

## What's New August 2007

### Cases

#### ***Webb v State of Western Australia* [\[2007\] FCA 1342](#)**

This case involved a native title determination application lodged by SWALSC over the southwest corner of Western Australia and follows the low water mark covering an area from Dunsborough to Capel. The application was registered in October 2006 and considers the new s 94C enacted under the *Native Title Amendment Act 2007*. The Native Title Registrar is responsible for notification under s 66C of the NTA. The Court considered the relationship between s 94C and s 66C. It noted that the purpose of s 94C is to 'provide for summary dismissal of native title determination applications that have been filed to secure procedural rights with respect to future acts covered by the right to negotiate provisions...the mechanism of summary dismissal enliven when, broadly speaking the procedural rights are effectively exhausted and the native title determination application is not being pursued to a mediated or litigated determination'. The report provided by the native title registrar is a 'statutory means for drawing the attention of the Court to applications which may meet the conditions of dismissal under s 94C'. The Court is not bound by the report and dismissal under s 94C is not considered unless there is failure to comply with direction under s 94C(1)(e)(i) of there has been a failure to take steps to resolve the claim, and following the notification of proposed future acts. Justice French found that the area of the claim was much larger than areas covered by future act notices and the application was a part of regional work program. Accordingly he found that there was no occasion for consideration of mandatory dismissal provisions.

#### ***Gudjala People 2 v Native Title Registrar* [\[2007\] FCA 1167 \(7 August 2007\)](#)**

This case involved an application for review of a decision by the Native Title Registrar not to register an application. The Court considered the applicant's argument that they were (1) misled by the Registrar who had accepted a previous application on similar ground but based in a different claim area (2) that the applicant was denied procedural fairness in the Delegates consideration of the statutory provisions (3) that an error of law had been made and (4) that the material that had been tendered did not justify failing the registration test.

In reaching its decision the Dowsett J said that the Registrar was bound by their statutory duty rather than a previous decision. Also even though there may be an error in decision making this may not necessarily deny the applicant procedural fairness. Dowsett J noted that the role of the Registrar is administrative and a failure to refer to a salient fact is not within this role. His Honour also considered the principles of *Yorta Yorta* and considered the reasons of the registrar, identification of the claim group. He found that even though membership of the claim group was asserted there was no evidence of the traditional laws and customs upon which membership was to have been based. His Honour did not encourage this approach but found that it was sufficient that the group was adequately identified by reference to apical ancestors. The Court considered the factual basis for claimed Native Title and found that the overlaps in the claim area were not adequately explained and that the application fails to explain how, by reference to traditional law and customs presently acknowledged and observed, the claim group is limited to descendants of the identified apical ancestors. Dowsett J also noted that no basis is shown for inferring that there was, at and prior to 1850-1860, a society which had a system of laws and customs from which relevant existing laws and customs were derived and traditionally passed on to the existing claim group. His Honour ultimately found that the claim should not be accepted for registration.

#### ***Van Hemmen on behalf of the Kabi Kabi People #3 v State of Queensland* [\[2007\] FCA 1185](#)**

This case involved the review of a decision by the Native Title Registrar to not accept the application of the Kabi Kabi #3 applicants. The Kabi Kabi #2 applicants, the Gurang Land Council and Queensland South Native Title Services supported the registrar's decision that the Kabi Kabi #3 applicants were not properly authorised and claimed that Kabi Kabi #3 should be dismissed pursuant to s 84C. The Court accepted this argument noting that the claim overlapped with another claim and that eleven of the twelve named apical ancestors were named in both the Kabi Kabi #2 and #3 claims. It also considered whether a majority vote is a method of decision making in accordance with traditional laws and customs of the Kabi Kabi people and whether all relevant Kabi Kabi people consulted.

***P.C (name withheld for cultural reasons) on behalf of the Njamal People v State of Western Australia* [\[2007\] FCA 1054](#)**

An application to amend the claim group description to reflect the community and replace persons under s66B of the NTA. The move to replace applicant which is now challenging the Court's orders arguing that the decision to remove him was reached during a meeting which was 'flawed'. Bennet J noted that there is no precise process or cultural precedent under the traditional laws and customs of the Njamal people that must be followed for decisions of the kind contemplated by s 66B of the Act or otherwise for authorising claim group members to represent the group as applicant. Decisions as to the authorisation or removal of applicants are not part of Njamal traditional law and culture. Instead, the Njamal people have agreed to and adopted a process of making decisions (s 251B(b) of the Act). Pursuant to that process, decisions are made by resolution or consensus at community meetings organised by the Pilbara Native Title Services ('PNTS'). He said that it was not for the Court to consider merits of the claim group's decision.

***Kerinaia v Tiwi Land Council & Anor* [\[2007\] NTSC 40](#)**

Applicant sought an interlocutory injunction to stop the Tiwi Land Council from granting a lease over the township of Nguuu. The applicant argued that there was inadequate consultation, agreement and approval processes but this was rejected and the application was denied.

## **International**

### **[Tsawwassen First Landmark Treaty Vote](#)**

On July 20, 23 and 25, Tsawwassen First Nation members voted on the Final Agreement. The ratification process required a positive endorsement from 50 per cent plus one of the members on the registered voters list. Of 187 registered voters, 69.5 per cent voted in favour of the treaty that provides a cash transfer of \$13.9 million and a land transfer totalling 724 hectares. Over the coming months, the Province of British Columbia will introduce Tsawwassen settlement legislation. See also Tsawwassen [First Nation treaty details](#)

### **[South Africa settles 90% of land claims](#)**

Speeches by the Minister of Agriculture and Land Affairs can be found online and outline areas of recent restitutions.

