The NTRU has been instrumental in organising the Institute's second Seminar Series for 1998. The series is titled *Land, Rights, Law: Issues of Native Title.* A list of speakers and dates is included at the back of this newsletter.

CLAIMS

Queensland

Wulgurukaba People No.1 and No.2 [NNTT Ref#QC98/30, QC98/31]

The Gabulbarra Reference Group has lodged two native title claims over areas of Magnetic Island. The Reference Group is acting for the Wulgurukaba people of Townsville and the Manbarra people of Palm Island who are claiming the right to use, manage and enjoy the land in accordance with their laws. The first claim covers the national park and the Horseshoe Lagoon Environmental Park, while the second claim covers state land used as a buffer zone between the towns and the national park. Leasehold and freehold land as well as government land such as reserves for schools, fire and police stations, are excluded from the claims. Beaches and reefs, including the Nelly Bay project site, are also excluded. Townsville Mayor, Tony Mooney, said he has no information on the claim and would be seeking discussions with the major stakeholders on Magnetic Island. *(CM, 30 June, p6)*

Fraser Island

The Dalungbara, Batchala and Ngulungbara people of Kgarl have sought recognition of common law native title to lands and seas in the Fraser Island region. The State Government has applied to the Supreme Court to strike out the claim on the basis that it was hopeless and frivolous because the applicants could not prove a contemporary connection with the land. The claimants argued they were hampered in proving such a connection because of state policy that scattered their people throughout the state. The application has been adjourned to a later date. *(CM, 24 July, p6)*

Griffith University

An agreement arising out of a native title claim was signed yesterday. The agreement between Griffith University and traditional owners of its Gold Coast campus land, will see important aspects of Kombumerri culture incorporated into the University. The Kombumerri people will not oppose the transfer of land from the Queensland Government to the University and in return, Griffith agrees to the acknowledgement of traditional owners through naming of facilities, inclusion of Kombumerri history and culture in the curriculum and scholarships for Indigenous students. The University has also agreed to survey the flora and fauna as well as sites of significance in the area. The implementation of the agreement will be overseen by a steering committee. *(Aus, 29 July, p34)*

South Australia

Dieri Mitha [NNTT Ref#SC95/2]

The application by the Dieri Mitha people, lodged in 1995, has been referred to the Federal Court for resolution. National Native Title Tribunal registrar, Chris Doepel, said the Tribunal had tried to help mediate an agreement between various parties but had failed. *(Ad, 4 June, p14)*

Kuyani no.2 [NNTT Ref#SC95/4]

The mediation conference for the Kuyani no.2 application, covering 151,000 square kilometres stretching from Whyalla, South Australia, towards the New South Wales border, north to Marree and west to Woomera, is to be conducted in Port Augusta from 13-15 July. It will be one of Australia's largest mediation conferences on a native title application.

National Native Title Tribunal Member Fred Chaney, who was to chair the mediation, said more than 880 people or groups had registered an interest in taking part in the mediation. Mr Chaney said the meeting would be an opportunity for the Indigenous applicants and the other parties, including miners, pastoralists, fishers and local authorities, to discuss the application, set out their points of concern, and decide how to progress negotiations. *(NNTT Media Release, 13 July, p1)**

Western Australia

Ngaanyatjarra Claims

The Ngaanyatjarra Land Council have 10 claims lodged with the National Native Title Tribunal. The Western Australian Government had plans to return a 250,000 square kilometre block of Aboriginal reserve and crown land to the Council, merging the 10 claims into one, but the Government has since decided to negotiate each claim individually. The Ngaanyatjarra people have expressed anger at repeated Government demands for proof of ownership of the land and at their insistence that none of the land belongs to the Ngaanyatjarra people. Because of these problems, negotiations with governments have stalled. *(WA, 4 June, p38)*

The Ngaanyatjarra People and the Spinifex People

An agreement has been signed between Ngaanyatjarra people and Spinifex people. The Ngannyatjarra people have agreed to surrender the southern-most section of one Aboriginal reserve over which the council holds lease when the Spinifex people get tenure at least as strong as the Aboriginal reserve. *(WA, 4 June, p38)*

Central Goldfields

Four native title applications by the Karonie people, an application by the Murdeeu group, and another by the Mingarwee people were today referred to the Federal Court for resolution. Tribunal Registrar, Chris Doepel, said the claims had failed to satisfactorily progress in mediation. *(NNTT Media Release, 4 June, p1)*

