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- Corporate design
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- Mediation and negotiation
- Claims management
- Collection management
- Cultural Heritage, and
- International comparisons

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What's New

Reforms and Reviews

Aboriginal Affairs Victoria. Review of the Aboriginal Heritage Regulations 2007

The *Aboriginal Heritage Act 2006* ('the Act') commenced operation on 28 May 2007. The commencement of the Act proceeded as soon as practicable after the completion of the Regulations. This new legislation substantially changed the management and protection of Aboriginal Cultural Heritage in Victoria.

Given the substantial change to the legislation, it was accepted that a period of operation was required before some aspects of the Regulations could be reasonably evaluated. Firstly, the Regulatory Impact Statement (RIS) process had highlighted that the cost of the Regulations could only be accurately assessed after the Regulations

had been in operation for a period. Secondly, the then Minister for Aboriginal Affairs wanted to ensure that the list of High Impact Activities in the Regulations was sufficiently targeted, and considered that an operational period may be needed to identify corrections (if any) in this list. In addition to these issues, a review was considered beneficial in assessing the effectiveness of the Regulations in meeting the aims of the Act.

This report sets out the results of the review of the Aboriginal Heritage Regulations 2007 ('the Regulations') conducted by Lily D'Ambrosio, Parliamentary Secretary, Community Development, and Aboriginal Affairs Victoria.

Recent Cases

Australia

Lansen v Minister for Environment and Heritage [2008] FCAFC 189

This was a decision of the Full Court of the Federal Court of Australia. The applicants were several Native Title Claim Groups with Native Title determination applications. This application was for approval of "controlled action" under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth). One issue was whether assessment of the proposal was properly made under a Bilateral Agreement between Commonwealth and Northern Territory when the Bilateral Agreement came into force after the decision of the Minister to deem the proposal a "controlled action". The Court considered whether assessment of the proposal should have been made under Part 8 of *EPBC Act* and whether the primary judge was correct in holding that the assessment of proposal was properly made under the Bilateral Agreement. A further issue was whether the pre-condition to the grant of approval under Part 9 of the *EPBC Act* was satisfied where the Minister received a report that there was not enough information and, secondly, whether the Minister received an assessment report as required by s 133. The Court considered whether the primary judge was correct in concluding that there was an assessment report in existence within the meaning of s 133 of the *EPBC Act*. The Court considered whether the Minister breached s 134(4)(a) of the *EPBC Act* and whether any breach of s 134(4)(a) rendered the approval invalid. Whether the primary judge erred in concluding that any breach of s 134(4)(a) did not render the Minister's decision invalid was considered. The final issue was whether the appellants should be permitted to raise an issue not argued before the primary judge. The order of the primary judge was set aside and an order made that the application for approval be remitted to the Minister for further consideration according to law.

Lardil, Yangkaal, Gangalidda & Kaiadilt Peoples v State of Queensland [2008] FCA 1855

Determination of native title by consent. The issue was whether it was within the power of the Court and appropriate to make an order under section 87 of the *Native Title Act* and, additionally, whether section 225 of the *Native Title Act* was satisfied. The determination of native title was made.

Worimi Local Aboriginal Land Council v Minister for Lands for the State of New South Wales (No 2) [2008] FCA 1929

Non-claimant application under *Native Title Act 1993* (Cth) seeking a determination that no native title exists over an area of land. The previous claimant applications for determination that native title exists were struck out for not meeting requirements of the Act. The previous claimant was joined as third respondent under s 84(5) of the *Act*. The third respondent opposed the non-claimant application. The Minister had not abandoned the right to participate in the proceedings as the Minister is not required to establish an interest to remain a party. The burden of proof is an evidentiary burden with a requirement to prove the proposition negative on the balance of probabilities. There is no presumption of native title and the third respondent is not required to establish native title but is required to adduce evidence once the applicant has adduced sufficient evidence from which the negative proposition may be inferred. The third respondent had not adduced sufficient evidence to cast doubt on the applicant's case and there was no sufficient evidence that asserted rights and interests arise under normative system of traditional laws acknowledged and traditional customs observed. The court held that the applicant was entitled to a determination that there is no native title over the land.

