What's New May 2009

Cases

Australia

Coyne v State of Western Australia [2009] FCA 533

This case concerned an application under section 66B of the *Native Title Act 1993* (Cth) to replace the current applicant to a native title determination (known as the Southern Noongar claim). The motion was opposed by three parties to the proceeding. The issues were whether the claim group meeting was representative, whether authorisation of replacement applicant was effective, and whether the application was affected by the death of two persons authorised by claim group to comprise the replacement applicant before application was heard. Justice Siopis held that the applicants were/are authorised to make the native title application as the replacement for the current applicant.

Walmbaar Aboriginal Corporation v State of Queensland [2009] FCA 579

In this case the Walmbaar Aboriginal Corporation applied under sections 50(2) and 61(1) of the *Native Title Act 1993* (Cth) (NTA) for a determination of the compensation payable in respect of acts that extinguished, significantly impaired or otherwise affected the native title rights and interests of the Dingaal People forming part of the Hopevale determination. Overall, it was found that Walmbaar had commenced the compensation application without authority (Rule 9(1) of the corporation's rules, section 57(3)(b) NTA, Regulation 7 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth)) of the and further, that the compensation claim included lands and waters over which there had been no determination of native title. Thus, the application was dismissed pursuant to s84C NTA.

Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu)/Western Australia/Holocene Pty Ltd [2009] NNTTA 49

This case concerned an application under section 35 of the *Native Title Act 1993* (Cth) (NTA) for a future act determination under section 38 NTA. The future act was the granting of a mining lease under the *Mining Act 1978* (WA) to Holocene Ltd over land which is the subject of the native title determination of the Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) (WDLAC/the Martu People).

The main issue was the effect of the project on Lake Disappointment, a site of particular significance, in the context of the interests, proposals, opinions or wishes of WDLAC in relation to the management, use or control of the land. It was argued by WDLAC that the mining lease should not be granted unless agreement could be reached regarding a satisfactory working relationship, protection of heritage, regulation of activities, appropriate involvement and reasonable benefits and compensation including relevant ownership of the project. Although it was noted that a native title party does not have a veto over development proposals, it was recognised that the Tribunal should give considerable weight to their view about the use of the land.

Deputy President Sumner in his conclusion stated:

> 'In my view the interests, proposals, opinions and wishes of the native title party [WDLAC] in relation to the use of Lake Disappointment should be given greater weight than the potential economic benefit or public interest in the Project proceeding' [216].

The final determination was that the mining lease must not be granted.

International

Case of the Saramaka People v. Suriname, Inter-American Court of Human Rights, Judgment of November 28, 2007

The application submits to the Court's jurisdiction alleged violations committed by the State against the members of the Saramaka people, an allegedly tribal community living in the Upper Suriname River region. The Commission alleged that the State has not adopted effective measures to recognise their right to the use and enjoyment of the territory they have traditionally occupied and used, that the State has allegedly violated the right to judicial protection to the detriment of such people by not providing them effective access to justice for the protection of their fundamental rights, particularly the right to own property in accordance with their communal traditions, and that the State has allegedly failed to adopt domestic legal provisions in order to ensure and guarantee such rights to the Saramakas.

This finding was supported by the Federal Court, who reasserted that the State did not provide for the resumption of the native customary rights land or the extinguishment of such rights.

New Zealand Fish and Game Council v Attorney-General & Anor CIV-2008-485-2020 12 May 2009-05-14

The issue that arose in this case was whether a pastoral lease granted under the *Land Act 1949* had the effect of granting exclusive possession. Ultimately the judge held exclusive possession was granted. However, the judge noted that he had not considered the relationship of the leases to native or customary title. Therefore he was not commenting on the effect of the leases on native title.