Rottnest Island [NNTT Ref#WC96/47]

The National Native Title Tribunal has formally rejected a native title application over Rottnest Island and three nautical miles of sea around it. Mr Corrie Bodney lodged the application on 9 May 1996. Tribunal Registrar, Chris Doepel, said under section 169 of the *Native Title Act 1993,* the applicants could appeal the decision to the Federal Court within 28 days. *(NNTT Media Release, 5 June, p1)*

Rockingham – Bunbury [NNTT Ref#WC96/90]

The National Native Title Tribunal has formally rejected a native title application over 36,000 square kilometres, stretching from Rockingham to Bunbury. Mr Allan Kickett lodged the application on 12 August 1996. Tribunal Registrar, Chris Doepel, said the application was rejected on the grounds that on the face of it, it could not succeed. He said the application did not set out an identifiable community from which the native title rights were derived and did not set out specific native title rights that the applicants were seeking to enjoy. *(NNTT Media Release, 15 June, p1)**

Ngyullee Ba Marbithar Boogoolaba Nyinnargoo [NNTTRef#WC98/19]

The National Native Title Tribunal has been verbally advised that Australia's largest native title application will be withdrawn. The application, covering 469,000 square kilometres and centred on Western Australia's Goldfields, was lodged on 7 April 1998. *(NNTT Media Release, 18 June, p1)** A spokesperson for the claimants, Mr Brian Wyatt, said the decision followed negotiations with other native title groups in the area. *(FinR, 19 June, p22)**

Southern Goldfields

Overlaps in four native title applications in the southern Goldfields region have been eliminated following extensive mediation assisted by the National Native Title Tribunal. The Tribunal has approved amendments to three applications by groups of Ngadju people. The amendments involved Indigenous applicants redrawing boundaries to eliminate overlaps. In addition, Kalaako applicants have agreed to withdraw their boundary from overlapping the Ngadju applications. Tribunal Member Tony Lee, who presided over the mediation, said that by combining their efforts and addressing the issue of overlaps, the Ngadju people are now in a much better position to engage in constructive negotiations with other parties, such as pastoral lease holders and local governments. *(NNTT Media Release, 19 June, p1)*

North-East Goldfields

Negotiations have resulted in the withdrawal or amendment of seven applications to reduce overlaps. The Milangka/Farmer application and a Goolburthurnoo Waljen application were withdrawn. The Youndou, Milangka Purungu and another Goolburthurnoo Waljen application, have been reduced in size. The two oldest Waljen applications were amended so they now represented a larger number of the Waljen people. *(NNTT Media Release, 19 June, p1)*

Gascoyne Region

The National Native Title Tribunal has referred four Gascoyne region native title applications to the Federal Court for resolution. The four applications by the Nganawongka, Wadjari and Ngarla people – north of Meekatharra – had reached a deadlock in negotiation over a process for the provision of anthropological research information. *(NNTT Media Release, 23 June, p1)**

Koara Determination, Eastern Goldfields [NNTT Ref#WF96/1, WF96/5, WF96/11]

The National Native Title Tribunal has given the go ahead for seven mining leases to be issued by the State Government in an area that was the subject of a native title application by the Koara people. The Tribunal has approved the granting of the leases, all of which were north of Leonora in the eastern Goldfields, with conditions to protect the native title rights and interests of the Koara people. The conditions were designed to protect native title rights and interests for the period of the leases, which are granted for 21 years with a renewal option of 21 years. The 16 conditions set by the Tribunal include:

- that the Koara people's access to the land covered by the mining leases be maintained;
- that sites of particular cultural significance are protected;
- that in the event of a mining development being proposed, a social impact study be conducted;
- that the Koara people be given employment and training opportunities where possible; and
- that the mining operators undertake training to raise their awareness of the Koara people's culture. *(NNTT Media Release, 24 June, p1&2)*

The Koara Determination

The Koara determination is the culmination of two years of arbitration under s.38 of the *Native Title Act.*

A decision of the National Native Title Tribunal (NNTT) in 1996, determined that the State party may grant mining tenements to the grantees subject to conditions.

The conditions were:

- that the native title party enjoy access to land that is the subject of the mining leases, except where mining operations may cause safety and security concerns;
- the grantee party was obliged to conduct site surveys and to involve the native title party to avoid site damage; and
- the parties were to negotiate benefits to the native title party under a two stage process when a productive mine was proposed.

