Feedback showed that a number of participants found considerable value in networking, meeting face to face with State or Territory representatives in a relaxed forum and learning from the processes which are employed in other State or Territory jurisdictions. Some have already modified their work practices and others capitalised on the opportunities for dialogue with peers. Others were disappointed at the seeming lack of capacity of participants to be innovative and look to ways of doing things differently.

A recurring theme that emerged during the workshop was the need for connection processes to be scoped with all parties at the commencement of mediation processes and managed by an independent third party NNTT member. Another recurring theme was the need for building relationships between those involved in connection processes whilst acknowledging power differentials between State and Territory representatives and NTRBs/NTSPs representing the applicants.

A report on the workshop is currently being prepared and it is hoped that the States and NTRBs/NTSPs will continue to meet in their separate jurisdictions to improve practice.

Notes on the power point presentations that were made in plenary sessions at the workshop are available on request from toni.bauman@aiatsis.gov.au .

Case Note

Defensive assertions of native title where there has been no legal authorisation: *Kokatha People v State of South Australia* [2007] FCA 1057

By Tran Tran, Research Assistant, NTRU

On 16 July 2007 Justice Finn from the Federal Court handed down *Kokatha People v State of South Australia.*[1]

The Kokatha decision involved a question of statutory construction: whether the court has the jurisdiction under the NTA to make a determination of native title in favour of a person or group of persons that had not made a native title determination application under s 61 but were a respondent to such an application brought on behalf of another claimant group to which the respondent does not belong.[2] This judgment has implications for the resolution of overlapping claims where native title has been asserted defensively in relation to s 61 proceedings. It should be noted that this relates to the issue of whether native title rights and interests can be decided for a group which is not an applicant rather than whether or not that question is negative or positive.

Both the, Aboriginal Legal Rights Movement (the representative body) and the Commonwealth argued that the court can make a determination of native title recognising the rights and interests of a group regardless of whether or not the group has made an application for the determination. Based on this view, the purpose of s 225 is to determine authoritatively whether anyone has native title rights and interests in relation to an area which, as a consequence, requires the Court to determine all claims of native title rights and interests regardless of whether all of the claimants are a party to an s 61 application. Alternatively, South Australia contended that native title determinations can only be made in accordance with the proper procedures under the NTA, namely sections 10, 13, 61 and 225. This means that a group that has not made an application cannot have a judgment of native title rights and interests made. The State argued that despite the inconvenient consequences of this conception, authorisation procedures remain central to the NTA.

South Australia's argument was accepted by the Court. In reaching his decision, Justice Finn referred to the legislative scheme surrounding authorisation. He noted that it was 'difficult to overstate the centrality of the requirement of 'authorisation' in the scheme laid down by the Act [NTA] for the making of a native title application'.[3] Finn J reiterated that there can only be one determination in relation to an area,[4] however this

[1] *Kokatha People v State of South Australia* [2007] FCA 1057 (*Kokatha*).

[2] *Kokatha,* [2].

[3] *Kokatha,* [17].

[4] *Native Title Act 1993 (*Cth), s 13(1), 61A(1) and 68.

determination must not always be made where there is an application.[5] This is because a determination of native title is binding on the whole world, or a judgment *in rem*.[6] It requires a determination on an application that is an 'approved determination of native title' which must be properly authorised.[7] Finn J rejected ALRM's reliance on the decision of Justices' Beaumont and von Doussa in *Western Australia v Ward* where they stated that:

> Section 225 expressly requires the Court to determine the persons or each group of persons holding the common law rights comprising native title, and the nature and extent of those rights and interests. Section 225 does not limit the jurisdiction of the Court solely to defining the rights and interests of the named persons who initiate the claim for a determination of native title.[8]

Finn J noted that this was later qualified by Mansfield J in *Kokatha Native Title Claim v South Australia* where he observed:

> The prescriptive nature of the Act (NTA) for the making of an application for the determination of native title under s 61 with the procedural requirements of s 62 and, since the…1998 amendments…the authorisation requirement under s 251B are clear. They provide the only vehicle for the positive determination of native title rights and interests. They require the assurance that the whole of the claim group has authorised the bringing of the claim through the authorised claimants.[9]

Finn J declined to follow Beaumont and von Doussa JJ noting that the requirement of authorisation serves a variety of purposes, including ensuring that the claim group has approved the 'bringing' of the claim.[10] Finn J found that s 67, 'while requiring that overlapping claims must to the extent of the overlap be dealt with in the same proceedings, does not require that each claimant group be formally constituted an applicant in the proceedings'.[11] That is, where a determination that a respondent has native title rights and interests (as in the case of *Ward*) is made, the order is to ensure that overlaps are dealt with in the same proceedings rather than create a positive right held by respondents to have their rights and interests determined. He also noted that the 'Legislature would leave a non-applicant respondent unconstrained in advancing a claim for a determination of native title'.[12] Finn J also referred to the recent decision of *Moses v State of Western Australia* where Justices' Moore, North and Mansfield noted that:

