What's New

Legislative Reforms and Reviews

Native Title Amendment Bill 2009, Report of the Senate Standing Committee on Legal and Constitutional Affairs, May 2009.

The report of the Senate Standing Committee on Legal and Constitutional Affairs on the *Native Title Amendment Bill 2009* was delivered in May 2009. Ultimately, the Committee recommended that the Bill be passed.[1]

The Committee began by summarising the key amendments proposed by the Bill. The Bill:

- invests the Federal Court with the authority to decide whether it, the National Native Title Tribunal, or another individual or body should mediate a native title claim;
- further encourages and facilitates negotiated settlement of claims;
- allows the application of amended evidence rules for evidence given by the Aboriginal and Torres Strait Islander people to apply to native title claims in certain circumstances; and
- streamlines provision relating to the role of representative bodies.[2]

In Chapter 2 the Committee discussed in detail each of the proposed changes.

In Chapter 3 the Committee noted that the:

> Tribunal's concerns derive largely from the Bill's proposal to centralise the management of native title cases in the court and hinge on the assertion that the amendments would not necessarily bring about a faster or more efficient claims settling process.[3]

The Tribunal argued that the amendments in relation to mediation were problematic. The amendments would lead to the possible segmentation of claims, resulting in duplication and wasted time and resources. Mr Neate also argued that the amendments may also create uncertainty about the respective powers and functions of the Court and the Tribunal. He stated that these are clearly identified within the current system.

The Committee noted the comments of an earlier senate inquiry, 'significant concerns were expressed about the expansion of the NNTT's powers, particularly as most stakeholders do not have confidence in the NNTT's capacity or expertise to conduct effective mediation'.[4]

The Tribunal's contention that the changes will not bring about improvements in the claims process was disputed by the Court which argued that: results could be obtained through a flexible and responsive approach; the Court has a wealth of experience; and the Court in the best position to decide which mechanism was in the best interests of each case.

The reasoning of the Committee is captured in the following paragraph:

> While the arguments of the NNTT and others that native title is inherently complex and drawn-out, the committee is impressed by the innovations and flexibilities offered by the Federal Court taking a more central role in case management. The capability of the Court is clear, and the committee considers there is good reason to anticipate a smoother and more expeditious flow of native title case management as a result of the changes being implemented. For these reasons, and in the absence of substantive criticism of other aspects of the Bill, the committee recommends the Bill be passed.[5]

Native Title Amendment Bill 2009 (Amendment to be moved by Mr Oakeshott)

The amendment introduces a provision that reverses the current burden of proof. The text is as follows:

Part 3— Burden of proof for applicants

20 After section 61A

Insert: 61B Burden of proof for applicants

[1] [3.19] p15
[2] [1.3] p.1.
[3] [3.3] p.11.
[4] [3.7] pp.12-13.
[5] [3.14] pp.14-15.

(1) This section applies to an application for a native title determination brought under section 61 of the Act where the following circumstances exist:

(a) the native title claim group defined in the application applies for a determination of native title rights and interests where the rights and interests are found to be possessed under laws acknowledged and customs observed by the native title claim group;

(b) members of the native title claim group reasonably believe the laws and customs so acknowledged to be traditional;

(c) the members of the native title claim group, by their laws and customs have a connection with the land or waters the subject of the application;

(d) the members of the native title claim group reasonably believe that persons from whom one or more of them was descended, acknowledged and observed traditional laws and customs at sovereignty by which those persons had a connection with the land or waters the subject of the application.

(2) Where this section applies to an application it shall be presumed in the absence of proof to the contrary:

(a) the laws acknowledged and customs observed by the native title claim group are traditional laws and customs acknowledged and observed at sovereignty;

(b) the native title claim group has a connection with the land or waters by those traditional laws and customs;

(c) if the native title rights and interests asserted are capable of recognition by the common law then the facts necessary for the recognition of those rights and interests by the common law are established

Recent Cases

Australia

Coyne v State of Western Australia [2009] FCA 533

This case concerned an application under section 66B of the *Native Title Act 1993* (Cth) to replace the current applicant to a native title determination (known as the Southern Noongar claim). The motion was opposed by three parties to the proceeding. The issues were whether the claim group meeting was representative, whether authorisation of replacement applicant was effective, and whether the application was affected by the death of two persons authorised by claim group to comprise the replacement applicant before application was heard. Justice Siopis held that the applicants were/are authorised to make the native title application as the replacement for the current applicant.

Hogan v State of Western Australia [2009] FCA 610

The primary issue in the case was whether the Court could use its discretionary power to dismiss an application on its own motion where the applicant had previously failed the registration test.

On 13 November it was decided that the application did not satisfy a number conditions of the registration test. Following that date the applicants had not applied for reconsideration of the decision or amendment of the application. Further, there was no evidence to suggest it would be amended in a way that would lead to a different outcome. Therefore, under section 190F(6) *Native Title Act 1993* (Cth) the application could be dismissed. However, the judge noted that the applicants could in the future file a 'properly constituted claim'.