The Tribunal did not decide on compensation payable to the native title party.

The native title party appealed this determination on the basis that NNTT erred in law. The two major arguments were:

1. That the NNTT erred in law in concluding it had no power on a future act determination to determine compensation be paid other than in accordance with Division 5.
2. That the NNTT can not set a two stage negotiation process to separate mining from exploration.

The Federal Court found the NNTT had erred in law on the following points:

1. It could in fact determine compensation be held in trust when there is no registered native title party.
2. The NNTT must not leave outstanding issues unresolved.

The matter was referred back to the NNTT for a determination. The NNTT heard argument and took further evidence. In June 1998, the Tribunal decision found that the mining leases may be granted subject to conditions [see above, p4]. Some of the conditions were made conditions on the mining lease, which means that if the company breaches those conditions then the lease can be forfeited.

Again, the NNTT did not decide on compensation.

The mining tenements affected by the decision were not for productive mines, rather the grantees who held exploration licenses were required by statute to apply for mining leases or lose their title to the land. In arbitration, the argument focused on criteria in s.39 of the *Native Title Act*. It was a question whether s.39 criteria can be applied where no productive mining is intended. The native title party argued that a worst case scenario must be contemplated, whereby a Western Australian mining lease can be granted for 21 years and is renewable for a further 21 years. In effect native title parties would lose their land for up to 42 years. The worst case scenario was not considered by the NNTT. The final conditions set by the decision, attempted to overcome the difficulties posed for this situation by the *Western Australian Mining Act* and overlapping claims. It set out some interesting options for dealing with non-productive mining leases and for how parties should interact should a productive mine be discovered.

The determination occurred under the previous *Native Title Act*. It is still unclear how the amendments affect future decisions of this nature.

At the time of writing the grantee party had requested an extension of the period for appeal.

Kado Muir, Visiting Research Fellow, NTRU. 31/7/98

Spinifex People [NNTT Ref#WC95/51]

The Spinifex people have entered into a framework agreement with the Western Australian Government, which was signed today at Mirramiratjara after two years of intensive negotiations. The agreement, which is underpinned by the recognition of traditional Aboriginal ownership of lands, relates to a 50,000 square kilometre area of desert country abutting the South Australian border south east of Warburton. The area included an Aboriginal reserve, a nature reserve and vacant Crown land and had no current pastoral or mining leases, although there was exploration interest in the area.

The framework agreement set out substantive issues for further negotiation including providing the Spinifex people with a permanent and secure form of land tenure, and involving the Spinifex people in environmental management and economic development. *(NNTT Media Release, 1 July, p1)**

Warrarn No.1 and No.4 [NNTT Ref#WC95/61, WC95/64]

The National Native Title Tribunal has referred two Pilbara region native title applications to the Federal Court for resolution. The two Warrarn applications over Streeley and Coongan stations, 50km south east of Port Hedland, failed to satisfactorily progress in mediation. The applications overlapped with others in the region. Efforts to bring about a consolidation of the applications were unsuccessful. *(NNTT Media Release, 2 July, p1)**

Neil Albert Phillips [NNTT Ref#WC97/5]

The National Native Title Tribunal has formally rejected a native title application stretching from Guiderton to Southern Cross, and south to Corrigin. The application, by Mr Neil Phillips on behalf of Pandawn descendants, was lodged on 28 January 1997 over an area of more than 41,000 square kilometres. Tribunal Registrar, Mr Chris Doepel, said that the material supplied by the applicant did not identify a community of Indigenous people who are the native title holders and from whom the applicants are descended. *(NNTT Media Release, 3 July, p1)*

Kanana [NNTT Ref#WC97/6]

The National Native Title Tribunal has rejected the Kanana application, lodged on 28 January 1997 by the Smith family. The application covered the South West Shire of Boyup Brook. It was rejected because, on the face of it, it could not succeed. Tribunal Registrar, Mr Doepel, said that the material supplied by the applicants did not establish a continuous connection with the area. He said that the application also seeks a determination of exclusive possession, but such an application could not succeed because native title cannot override the validly granted rights and interests of others. *(NNTT Media Release, 8 July, p1)*

Wiljen [NNTT Ref#WC95/84]

