

What's New October 2008

Cases

Australia

***Fesl v Delegate of the Native Title Registrar* [2008] FCA 1469**

The court dismissed an application for judicial review of decision by a delegate of the Native Title Registrar to register an Indigenous Land Use Agreement. The grounds for review centred on whether it was part of delegate's function to decide if the agreement presented was an ILUA and further, whether conclusion that the agreement was an ILUA was amenable to judicial review. An additional issue was whether the evidential requirements to justify the delegate's registration decision were satisfied and whether the delegate failed to consider relevant considerations. The applicant was unsuccessful in arguing that the agreement did not make lawful provision for the cultural heritage duty of care as required by the *Aboriginal Cultural Heritage Act 2003* (Qld). The court also considered whether there was no evidence or other material to justify the delegate's conclusion that the making of the ILUA had been authorised by the native title group as well as considering the proper construction of statutory provisions for authorising an ILUA by a native title group. In this context the relationship between *Aboriginal Cultural Heritage Act 2003* (Qld) and *Native Title Act 1993* (Cth) was considered.

***Fesl v Delegate of the Native Title Registrar (No 2)* [2008] FCA 1479**

This was a costs hearing associated with the unsuccessful application for review by a delegate of the Native Title Registrar to register an ILUA. The issue was whether circumstances of the case warranted departure from ordinary rule as to costs. The reasonableness of the review application and public importance of issues raised were considered along with the relevance of s 85A of the *Native Title Act 1993* (Cth). The court declined the application for costs.

***Glasshouse Mountains Gubbi Gubbi people v Registrar, Native Title Tribunal & Anor*, [2008] FCA 529**

This case concerned the validity of the registrar's decision to remove the applicant's native title claim for registration on the Register of Native Title Claims. The court rejected the claim that the registrar was not empowered to decide whether to accept a claim for registration and likewise that the registrar is empowered to remove claims from the Register. From this finding, the registrar in this case was correct in removing the claim from the Register. The final ground of appeal: that the applicant was denied procedural fairness or natural justice through failure to grant an extension of time was also rejected. The court held that no extension of time was warranted in the circumstances.

***Christine George & Ors on behalf of the Gurambilbarra People v State of Queensland* [2008] FCA 1518**

This was a 'show cause' proceeding on the Court's own motion asking why the present application should not be dismissed pursuant to s 190F(6) of the *Native Title Act 1993* (Cth). The Court considered the construction of s 190F(6) and the relevance of general law with respect to summary dismissal. In this instance where application had not been amended since consideration by the Registrar, and where it was not likely to be amended in a way that would lead to a different outcome once considered by the Registrar, there is no other reason why the application should not be dismissed.

***Hayes on behalf of the Thalanyji People v State of Western Australia* [2008] FCA 1487**

Proposed consent determination pursuant to s 87 of the *Native Title Act 1993* (Cth). The question was whether the Court was satisfied that the order is within power having regard to the importance placed on mediation as primary means of resolving native title applications. The court recognised the need for power under s 87 to be exercised flexibly and that it is not conducive for respondents to conduct their own trial of the application to satisfy the Court. The Court took a flexible approach to the requirement of connection and continuity in traditional laws acknowledged and traditional customs observed, commenting that white settlement has inevitably had an impact of traditions. In recognising the native title rights and interests of the Thalanyji people, the Court turned to the requirement for proscribed bodies corporate pursuant to ss 55 and 56 of *Native Title Act 1993* (Cth).

***Western Desert Lands Aboriginal Corporation v State of Western Australia and others* (2008) 218 flr 362; [2008] NNTTA 22**

Objection to expedited process for the proposed future act of granting exploration licences within the determination area. The issue was whether this procedure is available in relation to land the subject of a determination of native title rights and interests. The Tribunal considered whether s 7(2) of *Native Title Act 1993* (Cth) was relevant to the objection application because by finding the expedited procedure to be acceptable there would be an inconsistency with the *Racial Discrimination Act 1975* (Cth). The Tribunal found no basis for distinction between registered claimant and registered native title holder in manner in which expedited procedure operates. The objection applications were dismissed pursuant to s 148(a) *Native Title Act 1993* (Cth).

