NTRU project updates:

Progress report: 'The Future of Connection Material' project

Grace Koch, Native Title Research and Access Officer

The findings from the project, *The Future of Connection Material (FCM)*, have provided a set of guidelines for collection management practice within Native Title Representative Bodies (NTRBs). The *FCM* final report, researched over a period of three years, was based upon visits to NTRBs, workshops, and recommendations agreed upon at a Senior Professional Officers' meeting sponsored by FaHCSIA in March, 2008. It can be found online at: http://www.aiatsis.gov.au/ntru/docs/researchthemes/connection/future/KochFuture.pdf

In 2008, I visited Queensland South Native Title Services in order to compile a report on specific collection management needs based upon the recommendations set by the *FCM* document. The following year, FaHCSIA requested that I present an overview of the state of NTRB collection management practice to a forum that it sponsored in Melbourne on 8 October 2009 for Chief Executive Officers and Senior Professional Officers of NTRBs. At that meeting, it was decided that I would prepare reports for other NTRBs as requested.

Yamatji Marlpa Aboriginal Corporation invited me to write a report on their collection management needs. Airfare and accommodation expenses were met by Yamatji for a visit from 14-18 December 2009, and staff were interviewed at the Perth and Karratha offices. Although the original aim of the visit was to look at all systems, work was limited to the research and heritage areas because of the short time available. The resulting report, which had significant staff input, detailed seven areas for action, including consolidation of multiple databases where possible, privacy and security of documents, storage conditions, and consolidation of documentation. The report was structured to give some background, description of the present situation, and recommendations on steps for improvement for each action area.

Many of the issues raised by the report are relevant to NTRBs in general. Hopefully some progress in collection management practices will result from the findings and the recommendations.

AIATSIS' submission to the Attorney-General's Department: A summary

Zoe Scanlon, Native Title Research Unit, Research Officer

Proposed amendment to enable the historical extinguishment of native title to be disregarded in certain circumstances

The doctrine of extinguishment is a particularly contentious area of native title law that is unquestionably deserving of more critical attention: extinguishment is one of the key racially discriminatory aspects of native title. Specifically, the circumstances prescribed by the *Native Title Act 1993* (Cth) in which the extinguishment of native title may be disregarded are among the few attempts to develop a more just legal framework for the recognition and protection of native title, though they remain far too limited in scope.

In addition to the significant research that is required by native title parties to prove connection with and rights to land and water, state government parties must undertake costly and time-consuming searches of historical tenure over land in order to resolve native title claims. An intricate evaluation of this information is required in order to establish whether each particular act affecting land has occasioned any extinguishment and to what extent. Effectively, a potential dispute arises over each individual tenure granted over past 230 years. Regardless of whether these disputes take the form of negotiation or litigation, the time and cost associated with this aspect of the claims is significant.

The proposed s 47C appears to be a beneficial amendment to the *Native Title Act.* Section 47C could eliminate unnecessary delay and cost currently attached to native title claims over national parks by eliminating tenure assessments, and may facilitate the return of national park lands over which Indigenous peoples continue to hold rights and interests under Indigenous law.

However, a considerable problem with this reform remains in s 47C(1)(c)(ii) which requires claimants and State governments to agree to the operation of s 47C. This further erodes the negotiating power of native title parties and unduly places power in the hands of the State.

Further, reform in this area should be more extensive. Numerous problems exist in relation to the doctrine of extinguishment. These include the discriminatory nature of the doctrine, the unjust enrichment of the Crown, the inadequate justification for permanent extinguishment, the confusing and impractical piecemeal erosion caused by partial extinguishment, and the problem of the inconsistent approaches across jurisdictions.

While the addition of s 47C is certainly a positive step, the problems with the current law of extinguishment could be ameliorated by further reform to expand the circumstances in which historical extinguishment can be disregarded to include all Crown land.

The full submission can be accessed here: http://www.aiatsis.gov.au/ntru/docs/publications/submissions/s47.pdf

What's New?

Recent cases

Edwards v Santos Limited [2009] FCA 1532
(18 December 2009)
Logan J
Federal Court of Australia, Brisbane

The applicants, on behalf of the Wongkumara people, were 'registered native title claimants' over land in south-west Queensland and north-west New South Wales. There had not yet been a determination as to native title in that area.

The first and third respondents (Santos Ltd and Delhi Petroleum Pty Ltd) held an authority to prospect (under the *Petroleum Act 1923* (Qld)) in an area that included part of the claim area. The applicants sought to prevent the respondents seeking a petroleum lease on the basis that this was an impermissible future act.

Justice Logan found that, as the claimants did not hold native title at that time, they were effectively asking for an advisory opinion as to the outcome that would eventuate should native title be found to exist and the petroleum lease be sought by the respondents. His Honour considered that he was bound by *The Lardil People v Queensland* (2001) 108 FCR 298, which confirms the definition of 'future act' in s 223 of the *Native Title Act* as an act that 'affects' native title, not an act which, if native title existed, *might* affect it. He found that this application therefore had a hypothetical nature and that giving an advisory opinion was antithetical to the exercise of federal jurisdiction as this issue did not, in itself, constitute a 'matter'. Therefore the applicants' 'mere status' as registered native title claimants did not give them standing to claim any of the relief sought.

His Honour dismissed the application. The question of costs was not addressed, but scheduled for a later hearing.

Edwards v Santos Limited [2010] FCA 34
(4 February 2010)
Collier J
Federal Court of Australia, Brisbane

The applicants sought leave to appeal the dismissal of their claim (see above *Edwards v Santos* [2009] FCA 1532) before a Full Court.

Justice Collier considered that the submissions supporting the applicants' case held some potential merit, that the original judgment had resulted in important consequences for the parties and that the case raised issues of public importance. Her Honour found that the application involved issues that were suitable for consideration by the Full Court.

Justice Collier referred the application for leave to appeal to a Full Court of the Federal Court of Australia. The application for leave to appeal would be heard concurrently with or immediately before the appeal (subject to any contrary direction of the Full Court).

Edwards v Santos Limited (No 2) [2010] FCA 238
(17 March 2010)
Logan J
Federal Court of Australia, Brisbane

This proceeding concerned the awarding of costs in relation to the decision made in *Edwards v Santos Limited* [2009] FCA 1532 (see above). Logan J found that s 85A of the *Native Title Act 1993* (Cth) was inapplicable, relying on *The Lardil Peoples v Queensland* (2001) 108 FCR 453.

His Honour found that although the applicants' motivation in bringing the case was to resolve a negotiation dispute and there is a public importance in considering whether persons in the applicants' position have standing, this public interest is not greater than that of the respondents to be able to conduct their business without the burden of costs and unnecessary litigation. Neither was he convinced that