Getting Outcomes Sooner – a workshop on native title connection

By Toni Bauman, Visiting Research Fellow, NTRU, AIATSIS

From 24 to 26 July 2007, the Native Title Research Unit and the National Native Title Tribunal (NNTT) co-convened a workshop in the Barossa Valley in South Australia to discuss ways of getting better outcomes from native title connection processes.

John Catlin, NNTT Member, noted at the opening session of the workshop that, based on the current rate of progress, many native title claims face a 20-30 year wait before they are settled. Furthermore, the capacity to settle many of those claims is diminishing as the generation who lodged the claims passes on.

The *Getting Outcomes Sooner* workshop focussed on issues in processing connection with the aim of identifying best practice approaches and exploring options for reaching agreement faster and more efficiently without compromising common law standards. The workshop aimed to identify how to improve the current system of connection research and assessment with more inventive and constructive models for settling matters of native title proof within mediation.

A balance of research, legal and government policy skills and experience was sought by organisers in determining attendance at the workshop which was attended by around 40 participants. Participants included two representatives from each State or Territory, representatives of the Federal Court, the Attorney-General's native title branch, Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) from across the country, and independent barristers and consultant researchers. Workshop participants were asked to attend as technically-informed experts with an open mind, rather than as spokespersons for particular institutional viewpoints.

Participants were allocated to one of four groups in which discussion was facilitated by NNTT members,

TOP (Left to right): Tony McAvoy, Barrister, Toni Bauman, Visiting Research Fellow, AIATSIS, Valerie Cooms, Chief Executive Officer of Queensland South Native Title Services, Louise Anderson, Registrar, Federal Court of Australia.

BOTTOM: John Catlin, National Native Title Tribunal Member, facilitating one of the small workshop group discussions.

John Catlin, Gaye Sculthorpe, Dan O'Dea and Graham Fletcher. Groups reported back to the plenary at the end of each session in power point presentations, the notes of which have been circulated to participants.

Feedback showed that a number of participants found considerable value in networking, meeting face to face with State or Territory representatives in a relaxed forum and learning from the processes which are employed in other State or Territory jurisdictions. Some have already modified their work practices and others capitalised on the opportunities for dialogue with peers. Others were disappointed at the seeming lack of capacity of participants to be innovative and look to ways of doing things differently.

A recurring theme that emerged during the workshop was the need for connection processes to be scoped with all parties at the commencement of mediation processes and managed by an independent third party NNTT member. Another recurring theme was the need for building relationships between those involved in connection processes whilst acknowledging power differentials between State and Territory representatives and NTRBs/NTSPs representing the applicants.

A report on the workshop is currently being prepared and it is hoped that the States and NTRBs/NTSPs will continue to meet in their separate jurisdictions to improve practice.

Notes on the power point presentations that were made in plenary sessions at the workshop are available on request from toni.bauman@aiatsis.gov.au .

Case Note

Defensive assertions of native title where there has been no legal authorisation: *Kokatha People v State of South Australia* [2007] FCA 1057

By Tran Tran, Research Assistant, NTRU

On 16 July 2007 Justice Finn from the Federal Court handed down *Kokatha People v State of South Australia.*[1]

The Kokatha decision involved a question of statutory construction: whether the court has the jurisdiction under the NTA to make a determination of native title in favour of a person or group of persons that had not made a native title determination application under s 61 but were a respondent to such an application brought on behalf of another claimant group to which the respondent does not belong.[2] This judgment has implications for the resolution of overlapping claims where native title has been asserted defensively in relation to s 61 proceedings. It should be noted that this relates to the issue of whether native title rights and interests can be decided for a group which is not an applicant rather than whether or not that question is negative or positive.

Both the, Aboriginal Legal Rights Movement (the representative body) and the Commonwealth argued that the court can make a determination of native title recognising the rights and interests of a group regardless of whether or not the group has made an application for the determination. Based on this view, the purpose of s 225 is to determine authoritatively whether anyone has native title rights and interests in relation to an area which, as a consequence, requires the Court to determine all claims of native title rights and interests regardless of whether all of the claimants are a party to an s 61 application. Alternatively, South Australia contended that native title determinations can only be made in accordance with the proper procedures under the NTA, namely sections 10, 13, 61 and 225. This means that a group that has not made an application cannot have a judgment of native title rights and interests made. The State argued that despite the inconvenient consequences of this conception, authorisation procedures remain central to the NTA.

South Australia's argument was accepted by the Court. In reaching his decision, Justice Finn referred to the legislative scheme surrounding authorisation. He noted that it was 'difficult to overstate the centrality of the requirement of 'authorisation' in the scheme laid down by the Act [NTA] for the making of a native title application'.[3] Finn J reiterated that there can only be one determination in relation to an area,[4] however this

[1] *Kokatha People v State of South Australia* [2007] FCA 1057 (*Kokatha*).

[2] *Kokatha,* [2].

[3] *Kokatha,* [17].

[4] *Native Title Act 1993 (*Cth), s 13(1), 61A(1) and 68.