Access to the documents held needs to be efficient. Contract researchers who prepare connection reports are employed for fixed time periods and depend upon efficient and accurate retrieval mechanisms for locating relevant information on local groups, historical documents, and neighbouring claims. Unfortunately, databases for documentation and internal storage provisions vary widely amongst Native Title Representative Bodies with some material being in danger of dispersion or decay.

It became obvious that action needed to be taken to ensure that the holdings of NTRBs be catalogued and that secure storage and preservation issues be addressed. These became the aims and objectives of a project sponsored by the NTRU of AIATSIS entitled 'The Future of Connection Material'.

Early in 2005, the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), through the Native Title Research Unit (NTRU), sponsored a project to focus upon issues of arrangement, preservation, and access to connection material. A series of workshops, surveys, and web resources have resulted from directions and input provided by NTRB staff, who have set the goals for the project.

The AIATSIS Native Title Research and Access Officer (NTRAO) has been working through the recommendations arising from meetings and sessions held at the last three annual Native Title conference; however further implementation of these will require staffing and funding. Four recommendations are proposed in this report, which was workshopped at a Senior Professional Officers' seminar (3-4 March 2008), sponsored by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). A resolution in support of the project was formulated at the seminar and circulated to attendees at the seminar and to senior FaHCSIA staff.

The following key recommendations emerged from the Future of Connection Project:

Recommendation 1: Identification, arrangement and description

An assessment needs to be made urgently of which NTRBs are successful in organising their material and which ones need help, after which a plan should be implemented to get the material into proper order.

Recommendation 2: Preservation/conservation measures

Each NTRB needs to develop and implement a plan to ensure secure storage facilities to assess the condition of its records and to develop procedures for digitising the holdings.

Recommendation 3: Access and use protocols

Each NTRB needs a plan for access and use of native title material.

Recommendation 4: Location of an external repository

Each NTRB needs to select a separate and secure repository for their holdings to ensure their preservation for posterity.

The Future of Connection Material project aims to formulate a plan for NTRBs nationwide to establish standards and to develop skills towards proper documentation and secure storage for connection material and other original documents generated by the native title process. The project has been conducted within the NTRU, which exists as part of the Research Program of AIATSIS.

The final report of this project is now available online: http://ntru.aiatsis.gov.au/collections/connection_material.html

What's New

Reforms and Reviews

Victorian Government's Alternative Framework for Negotiating Native Title

The Victorian State Government and traditional Aboriginal owners can negotiate directly with each other outside of the Federal Court System which will allow the State to be proactive rather than reactive in the resolution

of claims. Professor Mick Dodson will be chairing an independent committee comprising of representatives of the Victorian Traditional Owner Land Justice Group and State representative whose joint task will be to develop a Victorian settlement framework.

Recent Cases

Australia

Hazelbane v Doepel [2008] FCA 290

This decision involves a review of the Registrar's decision to register an overlapping claim over the Town of Bachelor under s 190A of the Native Title Act 1993 (Cth). The original applicants, the Warai and Kungarakany groups opposed a later application made by the second applicants, the 'Town of Bachelor No 2 Applicants' representing the Emu and Blue Lizard Kungarakany group. They objected to the application on the basis that there are now two groups of people with the same negotiation rights in respect of the same claim area which would affect their rights and interests. The original applicants argued that the registrar, in deciding to accept the Town of Batchelor No 2 did not seek submissions from them, nor did the registrar notify the Northern Land Council (NLC), which is the responsible representative body in the area.

The court considered whether the original applicants had standing to bring the claim. It noted that a 'person aggrieved' for the purposes making an application for review under the ADJR Act included the original applicants on the basis that 'the potential beneficiary of the future act [was] unlikely to negotiate in a way which would give each of the negotiating registered native title applicants the same benefits as if there were only one group of registered native title applicants with whom those negotiations should be conducted': [20].

The court also considered the original applicant's argument that they were not afforded with procedural fairness. It noted that the right to procedural fairness does not arise automatically where parties have standing to challenge the Registrar's decision, however it considered that the NLC were the relevant representative body for the area and was entitled to be notified of the Batchelor No 2 application.

The court also considered whether the claim was properly authorised. The Registrar noted that the applicant had been made in the first instance without legal assistance and did not expect the same level of organisation or legal sophistication that would otherwise be expected. However, the original applicants argued that the material did not allow the Registrar to reach the conclusion that there was a traditional decision making process in place nor did the application identify those with traditional authority or the basis for having such authority.

The court also considered whether the requirements of ss 190B and 190C and whether the Registrar erred in having regard to additional information provided by Batchelor No 2 claimants specifically for the purpose of a mediation in order. The court found that the Registrar fell into error by identifying a wrong issue and asking himself a wrong question in addressing procedural requirements in s 190C(2) and (4). Accordingly it was held that the decision to register the Batchelor No 2 application be set aside.

