

## What's New April 2009

### Cases

#### Australia

##### ***Adnyamathanha No 1 Native Title Claim Group v The State of South Australia [2009] FCA 358 (19 March 2009)***

The case concerns an application for separate determinations of native title under section 61(1) *Native Title Act 1993* (Cth). The three proposed determinations relate to two native title claims. The first is a claim to a substantial area of South Australia. The second claim is over the Flinders Ranges National Park which is within the boundaries of the first claim. It was proposed that the first claim be subject to two consent determinations, one over a large part of the claim and another over the smaller Angepena area.

The reasoning behind the decision was that it would result in a mutually satisfying outcome in a timely and efficient manner. Given the complex and varied nature of the proposed land uses in Angepena it would be better if it were the subject of a separate consent determination. Further, the work and negotiations conducted in relation to Angepena were specific to the area.

Thus, the court ordered that the hearing of the proposed consent determinations be confirmed for a later date (see case below), with a separate consent determination to be entered in relation to Angepena Station.

##### ***Adnyamathanha No 1 Native Title Claim Group v The State of South Australia (No 2) [2009] FCA 359 (30 March 2009)***

The Federal Court made three determinations of native title in response to applications for consent determinations. The parties to two native title applications applied for three consent determinations after they reached an agreement that native title exists in some parts of the claim areas and has been extinguished in others. They also agreed on the native and extent of the native title rights and interests.

The applications were made under sections 87 and 87A of the *Native Title Act 1993* (Cth). Section 87 sets out the Federal Court's power to make orders sought by the consent of the parties. Section 87A sets out the power to make orders sought by consent of the parties to make a determination for part of an area. Justice Mansfield found that the required period under both provisions had elapsed, and other requirements relating to filing of documents had been met.

As the orders sought concerned a determination of native title, they had to comply with section 94A NTA which specifies that the proposed orders must contain the details mentioned in section 225. Section 225 requires, amongst other things, specification of the details of the nature and extent of native title rights and interests in relation to the determination area. Native title rights and interests are defined in section 223(1). Justice Mansfield held that the material relied upon by the applicants, and the terms of the proposed consent determinations, adequately addressed the requirements of sections 223(1) and 225.

Although a late objection was made by a pastoralist who did not consent to the determination, Justice Mansfield decided to proceed with the hearing of the application for consent determinations for two reasons. First, there a range of prescribed notification procedures in the NTA which the pastoralist did not seek to utilise at any time. Second, the pastoralist was aware of the Adnyamathanha claim and could have expressed any concerns at an earlier time.

##### ***FMG Pilbara Pty Ltd v Cox [2009] FCAFC 49 (30 April 2009)***

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 (27 March 2009)***

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 (5 March 2009)***

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 (20 February 2009)***

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.

## **Indigenous Land Use Agreements**

- See the [National Native Title Tribunal Website: ILUAs](#)
- The [Native Title Research Unit](#) also maintains an [ILUA summary](#) which provides hyperlinks to information on the NNTT and ATNS websites.
- Information about specific ILUAs is also available in the [Agreements, Treaties and Negotiated Settlements \(ATNS\) Database](#).

## **Native Title Determinations**

- See the [National Native Title Tribunal website: Search Determinations](#)
- The [Native Title Research Unit](#) also maintains a [Determinations Summary](#) which provides hyperlinks to determination information on the Austlii, NNTT and ATNS websites.
- The [Agreements, Treaties and Negotiated Settlements \(ATNS\) Database](#) provides information about native title consent determinations and some litigated determinations.

## **Native Title in the News**

- [NTRU Native title in the News](#)

## 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.

## Publications

### 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/)

### 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.

### Articles/Papers

- Australian Law Reform Commission, 'Native Title', *Reform*, Issue 23, 2009.
  - Tom Calma, 'Native Title in Australia: good intentions, a failing framework?', pp.6-9.
  - Chief Justice R.S. French, 'Lifting the burden of native title: Some modest proposals for improvement', pp.10-13.
  - Jenny Macklin MP, 'Can native title deliver more than a 'modicum of justice?', pp.14-16.
  - Megan Davis, 'Adding a new dimension: native title and the UN *Declaration on the Rights of Indigenous Peoples*', pp.17-19.
  - Graeme Neate, 'Native title: looking forward through the past', pp.20-23.
  - Monica Morgan, 'What has native title done for me lately?', pp.24-25.
  - Sean Brennan, 'Aboriginal land still vulnerable', pp.26-27.
  - Vance Hughston, 'A practitioner's perspective of native title', pp.28-29.
  - Tony McAvoy, 'Native title litigation reform', pp.30-32.
  - Alison Vivian, 'Conflict management in the native title system: A proposal for an Indigenous Dispute Resolution Tribunal', pp.33-36.
  - Steven Ross and Neil Ward, 'Mapping Indigenous peoples' contemporary relationships to country', pp.37-40.
  - Garth Nettheim, 'Native title in other lands', pp.43-44.
  - Alex Reilly, 'Native title as a cultural phenomenon', pp.41-42.
  - Neva Collings, 'Native title, economic development and the environment', pp.45-47.
  - Lisa Strelein, 'A captive of statute', pp.48-51.
  - Peter D. Fox, 'Indigenous land use agreements: a Canadian model', pp.52-54.
  - Tracy Nau, 'Looking abroad: models of just compensation under the *Native Title Act*', pp.55-58.

- 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 on future act negotiations', *Australian Indigenous Law Review*, vol.12, no.2, 2008, pp.54-65.
- 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 – co-operative 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.

## Training and Professional Development Opportunities

- See the [Aurora Project: Program Calendar](#) for information about [Learning and Development Opportunities](#) for staff of native title representative bodies and native title service providers.

## Events

- [NTRU events calendar](#)

(Sourced from NNTT Judgements and Information email alert service and the Federal Court's Native Title Bulletin)