> A determination of native title must be made in accordance with the provisions of the NTA, including its requirements regarding proof of the composition of the claim group and proper authorisation of the named applicants. In circumstances where the Kariyarra people participated as respondents only and made no attempt to satisfy the learned primary judge that all of the requirements of the NTA had been met in respect of their overlap claim, it would not have been appropriate to nevertheless make a determination of native title in their favour.[13]

In *Moses* the Court noted that the obverse determination that native title does not exist can be made, where there is competing evidence against the respondents without needing to satisfy the authorisation requirements under s 251B.

Finn J decided that a determination of native title cannot be made in favour of a non applicant:

> What a successful defensive use of such native title rights and interests can possibly secure is the exercise by the Court not to make either a

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[5] *Harrington Smith v State of Western Australia (No.9)* [2007] FCA 31.

[6] The *Wik peoples v The state of Queensland* (1994) 49 FCR 1; *Western Australia v Ward* (FC) [2000] FCA 191, 368-369; *Gumana v Northern Territory* (2005) 141 FCR 457, [127].

[7] *Kokatha*, [47].

[8] *Western Australia v Ward* (FC) [2000] FCA 191, [192], [193].

[9] *Kokatha People v State of South Australia* [2005] FCA 836, [22]-[23].

[10] He referred to *Jango v Northern Territory of Australia* [2007] FCAFC 101, [76] where it was noted that authorisation provides assurance that the whole claim group gas authorized the claim.

[11] *Kokatha*, [44].

[12] *Kokatha*, [48].

[13] *Moses v State of Western Australia* [2007] FCAFC 78, [18].

positive exclusive determination of native title in favour of an applicant or a negative determination that native title does not exist in the claim area. What it cannot secure is a s 225 determination in the non-applicant's favour.[14]

NTRU News

Native Title Research Unit National Meeting of Prescribed Bodies Corporate, Canberra 11-13 April 2007 Research Report 3/2007, AIATSIS

This workshop was held on 11-13 April 2007 in Canberra, and was attended by 23 people representing PBCs from Western Australia, Queensland, Victoria, New South Wales, and the Northern Territory. The meeting provided the PBCs with a much needed networking opportunity, and time to reflect on their particular challenges, aspirations and achievements. Various federal government departments were invited to present on the recent Commonwealth PBC reforms, and give advice about relevant funding and training opportunities for PBCs. This report provides a record of the meeting, and also aims to be of practical assistance to PBCs, particularly those who were unable to attend the meeting. Since the National PBC Meeting, the Department of Family and Community Services and Indigenous Affairs (FaCSIA) has released draft guidelines for supporting PBCs, some of the detail of which is also incorporated into this document. Further practical information for PBCs is also available in the PBC toolkit which has been developed by the NTRU.

Native Title Research Unit Native Title Representative Bodies and Prescribed Bodies Corporate: native title in a post determination environment Research Report 2/2007, AIATSIS

This workshop was held on 5-6 December 2006 in Canberra, and was attended by 25 staff from Native Title Representative Bodies who have been or will be involved in the design and establishment of PBCs. Participants also included government representatives from the Department of Families, Community Services and Indigenous Affairs and Attorney General's Department who gave presentations on the proposed changes to PBCs as a part of the Australian Government's broader native title reforms. A report has been prepared based on the major issues that arose during the workshop. In particular, the report focuses on measures to improve the effectiveness of PBCs and coincides with the Government's recognition of the need for resources and support for PBCs to adequately carry out their functions.

[14] *Kokatha*, [50].

What's New

Reforms and Reviews

Negotiation Or Confrontation: It's Canada's Choice : Final Report of the Standing Senate Committee on Aboriginal Peoples Special Study on the Federal Specific Claims Process

In its study of the Specific Claims policy and process, this Committee found that the present system cannot resolve Specific Claims within a reasonable length of time. Lack of resources for, and contradictions within, the present system are producing results contrary to the goal of the federal government's Specific Claims policy which is to resolve Specific Claims.

Inquiry into the Northern Territory National Emergency Response Bill 2007 & Related Bills

Information about the inquiry

Information about the key Bills

- Northern Territory National Emergency Response Bill 2007
- Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007
- Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007
- Appropriation (Northern Territory National Emergency Response) Bill (No. 1)