Turrbal People v State of Queensland [2008] FCA 316

Notice of motion seeking to replace an applicant in proceedings. The original applicant, Connie Isaacs sought to replace herself with Maroochy Barambah. This motion was opposed on the basis that she did not have the authority of the claim group to make this decision. The court considered whether the issue of whether a native title determination application has been properly authorised can be considered during a strike out application under s 84C of the Act. Justice Splender noted that the relevant issue was if an application were to succeed on its own terms, the court need to consider whether the applicants would not have been authorised by all those persons the Court would determine to be the members of the claim group. However he found that the factual inquiry of whether the claimants actually constitute the persons who actually hold the common or group rights and interests cannot be properly the subject of a strike out application.

It was argued that if the Court was not satisfied that there was a traditional decision making process in place there

was an alternative decision making process that was agreed to and adopted by the claim group. His Honour found this argument inconsistent but followed the previous decision of Williams v Grant which assumes that Connie Isaacs was authorised. Following this decision, if she had the authority to make the original application, she had the authority to decide on an altered position of the applicant.

Foster v Que Noy [2008] FCAFC 56

Application seeking to overturn an order that removed Ms Majorie Foster as an applicant for the Kamu people in the Douglas North and Fish River Claims. The Applicant claimed that the trial judge had erred in concluding that she was properly removed according to s 66B of the Act. She argued that the decision to withdraw her was not made in accordance with traditional law and custom which would involve extensive negotiations and at a minimum, notification of the meeting where she was subsequently removed. However on appeal the Court found that whether or not the decision was made according to traditional law and custom was not challenged during the initial nor was the requirement of notice consistent with a decision making process based on traditional law and custom.

*Glasshouse Mountains Gubbi Gubbi People v Registrar Native Title Tribuna*l [2008] FCA 529

Application for a review of the decision of Native Title Tribunal Registrar not to accept a native title claim for registration on the Register of Native Title Claims. The court considered the operation of the Native Title Amendment Act 1998 and the registration test and whether the Registrar was empowered to not accept the claim for registration where the claim was already registered.
The current claim fell under the transitional provisions of the Native Title Amendment Act 2007 (Cth) which states that applications made before the 1998 amendments need to satisfy the registration test (which was introduced by the 1998 amendments). The registrar notified the applicants of when the registration test will be applied and sought further information by a certain date. The applicants, who were unrepresented, requested more time, and were rejected.

The applicants argued that the Registrar was not empowered to not accept the claim for registration since it was already registered as a native title claim under the old legislation and accordingly could not remove the claim from the claims register. In failing to accept the claim and subsequently removing it, the Registrar has denied the Applicants procedural fairness.

It was argued that the applicants had enjoyed the benefits of registration prior to the amendments and any statute that purported to remove this right should do so in plain language. However the Commonwealth argued that the legislation should have a broader interpretation given that the legislation mandated a statutory obligation so examine a claim against the requirements of ss 190, 190A, 190B and 190C. This view was accepted.

The Applicants also argued that there was no express power to remove the claim although the Commonwealth noted that there were circumstances that implied such a power. It was found that the legislation requires the Registrar to apply ss190B and 190C and update the register of claims accordingly.

It was also found that the Applicants were given sufficient noticed to respond to the Registrar and provide further materials to comply with the amendments. Accordingly there was not denial of procedural fairness by the Registrar and the application was dismissed.

Australian Manganese Pty Ltd/Western Australia/David Stock and Others on behalf of the Nyiyaparli People, [2008] NNTTA 38

Application for determination for the grant of mining lease. Section 39 criteria was considered and it was found that the future act had a limited effect on the enjoyment of registered native title rights and interests. The claimants had put forward a worse case scenario although this was rejected and it was found that the mining lease would have no effect on sites of particular significance. The issue of compensation was considered although it was held that there was no power to impose a condition for the payment of compensation.

Ned Cheedy and Others on behalf of Yindjibarndi #1/ Western Australia/ Cazaly Iron Pty Ltd, [2008] NNTTA 39

Involves an objection to a proposed grant of exploration licence. It was considered whether the act was likely to interfere directly with the carrying on of community or social activities, sites of particular significance or cause major disturbance to land or waters. There was an existing agreement that objection be withdrawn although the native title party declined to withdraw. However there was no consideration of the dismissal of objection on the basis of the agreement because the act was considered to be an expedited procedure.

International

Lax Kw'alaams Indian Band v. Canada (Attorney General), 2008 BCSC 447

The plaintiff Lax Kw'alaams is an Indian Band whose name means "place of small wild roses". It is comprised of approximately three thousand members. Most members reside on the Lax Kw'alaams Indian Reserve located approximately 30 km North of Prince Rupert. They are known colloquially as a "fishing people" and claim to have descended from nine Tsimshian tribes (the "Coast Tsimshian") who long before contact with any European soul, occupied territories and fishing sites in or near the coastal area of Northwest British Columbia, along and between the Lower Skeena and Nass Rivers, and on the inlets and islands between their estuaries, and extending to the North end of Grenville Channel (the "Claimed Territories").