(Sourced from NNTT Judgements and Information email alert service)

## **Events**

- [NTRU events calendar](#)

## **Indigenous Land Use Agreements**

- See the [National Native Title Tribunal Website: Browse Registered ILUAs](#).
- Information about specific ILUAs is also available in the [Agreements, Treaties and Negotiated Settlements \(ATNS\) Database](#).
- The [Native Title Research Unit](#) also maintains an [ILUA summary](#) which provides hyperlinks to information on the NNTT and ATNS websites.

## **Legislation**

### **[Native Title \(Federal Court\) Amendment Regulations 2007 \(No. 1\)](#)**

Number: SLI 2007 No. 250

These Regulations amend the Native Title (Federal Court) Regulations 1998 to update the forms to be used for making applications for the Federal Court for a determination of native title or compensation. These Regulations commence on 1 September 2007.

[Regulations \(Legislative Instrument\)](#)

[Explanatory Statement](#)

### **Native Title Act 1993**

Act Compilation (current) - C2007C00498  
Date Published: 31/07/2007 03:24:33 PM  
Start Date: 21/07/2007  
Incorporating Amendments to: Act No. 125 of 2007  
Administering Department: AG, FaCSIA

(Sourced from NNTT Judgements and Information email alert service)

## **Native Title Determinations**

- See the [National Native Title Tribunal website: Browse Determinations](#).
- The [Agreements, Treaties and Negotiated Settlements \(ATNS\) Database](#) provides information about native title consent determinations and some litigated determinations.
- The [Native Title Research Unit](#) also maintains a [Determinations Summary](#) which provides hyperlinks to determination information on the Austlii, NNTT and ATNS websites.

## **Native Title in the News**

- [NTRU Native title in the News](#)

## **Publications**

Agius, P, Jenkin, T, Jarvis, S, Howitt, R and Williams, R 2007, '(Re)asserting Indigenous rights and jurisdictions within a politics of place: transformative nature of native title negotiations in South Australia' *Geographical Research* Vol. 45 No. 2 pp. 194-202

Burke, P, Glaskin, K, Keen, I, Morton, J, Sackett, L and Sutton P, 2007, 'Applied forum [Responses to Basil Sansom's article "Yulara and future expert reports in native title cases"]' *Anthropological Forum* Vol. 17 No. 2 pp. 163-192

Dorsett, S and McVeigh, S 2001, 'An essay on jurisdiction, jurisprudence, and authority: the High Court of Australia in Yorta Yorta' *Northern Ireland Legal Quarterly* (Spring 2005) Vol. 56 No. 1 pp. 1-20

Dousset, L and Glaskin, K 2007, 'Western Desert and native title: how models become myths' *Anthropological Forum* Vol. 17 No. 2 pp. 127-148

'Hot Tubbing' anthropological evidence in native title mediations  
National Native Title Tribunal, *Specific Issue Reports*, June 2007

Magarey, K 2007, *Northern Territory National Emergency Response Bill 2007*, Bills Digest (13 August 2007) 2007-08, No. 28, Canberra.

Weir, J 2007, 'Native title and governance: the emerging corporate sector prescribed for native title holders' *Land, Rights, Laws : Issues of Native Title* Vol. 3 Issues Paper No. 9

**Rights Reform: Separating fact from fiction: An assessment of the proposed amendments to the Aboriginal Land Rights (Northern Territory) Act 1976**

**Briefing paper for Oxfam Australia prepared by Professor Jon Altman**

This paper provides compelling evidence to show that the proposed changes to the Aboriginal Land Rights (Northern Territory) Act 1976 (the "ALRA") have no connection with the incidence of child sexual abuse; are likely to jeopardize the effectiveness of the Government's emergency response in the Northern Territory and are detrimental to the development of Aboriginal communities.

**Canada's New Government and Assembly of First Nations Strike Specific Claims Task Force: July 25, 2007**

The Honourable Jim Prentice, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians and Phil Fontaine, National Chief of the Assembly of First Nations (AFN) have struck a Task Force to assist in the development of specific claims legislation. On 12 June 2007, the Right Honourable Stephen Harper, Prime Minister of Canada announced major reforms to the way Canada handles specific claims, with the goal of bringing forward legislation to implement the plan in the fall. The work of the Canada-AFN Task Force will shape the development of legislation centred on the creation of an independent tribunal on specific claims. The Task Force will be supported by experienced technical staff from both the Government of Canada and First Nations.

**Negotiation Or Confrontation: It's Canada's Choice: Final Report of the Standing Senate Committee on Aboriginal Peoples Special Study on the Federal Specific Claims Process**

(Sourced from NNTT Judgements and Information email alert service and the Federal Court Bulletin)

## **Reviews & Reforms**

### **Inquiry into the Northern Territory National Emergency Response Bill 2007 & Related Bills**

- [Information about the inquiry](#)
- Information about the key Bills
  - [Northern Territory National Emergency Response Bill 2007](#)
  - [Social Security and Other Legislation Amendment \(Welfare Payment Reform\) Bill 2007](#)
  - [Families, Community Services and Indigenous Affairs and Other Legislation Amendment \(Northern Territory National Emergency Response and Other Measures\) Bill 2007](#)
  - [Appropriation \(Northern Territory National Emergency Response\) Bill \(No. 1\)](#)
  - [Appropriation \(Northern Territory National Emergency Response\) Bill \(No. 2\)](#)

(Sourced from NNTT Judgements and Information email alert service)