What's New May 2008

Cases

Australia

***Wiri People v Native Title Registrar* [2008] FCA 574**

Application for a review of a decision of a delegate of the Native Title Registrar to not accept the Wiri People #2 Application for registration under s 190A of the *Native Title Act 1993* (Cth). The application had originally covered a larger area which was later reduced. The application was amended which reinstalled the larger claim, amended the description of the claim group and authorised a new applicant.

The amended claim means that the Wiri #2 Application now overlapped with another application, the Wiri Core Country Claim and was contrary to the certification provided by the CQLC. However the Wiri#2 applicants claimed that it was not for the CQLC to impose a description of their group of society but for the Wiri people to define how they are to be described. They argued that the delegate had misconstrued the principles of *Risk* and adjudicated between differing descriptions of the native title claim group and that she had taken extraneous material into account. The Registrar argued that their role 'goes beyond merely accepting the correctness of an applicant's assertion' [12].

However Justice Collier noted that a native title group is not recognised merely by asserting themselves. It is also 'incumbent on the delegate to be satisfied that the claimants truly constitute such a group and the applicant should be seen to be authorised by all persons who relevantly hold the common or group rights'. [8]. His Honour also noted that the Registrar was entitled to consider information that as obtained as a result of searches conducted by the Registrar under s 190A(3)(b).

His Honour also confirmed that a decision of the Registrar is a purely administrative function and that the delegate 'was not satisfied that the applicant was authorised to make the application and deal with matters arising in relation to it by all the other persons in the native title claim group' based on the available material: [21]. That is, s 190C (4)(b) does not confine the Registrar or their delegate to the statements made in affidavit or the information provided in the application (cf authority in *Doepel* where the Registrar is not required to look beyond the terms of the application for the purposes of s 190C(2)). This also includes the consideration of an overlapping claim which had also been certified by the relevant representative body in the area. The overriding rationale of s 190C(4) is that the Registrar must be satisfied as to the identity of the claimed native title holders including the applicant.

***The State of Western Australia v Sebastian* [2008] FCAFC 65**

This decision involves two competing claims to native title over land and waters around Broome in Western Australia. The primary judge Merkel J had held that the Yawuru claimants possessed native title rights and interests over the whole of the claim area. On appeal the State argued that the northern portion of the Yawuru claim area was traditionally held by the Djugan people who were distinct from the Yawuru people. The state also argued that because they have a cognitive descent system, they no longer had an interest in the claim area under traditional law and custom.

The full Federal Court considered the reasoning of Merkel J in his decision and upheld the original judgment of Merkel J. In reaching their decision, the full Federal Court made extensive comment on how the requirements *Yorta Yorta* are met. They also considered whether s 47 B could be applied to the area of Broome and found that s 47B was capable of applying to areas within the proclaimed township.

Click here for a summary of the judgement.

***Birri-Gubba (Cape Upstart) People v State of Queensland* [2008] FCA 659**
Consideration of an application by the State Government for costs order against applicants who wanted proceed with early preservation evidence but had failed to make adequate preparations

for trial. The State had incurred significant costs in seeking to comply with the court's orders even though the applicants eventually sought to amend their claim. The court considered whether the applicant group had caused State to incur costs by any 'unreasonable act or omission' under s 85A(2), *Native Title Act 1993* (Cth) or s 43, Federal Court of Australia Act 1976 (Cth). It was held that the applicant had acted unreasonable and that it was unjust for the State to bear the costs. The applicants were order to pay 50 per cent of the State's costs.

***Lapthorne v Indigenous Land Corporation* [2008] FCA 682**

Application to review authorisation of a native title claim. It was found that the applicant had not satisfied the elements of s 61(1) of the Native Title Act:

> Mr Lapthorne has not satisfied the requirements of s 61(1) of the Native Title Act 1993 (Cth) (the Act) by producing evidence required by that section read with s 251B, to show that he has been authorised by the Thudgari people to make this claim. Nor has he produced the necessary evidence to show that he is entitled under s 66B of the Act to replace the persons named as the applicant in the native title claim WAD 6212 of 1998 which has been brought by the Thudgari people in respect of the same land.

***Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20**

Click here to download a detailed case note.

International

Legislation

Aboriginal and Torres Strait Islander Land Amendment Bill 2008 (Qld)

The Bill amends the *Aboriginal Land Act 1991* (ALA), the *Land Act 1994*, the *Land Court Act 2000*, the *Local Government (Aboriginal Lands) Act 1978*, the *Native Title (Queensland) Act 1993* and the *Torres Strait Islander Land Act 1991* (TSILA). The objectives of the Bill are aimed at improving the lives of Indigenous Queenslanders, through Indigenous land tenure reform that will:

- enabling home ownership and provide leases for social housing;
- provide greater certainty over the governance of townships and
- assist the transfer process for Deed of Grant in Trust (DOGIT)
- lands;
- facilitate the establishment of public infrastructure; and
- encourage economic development in Indigenous communities.

Click here for the explanatory notes.

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.

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

Reviews & Reforms

Indigenous participation in Western Australia's resources sector

Chamber of Minerals and Energy of Western Australia

Children on Anangu, Pitjantjatjara, Yankunytjatjara Lands Commission of Inquiry: a report into sexual abuse
Children in State Care Commission of Inquiry

This is the report of an inquiry to examine the incidence of sexual abuse of children on the Lands, the nature and extent of that abuse, and to report as to measures which should be implemented to prevent sexual abuse of the children and to address the consequences for the communities. The Children on APY Lands Commission of Inquiry was established on 26 June 2007 during the course of the Children in State Care Commission of Inquiry (CISC Inquiry). A considerable body of evidence was received by the CISC Inquiry of allegations that many Aboriginal children in communities had been sexually abused but those allegations did not come within the terms of reference of the CISC Inquiry because the children were not in State care. The South Australian Parliament amended the legislation relating to the CISC Inquiry to include sexual abuse of children on the Anangu Pitjantjatjara Yankunytjatjara lands (the Lands) and thereby established the Children on APY Lands Inquiry. The same Commissioner constituted both commissions which operated contemporaneously.

Publications

Strelein, L, 2008, Taxation of Native Title Benefits, Research Monograph 1/2008, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Reports

Report of the Stolen Generations Assessor: Stolen Generations of Aboriginal Children Act 2006
Ray Groom / Department of Premier and Cabinet, State Government of Tasmania

The Stolen Generations of Aboriginal Children Act 2006 was passed unanimously by both Houses of Parliament in Tasmania in November 2006. The act made provision for a $5 million fund to provide payments to eligible members of the stolen generations of Aborigines and their children. The legislation provided for the appointment of an independent assessor, with responsibility to assess the eligibility of applicants. The Hon. Ray Groom accepted the appointment as Stolen

Generations Assessor in December 2006. The Act became operational on 15 January 2007. The office of the Stolen Generations Assessor also became operational on that day. This report provides background to the issue of the stolen generations in Tasmania and outlines the process for assessing applications and related matters.

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
- Annual National Native Title Conference Perth 2008

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