Legislation

Native Title Amendment Bill 2009 (Amendment to be moved by Mr Oakeshott)

The amendment introduces a provision that reverses the current burden of proof. The text is as follows:

Part 3— Burden of proof for applicants

20 After section 61A

Insert: 61B Burden of proof for applicants

(1) This section applies to an application for a native title determination brought under section 61 of the Act where the following circumstances exist:

(a) the native title claim group defined in the application applies for a determination of native title rights and interests where the rights and interests are found to be possessed under laws acknowledged and customs observed by the native title claim group;

(b) members of the native title claim group reasonably believe the laws and customs so acknowledged to be traditional;

(c) the members of the native title claim group, by their laws and customs have a connection with the land or waters the subject of the application;

(d) the members of the native title claim group reasonably believe that persons from whom one or more of them was descended, acknowledged and observed traditional laws and customs at sovereignty by which those persons had a connection with the land or waters the subject of the application.

(2) Where this section applies to an application it shall be presumed in the absence of proof to the contrary:

(a) the laws acknowledged and customs observed by the native title claim group are traditional laws and customs acknowledged and observed at sovereignty;

(b) the native title claim group has a connection with the land or waters by those traditional laws and customs;

(c) if the native title rights and interests asserted are capable of recognition by the common law then the facts necessary for the recognition of those rights and interests by the common law are established

Native Title Amendment Bill 2009, Report of the Senate Standing Committee on Legal and Constitutional Affairs, May 2009.

The report of the Senate Standing Committee on Legal and Constitutional Affairs on the *Native Title Amendment Bill 2009* was delivered in May 2009. Ultimately, the Committee recommended that the Bill be passed.[1]

The Committee began by summarising the key amendments proposed by the Bill. The Bill:

- invests the Federal Court with the authority to decide whether it, the National Native Title Tribunal, or another individual or body should mediate a native title claim;
- further encourages and facilitates negotiated settlement of claims;
- allows the application of amended evidence rules for evidence given by the Aboriginal and Torres Strait Islander people to apply to native title claims in certain circumstances; and
- streamlines provision relating to the role of representative bodies.[2]

In Chapter 2 the Committee discussed in detail each of the proposed changes.

In Chapter 3 the Committee noted that the:

> Tribunal's concerns derive largely from the Bill's proposal to centralise the management of native title cases in the court and hinge on the assertion that the amendments would not necessarily bring about a faster or more efficient claims settling process.[3]

The Tribunal argued that the amendments in relation to mediation were problematic. The amendments would lead to the possible segmentation of claims, leading to duplication and wasted time and resources. Mr Neate also argued that the amendments may also create uncertainty about the respective powers and functions of the Court and the Tribunal. He stated that these are clearly identified within the current system.

The Committee noted the comments of an earlier senate inquiry … 'significant concerns were expressed about the expansion of the NNTT's powers, particularly as most stakeholders do not have confidence in the NNTT's capacity or expertise to conduct effective mediation'.[4]

The Tribunal's contention that the changes will not bring about improvements in the claims process was disputed by the Court – results obtained through a flexible and responsive approach; court has a wealth of experience; court in the best position to decide which mechanism was in the best interests of each case.

Committee is mindful of the need for care when appointing mediators. But is encouraged by evidence of consultation

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[1] [3.19] p15
[2] [1.3] p.1.
[3] [3.3] p.11.
[4] [3.7] pp.12-13.

The reasoning of the Committee is captured in the following paragraph:

> While the arguments of the NNTT and others that native title is inherently complex and drawn-out, the committee is impressed by the innovations and flexibilities offered by the Federal Court taking a more central role in case management. The capability of the Court is clear, and the committee considers there is good reason to anticipate a smoother and more expeditious flow of native title case management as a result of the changes being implemented. For these reasons, and in the absence of substantive criticism of other aspects of the Bill, the committee recommends the Bill be passed.[5]

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

Articles/Papers

- Altman, J., and Jordan, K. 2009. 'A Brief Commentary in Response to the Australian Government Discussion Paper "Optimising Benefits from Native Title Agreements" and the Report of the Native Title Payments Working Group' CAEPR Topical Issue 3/2009, Centre for Aboriginal Economic Policy Research, Canberra.
- National Native Title Tribunal, *Talking Native Title*, Issue No 31, June 2009.
- Wright, L., and Sparkes, S. 2009. 'ILUA discussion paper: Authorisation of an area agreement', National Native Title Tribunal, 28 May 2009.

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)

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[5] [3.14] pp.14-15.