

sometimes it is helpful for them to seek guidance from the Family History Unit, which is located next to the Library.

Please contact Grace Koch, Native Title Research and Access Officer, at [grace.koch@aiatsis.gov.au](mailto:grace.koch@aiatsis.gov.au) or by phone at 02 6246 1103.

## What's New

### Recent Cases

#### Australia

##### *Adnyamathanha No 1 Native Title Claim Group v The State of South Australia [2009] FCA 358*

See Case Note above.

##### *Adnyamathanha No 1 Native Title Claim Group v The State of South Australia (No 2) [2009] FCA 359*

See Case Note above.

##### *Brown v State of South Australia [2009] FCA 206*

This case was a native title determination application. There were two issues in the case. First, was the group identified in the application a native title claim group under section 61 of the *Native Title Act 1993* (Cth) ('NTA'). It was held that the applicant's family group was not a native title claim group but rather a subgroup or a group larger than specified in the application. Second, was the applicant authorised by the native title claim group to make the application. On this point it was found that the applicant did not meet the authorisation requirements under section 251B. For these two reasons the native title determination application was struck out under section 84C NTA.

##### *FMG Pilbara Pty Ltd v Cox [2009] FCAFC 49*

The case concerned a review of a finding by the National Native Title Tribunal (NNTT) that a party did not fulfil its obligation to negotiate in good faith. It was concerned with the scope of the obligation to negotiate in good faith,

in particular the relevance of the stage of negotiations and if there was a requirement to negotiate specifically about a future act. The Court held that the applicant fulfilled its obligation to negotiate in good faith and the Tribunal had the power to conduct an inquiry and make a determination under section 38 *Native Title Act 1993* (Cth) (NTA). Accordingly, the Court allowed the appeal and ordered that the decision of the NNTT be set aside.

##### *Hunter on behalf of the Wiri People No 2 v State of Queensland [2009] FCA 325*

This case concerns an application that failed the registration test. There was a notice on the Court's own motion requiring the applicant to show cause why the application should not be dismissed pursuant to section 190F(6) *Native Title Act 1993* (Cth). Under section 190F(6) applications may be dismissed if two conditions precedent are met. These are that (i) the application has not been amended since registration and is unlikely to be amended in way that would lead to a different outcome and (ii) in the court's opinion there is no reason why the application should not be dismissed. Here the court found that the conditions had been met. Also, there was an additional basis for dismissal namely, multiple defaults of appearance by the applicant.

##### *Margarula v Northern Territory of Australia [2009] FCA 290*

In this case the judge disqualified himself from further hearing or determining the proceeding. The reason for the disqualification was that the judge, whilst previously working as a solicitor, had given advice in relation to one of the issues likely to arise during the native title claim. Although the judge did not personally feel the apprehension of bias principle applied, he nevertheless considered it prudent to decline to continue to deal with the application. The proceedings were still at an early stage and it would be relatively simple to organise another judge rather than continuing with the possibility of being overruled by the Federal Court and wasting public resources.

*Smith on behalf of the Southern Barada & Kabalbara People v State of Queensland*  
[2009] FCA 285

This case concerns an application for an extension of time to comply with two previous orders made by the court. The orders primarily related to amendment of the native title application in order to clarify membership of the native title claim group. It was held that failure to comply and clarify the claim group was a deficiency of a fundamental kind. Thus the proceedings were dismissed as of the 13<sup>th</sup> or 14<sup>th</sup> February 2009. The application for a time extension was dismissed and the proceedings were not reinstated.

## International

*Carrier Sekani Tribal Council v British Columbia (Utilities Commission), 2009 BCCA*  
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In this case the broad general principles of the Crown's duty to consult and, if necessary, accommodate Aboriginal interests were applied to a concrete set of circumstances.

*Kwikwetlem First Nation v British Columbia (Utilities Commission), 2009 BCCA*  
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This appeal under s. 101 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473, questions British Columbia Utilities Commission's approach to the application of the principles of the Crown's duty to consult about and, if necessary, accommodate asserted Aboriginal interests on an application under s. 45 of that *Act*, for a certificate of public convenience and necessity for a transmission line project proposed by the respondent, British Columbia Transmission Corporation.

*William v British Columbia (HMTQ), 2009 BCCA*  
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In this case a trial judge's stay was lifted on appeal proceedings after a very long Aboriginal claims trial. Trial judge's order raises issues of public interest and of importance to Aboriginal law. Settlement discussions among the parties, unsuccessful after a year can, continue while the appeal moves forward.

*Wolfchild v U.S. 2008 CAFC 5018*

The court determined that self-described "lineal descendants" of the Loyal Mdewakanton Dakota are not owed money for land promised to their ancestors in the late 1800s.

## Reports

### *Native Title Report 2008*

Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner

The report is focused on two main topics. First, there is an overview of changes to native title law and policy, and a summary of native title cases that were heard during the reporting period. The second half of the report focuses on climate change and water policy, and makes a number of recommendations aimed at heightening Indigenous participation and engagement in these policy areas. The report also includes two case studies which demonstrate the potential impacts of climate change on the human rights of Torres Strait Islanders and the Indigenous nations of the Murray Darling Basin.

