

NTRU Report

Native Title Conference 2008

The upcoming conference is focused on how native title can recognise and strengthen the fabric of Indigenous nations. This year's theme is *Koora, Yirra, Boordah* meaning, 'past, present, future'. Sub themes include:

- developing young leaders
- women's perspectives on native title
- economic development
- land management
- partnerships
- negation, mediation and conflicts
- collective enterprise and private wealth
- a national voice
- Indigenous representation
- Governance
- Government and native title
- Reconciliation

The conference will be held at the **Perth Convention Centre, 3-5 June 2008**. The NTRU is currently calling for conference papers. Please send submissions to ntru@aiatsis.gov.au, or email us if you have any further queries.

Staffing

Kerry Kennell, has joined the NTRU as a part of the Aurora program. She is a Torres Strait Islander and comes from Griffith University, in Queensland. Kerry has interests Indigenous people and the law, especially, native title and property law. She has previously worked with local government in Victoria and is currently starting her fourth year law degree.

What's New

Reforms and Reviews

ABARE, 2007 Torres Strait Islanders: Improving their Economic Benefits from Fishing, ABARE Research Report 07.21

ABARE was commissioned by the Fisheries Resources Research Fund to undertake a survey of fishers in the Torres Strait to examine this perception and to identify ways in which Torres Strait Islander fishers could obtain higher economic benefits from commercial fishing.

NSW Auditor General's Report 2007 Department of Lands. Aboriginal Land Claims

The NSW Auditor General has recommended that the Department reduces the time taken to process Aboriginal Land claims. The Department investigates aboriginal land claims made under the *Aboriginal Land Rights Act 1983* (NSW). It has been recommended that the Department reduces the time taken to transfer legal title to successful Aboriginal Land claimants. The Crown Leaseholds entity has \$1.0 billion of land granted to Aboriginal Land claimants that has not been transferred due to the absence of legal title. Legal title cannot pass until the land has been surveyed and details recorded on the State's Digital Cadastral Database so that formal title can be issued in the name of the relevant local Aboriginal Land Council. Until legal title passes, claimants cannot fully access or use the land. Based on current survey resourcing capacity, it may take more than 20 years before all current granted claims are cleared.

Recent Cases

Australia

Authorisation

Anderson v State of Western Australia [2007] FCA 1733

Justice French considered a motion to amend a native title application to replace the existing applicants. His Honour considered evidence of the authorisation meetings, how participants were selected, given notice and the resolutions that were reached. Justice French noted that there were both targeted and general attempts made to locate the descendants of the apical ancestors of the claim group and was satisfied that there was no traditional decision making process under traditional law and custom that must be complied with. His Honour accepted that a process of majority decision making was agreed to and adopted by a sufficiently representative section of the native title claim group for the purpose of dealing with matters arising in relation to the application.

Button Jones (on behalf of the Gudim People) v Northern Territory of Australia [2007] FCA 1802

This is one of 55 applications for the determination of native title under s 61 of the Act which have been the subject of advice by the Native Title Registrar (the Registrar) under s 66C of the Act. To explain the significance of that advice, it is necessary to refer to s 66C and s 94C of the Act. The full list of 55 applications (there is one duplication) is contained in the advices of the Registrar.

Claim of right

Mueller v Vigilante [2007] WASC 259

This case considered whether a claim of right under s 22 of the *Criminal Code* (WA) was available to third parties. This particular case involved a non-Indigenous Senior Coastal Officer for the Kimberley Land Council. He was fishing with two Indigenous boys at the time when he was charged for catching undersized crabs. It was found that, although there was no occasion for them to formally exercise it, the boys, by reason of their status as Aborigines, had a claim of right to the undersized crabs that were in the possession of the respondent. The respondent's possession of the undersized crabs was no more than an incident of the possession of the persons who had a claim of right to possess.

Consent determinations

Trevor Close on behalf of the Githabul People v Minister for Lands [2007] FCA 1847 -

Native title consent determination.

Walker on behalf of the Eastern Kuku Yalanji People v State of Queensland [2007] FCA 1907 (9 December 2007)

Determination for Eastern Kuku Yalanji People.

Costs

Gumana v Northern Territory of Australia (No 2) [2007] FCAFC 168

Judgment on costs.

Joinder

Akiba and Others on behalf of the Torres Strait Regional Seas Claim People v State of Queensland (No 3) [2007] FCA 1940 (7 December 2007)

Application for review of Registrar's decision dismissing a joinder motion made by a national of Papua New Guinea asserting family and historical links to claim area as well as ownership of reefs, seas and waters. The motion was dismissed. It was found that no basis for assertion was disclosed and that there was no identification of area in which ownership is asserted.

Native title claim group

Que Noy v Northern Territory of Australia [2007] FCA 1888

This case involved a motion under s 66B involving the Fish River Claim and the Douglas North Claim and the approval of terms under which access is to be given for the proposed Wadeye to Ban Ban Springs pipeline running through the two claim areas. There was a dispute between Majorie Foster and the other applicants over the terms of the agreement. Ms Foster represented

the Kamu people who, combined with the Wagiman and Warai were the claim group. Justice Mansfield found that in asserting that she was the sole authority on behalf of the claim group, Ms Foster had exceeded the authority given to her by the claim group. Accordingly, she was removed as applicant for the claim. However Justice Mansfield noted that she remains a members of the native title claim group and her family will continue to recognise and refer to her as a senior Kamu person.