The Federal Court has struck out the claim lodged on behalf of the Wiljen people over land from Balladonia to Walpole. The National Native Title Tribunal referred the claim to the Federal Court in March last year, after mediation between parties broke down. *(WA, 10 July, p6)*

Rubibi No.6 and Leregon (Lanaganjun) Clan. [NNTT Ref#WC95/28, WC95/43]

The National Native Title Tribunal has referred two overlapping native title applications to the Federal Court for resolution. The applications were over seven square kilometres at Fishermen's Bend near the Broome townsite. The Kimberley Land Council, on behalf of Yawuru traditional owners, lodged the first application on 28 July 1995. Mr Jack Lee lodged the second application on 10 August 1995 on behalf of the Leregon clan of the Yawuru people. Registrar Chris Doepel said long term efforts to mediate between the Indigenous

parties about the overlap had been unsuccessful, leaving the Tribunal with no option but to refer the matter to the Federal Court. Mr Doepel said the State Government had written to the Tribunal in January requesting that the matter be referred to the Federal Court. *(NNTT Media Release, 15 July, p1)*

Maduwongga people

The Maduwongga people from the Goldfields region have failed to stop the National Native Title Tribunal from giving the State Government the go-ahead to develop land near Kalgoorlie-Boulder subject to native title claims. The Federal Court said the grounds of the appeal did not establish any error of law. *(WA, 25 July, p43)*

Karratha

The State Government has withdrawn from native title negotiations with claimants represented by the Nanga Ngoona Moora Joorga Land Council, over land in the Karratha suburb of Baynton. The Roebourne Shire Council is expecting an influx of 10,000 workers in the Karratha area and fears it will run out of residential land. Shire chief executive, Trevor Ruland said they had thought negotiations were close to settlement and expressed surprise at the Government's decision to pull out of talks. According to Lands Minister, Doug Shave, talks had failed to bring an agreement that would enable the release of land in the short term, prompting the Department of Land Administration to withdraw. *(WA, 27 July, p28)*

ACT

Ngunawal [NNTT Ref#AC98/1]

The National Native Title Tribunal has rejected a native title application over Parliament House and the High Court. The application was lodged by on behalf of the Ngunawal people in March. Tribunal Registrar, Chris Doepel, said that the application was rejected because, on the face of it, it could not be made out. He said the construction of major public works on this land was inconsistent with the survival of native title rights and interests which can be recognised in common law. *(CT, 8 July, p3)**

Ngunnawal [NNTT Ref#AC96/2], Ngunawal [NNTT Ref#AC97/1]

Possible management options for Namadgi National Park under native title have been discussed in a report commissioned by the National Parks Association of the ACT. Aboriginal land claims consultant, Dermot Smyth, reports that there is a strong case for the development of joint management with native title holders that do not require them to lease their land to the government. The report considered management arrangements already held in other parks, including Kakadu and Uluru. *(Valley View, 21 July, p6)*

Northern Territory

Croker Island [NNTT Ref#DC94/6]

Justice Howard Olney decided to bring forward his judgment in the Croker Island case from October until Monday 6 July. This decision means that Justice Olney's findings can be taken into account in the Government's proposed native title amendment legislation. *(SMH, 4 July, p9)**

Justice Olney found that native title rights could exist over areas of sea and the sea-bed but that those rights were not exclusive. The claim, heard in the Federal Court, covered seas surrounding Croker Island, about 250 km north-east of Darwin, and some islands off the coast of Arnhem Land. *(SMH, 7 July, p5)**