Hunter v State of Western Australia [2009] FCA 654

The Nyangumarta People applied to the Federal Court for a determination of native title by consent in relation to an application area in the northwest Pilbara and southwest Kimberley regions. The Court made the order pursuant to sections 87 and 87A of the *Native Title Act*

1993 (Cth) (NTA). The Court also made an order, under section 56 NTA, giving effect to the parties' proposal that the Nyangumarta Warrarn Aboriginal Corporation be the trustee of the native title rights and interests.

Most of the application area is unallocated Crown Land, to which the Nyangumarta People hold an entitlement as against the whole world to the possession, occupation, use and enjoyment of the land and waters to the exclusion of all others. Regarding other parts of the application area which are held under various pastoral leases, the Nyangumarta People hold non-exclusive rights including the right to access, move through, and live on the area. All of these native title rights and entitlements are subject to any inconsistent rights of others.

Martin (deceased) v State of Western Australia (No 2) [2009] FCA 635

The case concerned an application under sections 61(1) and 66B(1)(b) of the *Native Title Act 1993* (Cth) (NTA) to replace the applicant in native title proceedings following the applicant's death. Orders were also sought to amend the claimant application in other ways. The applications were opposed by the Yamatji Marlpa Aboriginal Corporation (YMAC) who argued non-compliance with the NTA. The Court held that the claim group had complied with the requirements of the NTA (i.e. the claim group had appropriately authorised the seven nominated persons to make the application and deal with matters arising in relation to it). Furthermore, the judge rejected YMAC's assertion that the claim group was attempting to vindicate the native title rights of some larger group, of which they are a part, without the larger group's authority. Overall, the Court permitted the replacement of the deceased applicant and the proposed amendments to the claimant application.

Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council [2009] NSWCA 138

The Bathurst Local Aboriginal Land Council (the "BLALC") lodged an Aboriginal Land Claim over the Sir Joseph Banks Nature Park (the "Reserve"). The Reserve had previously been precluded from sale in order to preserve native flora, but had recently been closed down in July 2001 and made open to the public.

In accordance with s36(1)(b) of the Aboriginal Land Rights Act 1983 (NSW) (the Act), the BLALC would only be entitled to claim the Reserve if the land was not "lawfully used or occupied". The Minister administering the Crown Lands Act 1989 refused the BLALC's claim on the basis that the Reserve did not constitute claimable Crown land under the ALR Act.

The meaning of "used or occupied" was extensively considered, and ultimately the Reserve was transferred to the BLALC because it was not lawfully used or occupied when the claim was lodged. On appeal, it was held that no error of law had been made by the Land and Environment Court in reaching this conclusion, and consequently the appeal was dismissed.

Nambucca Heads Local Aboriginal Land Council v Minister for Lands [2009] FCA 624

An application was made by the Nambucca Heads Local Aboriginal Land Council (the Council) under section 61 *Native Title Act 1993* (Cth) (NTA) for a determination regarding existing native title rights and interests. The application was made in order to facilitate a joint venture by the Council and Indigenous Business Australia to develop two lots of land, owned by the Council, into a shopping centre. Section 40AA of the *Aboriginal Land Rights Act 1983* (NSW) prohibited the Council from disposing of the land without "an approved determination of native title". The Court determined that there were no native title rights and interests in relation to the land.

Walmbaar Aboriginal Corporation v State of Queensland [2009] FCA 579

In this case the Walmbaar Aboriginal Corporation applied under sections 50(2) and 61(1) of the *Native Title Act 1993* (Cth) (NTA) for a determination of the compensation payable in respect of acts that extinguished, significantly impaired or otherwise affected the native title rights and interests of the Dingaal People forming part of the Hopevale determination. Overall, it was found that Walmbaar had commenced the compensation application without authority (Rule 9(1) of

the corporation's rules, section 57(3)(b) NTA, Regulation 7 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth)) of the and further, that the compensation claim included lands and waters over which there had been no determination of native title. Thus, the application was dismissed pursuant to s84C NTA.

Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu)/Western Australia/Holocene Pty Ltd [2009] NNTTA 49

This case concerned an application under section 35 of the *Native Title Act 1993* (Cth) (NTA) for a future act determination under section 38 NTA. The future act was the granting of a mining lease under the *Mining Act 1978* (WA) to Holocene Ltd over land which is the subject of the native title determination of the Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) (WDLAC/the Martu People).

The main issue was the effect of the project on Lake Disappointment, a site of particular significance, in the context of the interests, proposals, opinions or wishes of WDLAC in relation to the management, use or control of the land. It was argued by WDLAC that the mining lease should not be granted unless agreement could be reached regarding a satisfactory working relationship, protection of heritage, regulation of activities, appropriate involvement and reasonable benefits and compensation including relevant ownership of the project. Although it was noted that a native title party does not have a veto over development proposals, it was recognised that the Tribunal should give considerable weight to their view about the use of the land.

Deputy President Sumner in his conclusion stated:

'In my view the interests, proposals, opinions and wishes of the native title party [WDLAC] in relation to the use of Lake Disappointment should be given greater weight than the potential economic benefit or public interest in the Project proceeding' [216].

