

## What's New November 2007

### 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.

##### 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.

##### Costs

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

Judgment on costs.

##### 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 Marjorie Foster to make the application.

## **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.'

## Events

- [NTRU events calendar](#)

## Indigenous Land Use Agreements

- See the [National Native Title Tribunal Website: Browse Registered 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](#).

## Legislation

### Native Title Determinations

- See the [National Native Title Tribunal website: Browse 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

ABARE. 2007. [Torres Strait Islanders : improving their economic benefits from fishing](#). ABARE Research Report 07.21.

Durette, M. 2007. [Indigenous property rights in commercial fisheries: Canada, New Zealand and Australia compared](#) CAEPR WORKING PAPER No. 37/2007

Farrell, R., Catlin, J. & Bauman, T. 2007. [Getting Outcomes Sooner - Report on a native title connection workshop](#), November 2007.

Gray, K. 2007. ['There's no place like home!'](#) *Journal of South Pacific Law* (2007) 11(1)

National Native Title Tribunal [National Native Title Tribunal Annual Report 2006-2007](#)

NSW Auditor General. 2007. [NSW Auditor General's Report 2007 Department of Lands. Aboriginal Land Claims](#).

O'Bryan, K. 2007. ['Issues in natural resource management – inland water resources – implications of native title and the future of indigenous control and management of inland waters'](#) *Murdoch University E Law Journal*, Vol. 14, No. 2

Smith, B. & Morphy, F. (Editors) 2007. [The Social Effects of Native Title Recognition. Translation, Coexistence](#) CAEPR Research Monograph No. 27 ANU E Press.

## Reviews & Reforms

Queensland Legal, Constitutional and Administrative Review Committee. [Hands On Parliament: Interim Evaluation of the Implementation of Recommendations made following a Parliamentary Committee Inquiry into Aboriginal and Torres Strait Islander Peoples' Participation in Queensland's Democratic Processes](#). November 2007. Report No. 61

## Speeches, Seminar Papers and Conference Presentations

[The Victorian Indigenous Affairs Framework & Indigenous Representative Arrangements](#)  
Paper presented at the 2007 Local Reconciliation Groups Conference Reconciliation Victoria and ANTaR 10 November, Aborigines Advancement League. Authorized by Robert Nicholls, Len Clarke and Graham Atkinson Co-chairs of the Victorian Traditional Owner Land Justice Group

[AIATSIS Conference 2007 'Forty Years On: Political transformation and sustainability since the Referendum and into the future'](#) (Various presentations available on-line)