Mary Yarmirr & Ors v The Northern Territory of Australia & Ors

- The applicants in the Croker Island Case are island people from the Mandilarri-Ildugij, Mangalara, Murran, Gadura, Minaga, Ngaynjaharr and Mayarram peoples who have a strong, historical and ongoing relationship to the islands in question and the surrounding waters.
- Unlike the plaintiffs in *Mabo (No. 2),* the applicants claim relates to the sea and the sea-bed surrounding the islands and not to the islands themselves. The application was brought under the *Native Title Act 1993* for a determination recognising the existence of native title interests. The interests claimed include rights over resources and the right to protect places of cultural importance. The Croker Island decision is particularly significant because it marks the first time a court has ruled on the existence of native title rights and interests in relation to offshore waters.
- Justice Olney of the Federal Court has proposed a determination that recognises the non-exclusive rights of claimants to travel through the claimed area, to fish and gather so as to satisfy their personal and communal needs (but not for commercial purposes), and to visit and protect places of particular cultural or spiritual significance. Fishing may be carried out by the applicants without the need for a license to be obtained where it otherwise may be required.
- The applicants did not satisfy the court that native title rights existed over the subsoil, including minerals such as petroleum under the sea-bed. They also failed to establish a right to the exclusive use of the waters within the area claimed. The Court will reconvene on 12 August 1998 to finalise the determination and any other related matters.
- Olney J examined the requirements of section 223 of the *Native Title Act 1993*, which stipulates that the native title rights must be rights and interests that are capable of being identified as common law rights. Olney J rejected the idea that native title was restricted to the territorial limits of the Northern Territory, finding that the common law had been extended over the relevant waters by the *Native Title Act 1993*.
- Olney J described, if it was subsequently found by superior court that native title stopped at the territorial limits of the Northern Territory, how the territorial limits of the Northern Territory should be determined. Olney J found that the territorial limits of the Northern Territory extended to the low water mark of the coast-line of the islands and the mainland.
- The decision addresses issues peculiar to the making of claimant applications over offshore waters including:
  - how the seaward boundary of a claimant application could be determined; and
  - how Commonwealth, State and Territory legislation (such as fisheries legislation) could impair, recognise or affect Indigenous rights.
- The decision raises several questions as to the effect of a native title right upon the exploitation of marine resources, and the effect of the right to protect areas of cultural or spiritual significance upon fishing and mineral exploration.

Howard Allen, 14/7/98

Northern Land Council lawyer, Ron Levy, said that while the Croker Island decision was for non-exclusive native title rights and interests, traditional owners could enter into meaningful negotiations with others who have interest in use of the sea and its resources. *(NT, 7 July, p7)*

Chair of the Australian Seafood Industry Council, Mr Nigel Scullion, indicated that the question of exclusive possession of native title rights over water is still uncertain after the Croker Island decision. *(FinR, 21July, p14)*

Antarctica

The Wiljen people have proposed to lodge a native title application over Antarctica. National Native Title Tribunal president, Justice Robert French, said the Tribunal would not accept the proposed application and that it is plainly frivolous and vexatious. He said such an application trivialises the deeply felt aspirations of Indigenous people genuinely seeking recognition of their traditional lands. *(NNTT Media Release, 24 July, p1)**

MINING AND NATURAL RESOURCES

National

Gas industry legal advisers say that the passage of the NTA Bill has removed an impediment to the development of gas pipelines. The amendments allow pipelines for public and private use to be developed without the right to negotiate applying. Developers are now required to consult with Indigenous groups who have claims over the area, as opposed to the provisions under the *Native Title Act* that allowed for notice of intention and a negotiation process. Mr van Hatten, partner of Freehill Hollingdale and Page, says that the primary issue for pipeline projects will now be Aboriginal heritage, rather than native title. *(FinR, 29 July, p31)*

New South Wales

Timbarra Gold Project – Ross Mining

Families from the Timbarra Bandjalung people have threatened Ross Mining with damages and compensation action over its Timbarra gold project in northern NSW. The families say they represent 100 traditional owners of the land who have been left out of negotiations between the NSW Government, Ross Mining and the NSW Aboriginal Land Council that lead to the issuing of a mining lease through the section 29 process of the *Native Title Act*. *(CM, 22 June, p21)*

Queensland

Century Zinc Mine

The Carpentaria Land Council was granted a Federal Court injunction against the Burke Shire Council and the Century Zinc Mine's developers. The court ruled that work on a bridge over the Gregory River should stop because negotiations had not been held with Aboriginal leaders. Justice Bryan Beaumont said the council was in breach of the *Native Title (Queensland) Act* because it had failed to properly notify possible native title holders of its willingness to negotiate over the proposed acquisition of the land. *(CM, 4 June, pH2)**

Due to inconclusive state election results, the Federal Court yesterday extended the time in which Burke Shire Council can indicate willingness to negotiate in good faith with the Carpentaria Land Council. Justice Beaumont said if there was no undertaking, developers and the council would be restrained from further work on the bridge. *(CM, 23 June, p6)*

South Australia

Lambina Agreement

A native title mining agreement between traditional owners and the South Australian Opal Miners Association has been signed. The agreement will allow opal mining in the Lambina area, about 230km north of Coober Pedy. Conditions of the agreement include protecting