***Australian Manganese Pty Ltd v State of Western Australia and others* (2008) 218 flr 387; [2008] NNTTA 38**

This involved an application for future act determination concerning the grant of a mining lease. Pursuant to s 38(2) *Native Title Act 1993* (Cth) there is no power to impose a condition for payment of compensation for the future act. The application was successful.

***Crowe and Others a State Of Western Australia And Another* (2008) 218 Flr 429; [2008] NNTTA 71**

Application for the objection of an expedited procedure to grant an exploration licence in the determination area. With reference to the site protective regime, the issue was whether the act was likely to interfere with sites of particular significance. The Tribunal found that subject to s 237(b) of the *Native Title Act 1993* (Cth), the expedited procedure will not apply in this case.

***Collard v The State of Western Australia* [2008] FCA 1565**

***Collard v The State of Western Australia* [2008] FCA 1564**

***Collard v The State of Western Australia* [2008] FCA 1562**

***Collard v The State of Western Australia* [2008] FCA 1563**

Issue whether an application should be dismissed pursuant to subsection 190F(6)(b) of the *Native Title Act* following a failure to apply for a review of the decision after initially failing the Registration Test. The applicants noted that this was because they were awaiting negotiations with the South West Aboriginal Land and Sea Council and anticipated that they would reach some agreement over the traditional owners of the land in dispute. They also submitted that the land had cultural significance but the court found that the requirements of s 190F(6)(b) were not satisfied and that the application should be dismissed.

***Wonyabong v The State of Western Australia* [2008] FCA 1561**

***Allison v The State of Western Australia* [2008] FCA 1560**

***Walker v The State of Western Australia* [2008] FCA 1559**

***Walker v The State of Western Australia* [2008] FCA 1558**

***Evans on behalf of the Koara People v The State of Western Australia* [2008] FCA 1557**

Issue whether an application should be dismissed pursuant to subsection 190F(6)(b) of the *Native Title Act* following a failure to apply for a review of the decision after initially failing the Registration Test. There was no evidence that it was likely that the application would be amended nor had the Representative Body received instructions from the applicant.

***Morich v State of Western Australia* [2008] FCA 1567**

Issue whether an application should be dismissed pursuant to subsection 190F(6)(b) of the *Native Title Act* following a failure to apply for a review of the decision after initially failing the Registration Test. The Applicants failed to provide affidavits but made written submissions noting the difficulty of securing legal representation due to conflicts within the community. They also noted that there were significant sites within the claim area and it was not open to the government to remove the claim against their wishes. The application was dismissed but the court noted that it remained open to the applicants to lodge a further application or join another applicant group.

Legislation

Amendments to the Fisheries Act 1994 (Qld)

New rules for Indigenous fishers that commence on 6 October 2008 have been introduced to provide a balance between fisheries sustainability and Indigenous traditional fishing rights. The changes recognise the important cultural role that fishing plays for many communities, but also acknowledges the need to protect our fish stocks for future generations.

The Act, as amended, can be found at
<http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/F/FisherA94.pdf>

Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008

This Bill implements the conclusions of a 2006 review of the *Great Barrier Reef Marine Park Act 1975* (the GBRMP Act), aimed at ensuring a relevant modern robust regulatory framework that delivers efficient and effective protection and management of the Great Barrier Reef, assisted through amendments which provided for:

- the restoration of Indigenous expertise to the Great Barrier Reef Marine Park Authority
- streamlining of environmental approval and permitting processes and requirements
- enhancement of the investigation, enforcement and offence provisions, providing for a more tailored and targeted approach,
- promotion of more responsible use of the park and the provision of new emergency management powers, and
- improved alignment and integration between the GBRMP Act, the *Environment Protection and Biodiversity Conservation Act 1999* and other Commonwealth and Queensland legislation.

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

House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Indigenous enterprises are now open for business*, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Commonwealth, 2008.