The report is available at:

[http://www.humanrights.gov.au/social\\_justice/nt\\_report/ntreport08/](http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/)

## NTRU Publications

Ganesharajah, C., 'Indigenous Health and Wellbeing: The Importance of Country', Native Title Research Report No. 1/2009, 2009, Native Title Research Unit, Australian Institute for Aboriginal and Torres Strait Islander Studies: Canberra.

## Books

Atkinson, W., 'Reflections on the Yorta Yorta native title claim, 1994-2003' in A Gunstone (ed), *History, politics & knowledge: essays in Australian Indigenous studies*, Australian Scholarly Publishing, Melbourne, 2008.

Hunt, M., *Mining Law in Australia*, The Federation Press, Annandale, NSW, 2009.

Jones, C., 'Apples and oranges: the intersection of Aboriginal law and native title mediation' in A Gunstone

(ed), *History, politics & knowledge: essays in Australian Indigenous studies*, Australian Scholarly Publishing, Melbourne, 2008.

Stanner, W.E.H., *The dreaming & other essays*, Black Inc. Agenda, Melbourne, 2009.

Neate, G., (ed) *Native title casenotes, 1971-2007*, LexisNexis, Chatswood, NSW, 2009.

## Papers

Australian Law Reform Commission, 'Native Title', *Reform*, Issue 23, 2009.

Behrendt, J., 'The Wagga land claim: *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* [2008] HCA 48', *Indigenous Law Bulletin*, vol.7, no.9, 2008, pp.22-25.

Burnside, S, 'We're from the mining industry and we're here to help: the impact of the rhetoric of crisis in future act negotiations', *Australian Indigenous Law Review*, vol.12, no.2, 2008, pp.54-66.

Koch, G., 'Music and land rights: archival recordings as documentation for Australian Aboriginal land claims', *Fontes Artis Musicae*, vol.55, no.1, 2008, pp.155-164.

'Minister Administering the Crown Lands Act v NSW Aboriginal Land Council', *Australian Indigenous Law Review*, vol.12, no.2, 2008, pp.84-85.

Neate, G., 'Improving and using the native title scheme – visions and dreams for the future', paper presented at the 3<sup>rd</sup> Annual Negotiating Native Title Forum, Melbourne, 19 February 2009.

Nettheim, G., 'International law and native title in Australia', *The University of Queensland Law Journal*, vol.27, no.2, 2008, pp.167-192.

'Northern Territory v Arnhem Land Aboriginal Land Trust', *Indigenous Law Review*, vol.12, no.2, 2008, pp.82-83.

O'Dea, D., 'Negotiating consent determination – cooperative mediation – the Thalanyji experience', paper presented at the 3<sup>rd</sup> Annual Negotiating Native Title Forum, Melbourne, 19 February 2009.

Secher, U., 'Implications of the crown's radical title for statutory regimes regulating the alienation of land: 'crown land' v 'property of the crown' post-*Mabo*', *Monash University Law Review*, vol.34, no.1, 2008, pp9-52.

Young, S., 'One step forward and one step back: the Noongar south-west native title claim', *Australian Property Law Bulletin*, vol.23, no.2, 2008, pp.14-17.

## Native title in the News

### National

Apr-09 NATIONAL **Title proof plan** The Federal Government is considering a proposed change to the native title claim system. The change would shift the burden of proof for connection from Aboriginal applicants to States, Territories etc. *Burnie Advocate*, (Burnie TAS, 11 April 2009), 24. *Bendigo Advertiser*, (Bendigo VIC, 11 April 2009), 14. *Northern Daily Leader*, (Tamworth NSW, 11 April 2009), 11. *Sunraysia Daily*, (Mildura VIC, 10 April 2009), 13. *Ballarat Courier*, (Ballarat VIC, 10 April 2009), 13. *Kimberley Echo*, (Kununarra WA, 23 April 2009), 7.

Mar-09 NATIONAL **Native Title Amendment Bill Introduced** Attorney-General Robert McClelland introduced the *Native Title Amendment Bill 2009* (Cth) into Parliament last week. The Bill will give the Federal Government authority over the whole process of native title claims. The Government claims that this will ensure greater efficiency. *Lawyers Weekly*, (National AU, 27 March 2009), 4.

Mar-09 NATIONAL **Green light for Aboriginal deals** Aboriginal landowners across NSW will be able to initiate deals with developers and unlock the value in up to \$2 billion worth of land under major reforms planned by the Rees Labor Government. *Australian*, (Australian, 10 March 2009), 4.

Mar-09 NATIONAL **Aborigines told to swap land rights for new homes** Under the Rudd Government's controversial plan, Aboriginal people living in remote areas throughout Australia will not receive a portion of \$2 billion in new housing money unless they sign away their land rights for at least 40 years. *NSW Indigenous*