

## What's New August 2008

### Cases

#### Australia

##### ***Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 (Blue Mud Bay)**

A detailed case note will be published in the July/August edition of the [\*Native Title Newsletter\*](#).

##### ***Foster v Que Noy (No 2)* [2008] FCAFC 137**

Decision to determine the costs of an appeal against an application to replace an authorised applicant under s 66B of the *Native Title Act 1993* (Cth). The court needed to determine whether the decision to remove an applicant fell within the exclusive jurisdiction of the court (that is, s 81) and accordingly whether s 85 applies in relation to costs. It was found that the decision was 'one which directly affects the authority of the applicant to deal with a native title determination application referred to in s 61' and that s 85 applied.

Under s 85, according to Lee J in *Ward v Western Australia* (1999) 93 FCR 305 and endorsed by the Full Court in *De Rose* (No 3) at [8]-[10] 'the starting point is that each party to a proceeding will be left to bear his or her own costs unless the Court considers it appropriate in the circumstances to make a costs order.' The court found that the respondents had failed to establish any extraordinary circumstances and ordered each party to pay their own costs.

##### ***June Ashwin & Ors on behalf of the Wutha People/Contact Uranium Ltd/ Western Australia*, [2008] NNTTA 92**

Future act decision concerning the application for a dismissal of an application under s 148 for a proposed grant of a Prospecting Licence. The application for dismissal was not upheld.

##### ***Gudjala People # 2 v Native Title Registrar* [2008] FCAFC 157**

Native title claimant application concerning the registration of an application, the Gudjala People Core Country Claim # 2. The second claim was intended to include areas within a central external boundary that were excluded from the "Gudjala People Core Country Claim" that had been filed on 22 March 2005. The second application was rejected by Registrar who, the primary judge found had made an error in law. At the primary hearing the judge found that the Registrar had erred in failing to accept the application for registration. The Court considered the criteria for registration focusing on the sufficiency of the asserted factual basis for native title rights and interests claimed and the relationship this has to the statutory requirements for the contents of the application. The court also considered whether there was an unduly onerous standard applied in referring to the sufficiency of evidence in support of the application. The court noted that:

...In substance, s 62(1) requires that the accompanying affidavit must contain evidence that the applicant believes the claimed rights have not been extinguished, believes none of the claimed area is covered by an entry in the Register, believes all the statements made in the application are true and that the applicant is authorised to make the application. The application must contain the details specified in s 62(2) and may contain details of the matters referred to in s 62(1)(c)....

In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more

than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim.

The court found that the appeal against the decision of the primary judge should be set aside and the matter should be remitted to the primary judge for consideration.

## International

### ***Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1020**

Case concerning the duty to consult where there is a 'removal decision' made affecting the Hupacasath First Nation. In the decision, the court held that:

1. the Respondent Minister of Forests had, prior to the removal decision on July, 2004 (the "Removal Decision"), and continues to have, a duty to consult with the Hupacasath First Nation ("Hupacasath") in good faith and endeavour to seek accommodation between their aboriginal rights and the objectives of the Crown to manage Tree Farm License 44 ("TFL 44") in accordance with the public interest, both aboriginal and non-aboriginal.
2. the Crown and the Petitioners will attempt to agree on a consultation process and if they are unable to agree on a process, they will go to mediation. If mediation fails, the Crown and the Petitioners may seek further directions from the court;
3. the Crown and the Petitioners will provide to each other such information as is reasonably necessary for the consultation to be completed and the Crown and the Petitioners will attempt to agree on the document exchange and if they are unable to agree, the matter will go to mediation.

## Indigenous Land Use Agreements

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

## Native Title Determinations

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

## Native Title in the News

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

## Publications

### Reviews & Reforms

#### [Queensland Local Government Template Indigenous Land Use Agreement](#)

This template local government ILUA is the outcome of negotiations which took place for the specific purpose of developing a "model" or "template" ILUA covering a range of issues that commonly arise in mediations between Queensland local governments and native title claimants. The template gives parties using it the flexibility to address issues and aspirations that are specific to them. It will be used to help conclude local government involvement in claim mediation with the three native title claim groups involved in its development. The template will also be made widely available as a tool to assist mediated outcomes between local government and native title claimants for other claims. The publication includes a commentary which provides a brief history of the template's development and also a clause-by-clause summary of the template.

#### [ORIC. A guide to writing good governance rules for Prescribed Bodies Corporate](#)

This good governance guide will help you to develop new rules for your Prescribed Body Corporate (PBC) or change your existing PBC rules to comply with the CATSI Act.

## NTRU Publications

Memmot, P and Blackwood P 2008 'Holding Title and Managing Land in Cape York – Two Case Studies' *Research Discussion Paper No 21*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

McAvoy T and Cooms V, 2008, 'Even as the crow flies, it is still a long way: implementation of the Queensland South Native Title Services Legal Strategic Plan' *Native Title Research Monograph No 2/2008*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

## Speeches, Seminar Papers and Conference Presentations

Weir, J and Strelein, L, 2008, 'Water and Native Title' presentation delivered at the AIATSIS Seminar Series, *Indigenous Public Policy Responses from the Ground*, Canberra.

Abstract and audio file available online:

[http://www.aiatsis.gov.au/research\\_program/events2/seminar\\_series\\_2\\_2008](http://www.aiatsis.gov.au/research_program/events2/seminar_series_2_2008)

## Training and Professional Development Opportunities

- See the [Aurora Project: Program Calendar](#) for information about [Learning and Development Opportunities](#) for staff of native title representative bodies and native title service providers.

## Events

- [NTRU events calendar](#)

(Sourced from NNTT Judgements and Information email alert service and the Federal Court's Native Title Bulletin)