The final determination was that the mining lease must not be granted.

International

Case of the Saramaka People v. Suriname, Inter-American Court of Human Rights, Judgment of November 28, 2007

The application submits to the Court's jurisdiction alleged violations committed by the State against the members of the Saramaka people, an allegedly tribal community living in the Upper Suriname River region. The Commission alleged that the State has not adopted effective measures to recognise their right to the use and enjoyment of the territory they have traditionally occupied and used, that the State has allegedly violated the right to judicial protection to the detriment of such people by not providing them effective access to justice for the protection of their fundamental rights, particularly the right to own property in accordance with their communal traditions, and that the State has allegedly failed to adopt domestic legal provisions in order to ensure and guarantee such rights to the Saramakas.

This finding was supported by the Federal Court, who reasserted that the State did not provide for the resumption of the native customary rights land or the extinguishment of such rights.

New Zealand Fish and Game Council v Attorney-General & Anor CIV-2008-485-2020 12 May 2009-05-14

The issue that arose in this case was whether a pastoral lease granted under the *Land Act 1949* had the effect of granting exclusive possession. Ultimately the judge held exclusive possession was granted. However, the judge noted that he had not considered the relationship of the leases to native or customary title. Therefore he was not commenting on the effect of the leases on native title.

NTRU Publications

Everard, D. 2009. 'Scoping Process Issues in Negotiating Native Title Agreements', Research Discussion Paper No.23, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies.

Weir, J.K. 2009. 'The Gunditjmara Land Justice Story', Native Title Research Monograph 1/2009, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies.

Other Publications

Books / Reports

Department of Justice, Report of the Steering Committee for the Development of a Victorian Native Title Settlement Framework, Department of Justice, Victorian Government, Melbourne, December 2008. Available at: http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebf9a00adc6c233/FINAL%20SC%20Report%2013May09.pdf

Papers

Altman, J., and Jordan, K. 2009. 'A Brief Commentary in Response to the Australian Government Discussion Paper "Optimising Benefits from Native Title Agreements" and the Report of the Native Title Payments Working Group' CAEPR Topical Issue 3/2009, Centre for Aboriginal Economic Policy Research, Canberra.

Armstrong, R. 2009. An overview of Indigenous rights in water resource management, Revised: Onshore and offshore water rights discussion booklets, Prepared by the Lingiari Foundation and North Australian Indigenous Land and Sea Management Alliance. Available at: http://www.nailsma.org.au/publications/indigenous_water_rights.html

Morphy, F. and Morphy, H. 2009. 'The *Blue Mud Bay case*: refractions through saltwater country', *Dialogue*, vol.28, no.1, pp.15-25.

National Native Title Tribunal, Talking Native Title, Issue No 31, June 2009.

Richardson, B., Imai, S., McNeil, K. *Indigenous peoples and the law: comparative and critical perspectives*, Hart, Oxford, 2009.

Wright, L., and Sparkes, S. 2009. 'ILUA discussion paper: Authorisation of an area agreement', National Native Title Tribunal, 28 May 2009.

Native Title in the News

National

02-May-09 NATIONAL **Urging on changes** The Federal Government has been urged to amend native title laws by providing a presumption of continuity to the lands claimed by Indigenous peoples. The presumption could be rebutted if it was proved there has been substantial interpretation in the observance of traditional law and custom by claimants. *Northern Daily Leader,* (Tamworth NSW, 2 May 2009), 3. *Daily Liberal,* (Dubbo NSW, 2 May 2009), 5. *National Indigenous Times,* (14 May 2009), 6.

Northern Territory

13-Jun-09 NT **Alice Springs parks given to Aboriginal peoples** A large section of land has been handed back to Aboriginal people in central Australia, ending a struggle for recognition by traditional land owners. The land is home to many culturally significant sites. The hand back is subject to 99-year leases to the NT government, allowing the land to continue being used as national parks. *Burnie Advocate,* (Burnie TAS, 13 June 2009), 23.

25-Jun-09 NT **Parks and reserves win for Top End traditional owners** A large chunk of land has been handed back to traditional owners in Central Australia, ending a hard fought struggle for recognition by traditional land owners. Nine parks and reserves to the east and south of the desert town of Alice Springs were returned to traditional owners earlier this month, including Trephina Gorge, Chambers Pillar and Ndhala Gorge. Queensland *National Indigenous Times,* (Malua Bay NSW, 25 June 2009), 7.

15-May-09 QLD **Native title deal** Indigenous groups have signed an agreement with WWF-Australia to obtain faster resolution to native title claims and better protection for native title land. WWF signed the Memorandum of Understanding with the Queensland Indigenous Working Group in Brisbane on the 14 May 2009. *Cairns Post,* (Cairns, 15/05/2009), 14. *Advertiser,* (Adelaide 15 May 2009), 27. *Western Cape Bulletin,* (Weipa QLD, 20 May 2009), 2.

21-May-09 QLD **Land rights claim** Traditional land owners are considering legal action against developers of a proposed Queensland Sports Museum. There are