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Adani mine leases and national parks in doubt after native title court decision

Ruling in favour of challenge against Noongar Indigenous land use agreement may lead to amendment of Native Title Act

A Melbourne rally against the Adani coalmine, which is already facing legal challenges and disputes from and within the Wangan and Jagalingou traditional owner group.

Helen Davidson
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Resources projects including the Adani coalmine, pastoral leases and a number of national parks across the country are potentially in doubt following a shock federal court decision striking out a native title deal in Western Australia.

The ruling by a full bench of the federal court on Thursday has prompted speculation the Native Title Act will be amended in response.

On Thursday the federal court ruled in favour of a challenge against the Noongar Indigenous land use agreement (ILUA), which sought to exchange $1.3bn in land, payments and benefits over 12 years in return for the Noongar people extinguishing native title rights on 200,000 hectares in south-west WA.

The court agreed with five Noongar applicants who argued the deal was invalid because they had refused to sign on with other representatives. Four of the six

agreements struck could not be legally registered, the court found, because the Native Title Act required “all” claim group members to agree.

The decision has overturned a legal precedent set in 2010 that formed the basis for ILUAs across the country between traditional owner groups and mining companies, pastoralists and governments of all levels.

Under the 2010 ruling, an ILUA did not need to have all claim group representatives on board if the majority of the broader clan or claim group voted in support.

Now, Guardian Australia understands, regardless of the broader support, an ILUA must have all representatives sign on.

“The key thing here is if there’s been an ILUA where all the registered claimants haven’t signed, and then tenures and other grants have occurred, those tenures and grants are now at risk,” Gavin Scott, who specialises in native title with the Ashurst law firm – which has previously represented Adani – told Guardian Australia.

Scott said this potentially included national parks, compulsorily acquired lands and mining tenures if the agreements with traditional owners of those lands were not signed in accordance with the decision set on Thursday.

“We don’t know yet how many ILUAs this could affected,” he said. “But I imagine many mining companies are looking at ILUAs they have in place and working out whether they have been signed in the manner this requires.”

The new ruling even throws into doubt agreements that did not have a claimant’s signature because they had died, Scott said.

“There are many ILUAs out there where a claimant has passed away,” he said. “The tribunal has forever registered ILUAs signed by the living complainants and just taken death notices [into account].”

He said the court had now determined claimant groups should use a subsection of the Native Title Act to remove the names of deceased persons from the group’s register to avoid the problem, similarly for removing “recalcitrant” members.

The controversial Adani coal project in Queensland – fiercely opposed by environmental groups but supported by government – is already facing a number of legal challenges and disputes from and within the Wangan and Jagalingou traditional owner group. The Noongar decision has reportedly sparked further panic.

Adani, which has already indicated any further delays could see it walk away, has sought assurances from the Queensland government its Galilee basin mine will go ahead, according to the Townsville Bulletin.

The land use agreement for Adani was voted down twice by the broader Wangan and Jagalingou group, until it swung majority support last year. There is now legal action between the split claimants amid allegations of payments to pro-Adani members, as well as a separate fresh challenge to the state minister’s granting of the mining lease.

While a high-profile example, the Adani project is not the only instance of disputes within traditional owner groups, land councils and mining companies over the level of support for a particular agreement.

The minister for northern Australia, Matt Canavan, said the federal government was seeking advice on the implications of the decision.

A spokeswoman for the attorney general, George Brandis, told the Bulletin it was considering its next steps in the wake of issues raised by the federal court, to "provide certainty for all parties in the native title system".

"We note that the Western Australian government has said that it is for the WA state solicitor's office to decide whether to seek special leave to appeal the decision to the high court of Australia," she said.

A high court challenge would likely take 12 to 18 months to be heard.

Brandis's office has been contacted for further comment.

The WA premier, Colin Barnett, said only a few of the 20,000 Noongar people affected had opposed the deal and had "frustrated" it through the courts.

Barnett vowed the deal would still proceed