Parry v Northern Territory of Australia [\[2007\] FCA 1889](#)

Case involved a motion under s 66B of the *Native Title Act 1993* (Cth) by certain members of the native title claim group to replace Marjorie Foster, one of the persons comprising the current 'applicant' with her daughter, Margaret Foster and with Arthur Que Noy. In reaching his decision, Justice Mansfield made reference to the decision of *Que Noy v Northern Territory of Australia* [2007] FCA 1888 (the Douglas North claim). For similar reasons he found that evidence from the anthropologist, Kim Barber removed the authority of Majorie Foster to make the application.

Procedural decisions

Allison v State of Western Australia [\[2007\] FCA 1969](#) (12 December 2007)

By an amended notice of motion filed on 31 August 2007, with five named persons ('the Movers') seeking orders for access to certain documents. The motion has been filed in native title proceedings known as the Wanmulla / Sir Samuel claim ('Sir Samuel 2 Claim'). The Sir Samuel 2 claim relates to an area in the north-west Goldfields region of Western Australia, located between Wiluna and Leinster

Respondent applications

Commonwealth of Australia v Clifton [\[2007\] FCAFC 190](#) (6 December 2007)

Respondent to an application for a native title determination seeking a determination of native title.

The respondent was not authorised by native title claim group as required by s61 of the Act. The Court reiterated that it can only make a determination of native title in favour of a person who has made an application under s13 of the Act and emphasised the significance of the statutory requirement that a determination of native title must be made in accordance with the procedures of the Act.

Rights and interests

Griffiths v Northern Territory of Australia [\[2007\] FCAFC 178](#)

Involved an appeal concerning three claims heard together: the first filed by the Ngaliwurru and Nungali Peoples claim over a parcel of land in the Tennant Creek township and the second filed by Alan Griffiths and William Gulvin as protective responses to the notices issued by the Northern Territory Government of a proposed compulsory acquisition. A third claim was filed by the same applicants over other lots covered by a Special Purpose Lease owned by the Conservation Land Corporation.

In the initial decision, handed delivered on 17 July 2006 it was held that that Ngaliwurru and Nungali Peoples had established that they had native title rights and interests in the claim area but this does not include exclusive rights to possession, occupation, use and enjoyment. An appeal was lodged arguing that the rights and interests possessed under traditional laws and customs acknowledged and observed by the native title holders conferred possession, occupation, use and enjoyment of the determination area. The Northern Territory Government filed a cross appeal that the laws and customs asserted were not traditional. The appeal was allowed and the determination amended to reflect the broader rights and interests recognised.

In reaching their decision, Justices, French, Branson and Sundberg considered the criteria for exclusivity and the classification of rights and interests. They also noted that the a change from patrilineal to cognatic descent does not negative continuity.

Strike out applications

Kite v State of South Australia [\[2007\] FCA 1662](#)

Involves an application by the State of South Australia that the claim of John Gilbert Kite, be struck out or else be summarily dismissed. Justice Finn found that the Mr Kite's application was flawed in a number of respects. His Honour noted that there were substantial ambiguities and contradictions between the evidence and submissions made during the hearing. Justice Finn also found that even though the evidence suggests that the claim group members were authorised to make the claim in accordance with traditional law and custom, there was some doubt as to the rights of the community of descendants advancing the claim. His Honour found that the claim 'may well owe more to concepts drawn from common law conceptions of property than from traditional laws and customs'. His Honour also expressed doubts as to the actual composition of the claim group itself.

Tax and trusts

Shire of Derby-West Kimberley v Yungngora Association INC [\[2007\] WASCA 233](#)

Involves an appeal from a decision of the State Administrative Tribunal to grant the Yungngora Association Inc an exemption from an obligation to pay rates on the basis that the land was used exclusively for a charitable purpose. The association holds land including the Noonkanbah pastoral station and has been endorsed as a charitable organisation providing housing, schooling and facilities for the local community. The shire had argued that the charitable purpose of the station was incidental to its commercial purpose. However the tribunal had found that the land was charitable, being to improve the economic position, social condition and traditional ties to the Land of the local Indigenous community. However on appeal it was found that the tribunal had erred in law by focusing on the benefits of the pastoral enterprise rather than the use to which the land was actually put. It was noted that the 'land is not used for charitable purposes where the land is used for

the purpose of raising funds for charitable purposes'. The Court held that the 'benefits to the community and its members are not sufficient for a finding that the Land is used exclusively for charitable purposes'.

International

Tsilhqot'in Nation v. British Columbia, [2007 BCSC 1700](#)

Case involved an application seeking a declaration of Tsilhqot'in Aboriginal title in a part of the Cariboo-Chilcotin region of British Columbia defined as Tachelach'ed (Brittany Triangle) and the Trapline Territory. The plaintiff also sought a declaration of Tsilhqot'in Aboriginal rights to hunt and trap in the Claim Area and a declaration of a Tsilhqot'in Aboriginal right to trade in animal skins and pelts. In reaching its conclusion, the court noted that:

I have come to see the Court's role as one step in the process of reconciliation. For that reason, I have taken the opportunity to decide issues that did not need to be decided. For example, I have been unable to make a declaration of Tsilhqot'in Aboriginal title. However, I have expressed an opinion that the parties are free to use in the negotiations that must follow.

Belize Supreme Court Claims Nos. 171 and 172 of 2007 (Consolidated) re Maya land rights

Determination finding that the 'claimants Villages of Santa Cruz and Conejo and their members hold, respectively, collective and individual rights in the lands and resources that they have used and occupied according to Maya customary practices and that these rights constitute 'property' within the meaning of sections 3(d) and 17 of the Belize Constitution.'