Quall v Northern Territory of Australia [2009] FCA 18

Application under Order 20 r 4 for summary dismissal. The native title determination application claim area is split into areas A and B with an earlier determination that no native title exists for area A because traditional Aboriginal society that existed at sovereignty had a

substantial interruption in acknowledgement and observance of traditional laws and customs. Issue estoppel was considered to the extent of whether an earlier determination decided what the relevant Aboriginal society was at sovereignty. If this was the case then an abuse of process had occurred because of a failure to claim particular Aboriginal society possessed native title rights and interests in earlier proceedings. A concurrent issue was whether an abuse of process had occurred due to an attempt to pursue that claim in proceedings for area B. The principles applicable to an application under O 20 r 4 for summary dismissal were considered along with the principle of issue estoppel, specifically whether the current claim is a re-litigation of the issue already determined in an earlier proceeding involving the same parties.

Eden Local Aboriginal Land Council v Minister for Lands [2008] FCA 1934

Non-claimant application for declaration that no native title exists. The application was made co-operatively for purpose of s 86G(2) of the *Native Title Act 1993* (Cth).

Holocene Pty Ltd/Western Australia/Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) [2009] NNTTA 8

Future act determination application concerning a proposed mining lease. A primary issue of the case was whether the grantee party had negotiated in good faith. An in-principle agreement was signed between the two parties, and the grantee party was not required to further negotiate about agreed commercial terms. A secondary issue was whether the grantee party agreed to pay the negotiation costs of the native title party. An unreasonable demand for the native title party to execute agreement was not fatal as the conduct is to be judged from the negotiations overall. The court held that the grantee party had negotiated in good faith.

International

R v Goodon 2008 MBPC 59 (Canada)

The accused is charged under s.19 of the Wildlife Act of Manitoba S.M. c. W 130 with possessing wildlife which was killed in contravention of that Act. The accused claims that he has a constitutionally protected right as a Metis to hunt for food under s. 35 of the Constitution Act, 1982 and therefore s. 19 of the Wildlife Act does not apply to him, containing no reasonable accommodation for his constitutionally protected right.

Temagami First Nation v. Turner (2008 FC 1287) (Canada)

The applicant is seeking an interim injunction that would enforce the results of a general election held on June 12, 2008 until the underlying proceeding dealing with a judicial review of two resolutions purporting to amend the Temagami First Nation Tribal Constitution has been heard and decided on its merits. The applicant is also requesting a stay of these resolutions amongst other remedies. It is suggested that what is at stake in these proceedings might be the leadership of the community. It might be a battle for control and the power to govern the Temagami First Nation.

Nunavut Wildlife Management Board v. Canada (Director General, Department of Fisheries and Oceans, Pacific Region) (2009 FC 16)

The applicant, the Nunavut Wildlife Management Board (NWMB), seeks judicial review of a decision dated 30 January 2008 by the respondent Minister of Fisheries and Oceans approving the permanent re-allocations of 1900 metric tonnes of quota for turbot for the offshore fisheries areas adjoining the marine areas of the Nunavut Settlement Area (NSA).

Books

Behrendt, L. and Kelly, L. *Resolving indigenous disputes: kind conflict and beyond* Annandale, N.S.W.:Federation Press, 2008.

Papers

McAvoy, T. 'Native title litigation reform' (2008) 8 *Native Title News* 12, 193-195.

Behrendt, J. 'The Wellesley Sea Claim and the gap between Indigenous sea cultures and native title recognition' (2008) 2 *Ngiya: Talk the Law* 2, 2-16.

Yogaratnam, J. 'Mabo: whistle blowing the state government on native title in Malaysia' (2008) 33 *Alternative Law Journal* 4, 240-243.