Indigenous business participation is relatively low, at only six per cent compared with 17 per cent for non Indigenous self employed. Non Indigenous people are also three times more likely to own and run their own business than Indigenous people, whose low outcomes are exacerbated with remoteness. During the inquiry the Committee heard that Indigenous Australians—young and old, from urban to remote regions—increasingly see business as an opportunity to benefit their communities and are keen to engage with the mainstream economy. The range and diversity of Indigenous owned businesses currently in operation was also impressive. There were recommendations specific to native title holders detailed in the report:

- **Recommendation 2** The Committee recommends that the Australian Government recognise the vital contribution of Indigenous business development to the economic and social sustainability of Indigenous communities and, accordingly, develop the methodology to adequately value this economic and social contribution when assessing the investment returns for providing assistance to Indigenous businesses.
- **Recommendation 3** The Committee recommends that the Australian Government develop templates for Indigenous Land Use Agreements to specify that corporate and industry partners fund Indigenous partner corporations to access advice, including financial, taxation and in particular expert legal advice of a quality comparable to that available to the other negotiating partner. This is to ensure that the terms of agreement meet the social and commercial objectives of the Indigenous communities involved.

- **Recommendation 4** The Committee recommends that the Australian Government develop a process for monitoring the content and implementation of Indigenous Land Use Agreements, and develop a complaints process for Indigenous partners.

There were also a number of specific recommendations that are relevant to prescribed bodies corporate in relation to business assistance, financing and mentoring.

- **Recommendation 10** The Committee recommends that the Australian Government provide a program of funding, including micro-funding, with an emphasis on remote area enterprises, to enable entrepreneurs to establish cooperative enterprises, especially in the arts sector. The Committee recommends that Indigenous Business Australia in association with a corporate partner in the financial sector deliver this program.
- **Recommendation 11** The Committee recommends that the Australian Government as part of the current review of Australia's taxation system include consideration of how to encourage Indigenous start up business through the taxation system.

Increasing Indigenous Employment Opportunity - Proposed reforms to the Community Development Employment Projects (CDEP) and Indigenous Employment Program

On 15 May 2008, Deputy Prime Minister, the Hon Julia Gillard the Minister for Employment and Workplace Relations, Minister for Families, Housing, Community Services and Indigenous Affairs the Hon Jenny Macklin MP and the Minister for Employment Participation the Hon Brendan O'Connor MP released *Increasing Indigenous Economic Opportunity – A discussion paper on the future of the CDEP and Indigenous Employment Programs*.

The discussion paper asked for suggestions about what is working and fresh innovative ideas for reforms to Indigenous employment services to help build stronger communities and close the gap in outcomes between Indigenous and non-Indigenous people.

A paper has been developed as the basis for the consultations entitled *Increasing Indigenous Employment Opportunity - Proposed reforms to the CDEP and Indigenous Employment Program*. The paper is available here:

[http://www.fahcsia.gov.au/internet/facsinternet.nsf/vIA/cdep/\\$file/Increasing_Indigenous_Employment_Opportunity.PDF](http://www.fahcsia.gov.au/internet/facsinternet.nsf/vIA/cdep/$file/Increasing_Indigenous_Employment_Opportunity.PDF).

Gardiner-Garden, John, *Commonwealth Indigenous-specific expenditure 1968-2008*, Department of Parliamentary Services, Research Paper No.10, 2008, Canberra 2008.

This paper attempts to identify Commonwealth expenditure in the area of Indigenous affairs over the 40 years from 1968 to 2008 and to plot that expenditure by agency. This includes commonwealth spending on native title specific to NTRBs/NTSPs as well as the Federal Court and National Native Title Tribunal.

Speeches, Seminar Papers and Conference Presentations

French, R, *Rolling a Rock Uphill? – Native Title and the Myth of Sisyphus*, paper presented to the Judicial Conference of Australia National Colloquium, 10 October 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

The Annual National Native Title Conference 2009 will be held at the MCG in Melbourne, 3-5 June 2009. The conference will co hosted by the Wurundjeri People and co convened by Native Title Services Victoria.

Contact the NTRU at ntru@aiatsis.gov.au to register your interest.

- [NTRU events calendar](#)

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

