of land with grass did not cause "major" disturbance to the large tracts of land forming the fairways".
2. If the fairways were not maintained, they would revert to natural scrub land and therefore the works cannot be seen as being done with the intent of them existing indefinitely.
3. The regular 'modification and adaption of the parklands to allow golf to be played' occurred over time and therefore were also not developed with an intent of them existing indefinitely.
4. None of the various earthworks, when considered separately, cause "major" disturbance at the time of their undertaking.

What has Council Undertaken to date?

Council has been working closely with our solicitors for more than 18 months gathering evidence and working through the various matters required of it to address the Wirangu No.2 Part A claim over many areas of the Streaky Bay District. Council have not advertised this engagement publicly as it is normal operational matter, however all information is available easily enough to the public through the native title website at http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/details.aspx?NTDA_Fileno=SC1997/006

Council is listed as a respondent to the claim as is normal in such circumstances. The only matter Council has contested to date is that of the golf course. The remainder of the claim area has been fairly easily settled as the application of the law has proceeded fairly easily. The golf club were at the time aware of the matter as they have been approached on numerous occasions to assist with searching for relevant documents etc. The hearing was held 21 July 2020. The CEO attended the hearing via Zoom. The Mayor was able to attend for part of the day. Council was invited as respondents. No one from the golf club attended at the time though after the hearing were made joint respondents as requested by Judge Charlesworth.

Judge Charlesworth's decision was handed down on 17 December 2020.

If an appeal of the decision were to be lodged, Council was advised that would be required no later than 15 January 2021.

Council met with approximately 30 members of the public at a Special Meeting held 22 December 2020 to consider community reaction and Council's intentions regarding an appeal of the decision.

The Elected Body at that time requested some further information from our solicitors and barrister which was provided during the Christmas break.

Council attempted to meet with the Wirangu peoples to ascertain their intentions regarding exercising their native title rights over the blue sections of the map shown. This request was refused by the Wirangu people's solicitors as they had not yet discussed the outcomes of the case with their clients, nor advised them of their rights.

A further Special Meeting was held on 6 January 2021 where Council moved the following:

Recommendation

MOVED: Cr Wheaton SECONDED: Cr Gunn

That Council, having considered Report No 18.11, Title: Streaky Bay Golf Club Tenure, dated: 6 January 2021 and its role under Section 6, 7 and 8 of the Local Government Act 1999

1. commence the appeal process with a view to mediation should that be possible;
2. write a letter to The Honourable Attorney-General to make her aware of the outcome and local implications for the Streaky Bay community and requesting assistance with the appeal process; and
3. conduct community engagement as soon as practicable.

CARRIED

In response to this motion the CEO has:

- instructed our solicitors to commence the appeal process
- written a letter for the Mayor's signature to the Attorney-General
- set a date for community engagement (today's meeting).

The Appeal

Instructions to Council's solicitors include a letter to the Wirangu people's solicitors to the following effect:

> *Our client [Council] is concerned to ensure that the existing Golf Course land can continue to be used as a Golf Course in perpetuity, whether under lease to an appropriate community organisation or operator, or otherwise. Such use needs to be unconstrained by the exercise of any native title rights, for example, camping on a fairway.*
>
> *Such use, including under lease, can probably continue as of right for so long as the land continues to be used as a Golf Course. That said there may be some uncertainty in respect of the land, which was dedicated for water reserve purposes in 2003, and what might occur if the balance of the Golf Course land was rededicated for something other than 'parklands'.*

It is not necessary for native title to be extinguished to give effect to our client's desires; extinguishment is simply one way of achieving that outcome.

We are instructed to propose a compromise for your client's consideration, namely, the settlement ILUA being negotiated with the State will include appropriate terms enabling:

1. *the Golf Course land to be used as a golf course in perpetuity, and for so long as this continues the exercise of native title rights on the Golf Course land will be limited to those which do not interfere with such use (for example, exercising a right of access would appear to be no different to what the public may do, as a matter of practical reality);*
2. *the Golf Course will be (re)named in consultation with your client to reflect the fact that it lies on Wirangu land and/or any particular significance to the Wirangu people; and*
3. *the Council will be obliged to require any operator (including any lessee or licensee) to:*

    A. *include words (to be negotiated) in the operator's promotional material (e.g., website, brochures) which explain that the Golf Course lies on Wirangu land and also explains any particular significance (if any) of the Golf Course land to the Wirangu people; and*
    B. *waive any membership fee requirement for all Wirangu persons who wish to be members of the Golf Club.*

Upon binding agreement being reached as to the foregoing, the appeal would be discontinued with no order as to costs.

We appreciate that it may take some time to obtain instructions in relation to the foregoing. It might be useful if the Applicant (all its members) could meet with the full elected membership of the Council in a confidential workshop to discuss the terms of settlement.

To allow time for negotiations, we propose to commence the appeal within the relevant time limits, but then seek to have it adjourned, and any respondents' obligations suspended, to permit negotiations to occur. We seek your client's consent to this.

The Elected Body felt the option to withdraw the appeal would mitigate the continued expense currently undertaken by Council. To date the cost of proceedings, have been $80,000 (this equates to a 2.5% rate rise) to date. Council would like to keep further costs to a minimum if it is at all possible. Continued expenses of negotiating and ILUA form part of that decision.

Letter to the Attorney-General

The letter written and sent to the Attorney-General is attached to this document.

Public Meeting

The public meeting is intended to assist Council to understand community sentiment for the future. This understanding will assist Council in their decisions regarding the appeal process and any negotiations to be had with the Wirangu peoples should that eventuate.