They also claim to have utilized the fruits of the seas and rivers in their Claimed Territories for food, social, ceremonial and commercial purposes long before the white man came, and would have continued to do so to the present day but for the unjustifiable interference of the Government of Canada as represented by the defendant.

The plaintiffs claim that their right to fish on a commercial scale is an integral part of their distinctive culture, and ask this court to declare it as such. They say that the Fisheries Act, R.S.C. 1985, c. F-14 and the Fisheries Act, R.S.B.C. 1996, c. 149 and ancillary legislation infringes on this aboriginal right and breaches the protection granted to aboriginal rights under s. 35 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982 c. 11, reprinted R.S.C. 1985, App. II, No. 44. They also say that the defendant has breached its unique duty to the plaintiffs based on fiduciary principles and the honour of the Crown.

Agreements

Australia

Single Noongar Claim – Memorandum of Understanding

Statement by Deputy Premier Eric Ripper, WA Hansard 19 March 2008

The South West Aboriginal Land and Sea Council signed a memorandum of understanding to progress native title negotiations in the south west corner of Western Australia. The State has agreed to begin negotiations to develop benefits packages for each of the five large claims that underlie the Single Noongar claim, the Gnaala Karla Booja; Yued; Ballardong; South West Boojarah 2; and Wagyl Kaip. The benefits packages will either be applied as compensation for extinguishment of native title, if native title is found to exist within the claim areas, or form part of an alternative settlement agreement, thereby recognising the claimants' traditional connections to the land.

Under the memorandum, the state will provide approximately $2.65 million over the next three years. This is primarily for developing and implementing a capacity building program for each of the claimant groups and facilitating the establishment of legal entities for managing any benefits that may flow from the negotiations. The memorandum sets out a process for considering genealogical facts that were presented as evidence during the Single Noongar claim trial. The memorandum sets out to recognise that the negotiation of native title agreements is complex, involving the interests of many parties; affirm the government's commitment to resolving claims through agreement, wherever possible; and indicate the underlying good

faith between the parties. It means that the South West Land and Sea Council can engage effectively with the state to reach agreement regarding the Single Noongar claim.

International

Agreement Concerning a New Relationship Between The Government of Canada and the Cree of Eeyou Istchee

The agreement, which includes $1.4 billion in compensation, is broad in nature in that it:

- brings resolution to litigation over past implementation of the James Bay and Northern Quebec Agreement (JBNQA);
- resolves other disputes not necessarily related to the JBNQA;
- clarifies the federal responsibilities the Cree Regional Authority will administrate for the next 20 years;
- establishes a two-phased process for modernizing Cree governance; and
- establishes a dispute resolution mechanism.

Canada, Seton Lake Indian Band and Province of British Columbia Reach Final Agreement on Settlement

The Seton Lake Indian Band will receive $600,000 from Canada and 31.6 acres of land from the Province which Minister Strahl will recommend be added to the reserve under the department's Additions to Reserve Policy. If the Band acquires other lands in the area, the Minister will, subject to the terms of the Additions to Reserve Policy, which requires consultation with local government, recommend the addition of up to another 168 acres of rural land in the area.

Native title in the News

National

01-Mar-08 NATIONAL **Native Title Talks** The Federal Government will 'seek to negotiate more settlements to native title claims' with Attorney General Robert McClelland saying that 'the Government would also try to make native title more effective in providing economic development opportunities for Indigenous people'. *Burnie Advocate* (Burnie, 1 March 2008), 17; 'Native Title Shake Up to Boost Communities' *Age* (Melbourne, 7 March 2008), 2; 'End native title litigation says AG' *Australian* (National, 7 March 2008), 30; 'ALP promises major change on native title' *West Australian* (Perth, 7 March 2008), 18; 'Native title to be fast tracked' *National Indigenous Times* (Malua Bay, 6 March 2008), 10.

01-Mar-08 NATIONAL **Industry leaders to review Kimberley and NW potential** Mining Industry leaders 'will convene on Broome from March 17 to 19 to review the future for mining and development' of the North West and Kimberley region. The conference will be held at the Cable Beach resort. *Mining Chronicle* (National, March 2008), 124.

07-Mar-08 NATIONAL **Aborigines fighting intervention have a lot to contend with** Traditional owners Reggie Wurridjal and Joy Garlbin from western Arnhem Land are challenging the federal government's Northern Territory National Emergency Response Act on the basis that no 'just terms have been offered'. They also argue that 'just terms are not just a monetary payoff. Maningrida wants the likes of sacred sites and traditional foraging rights protected from interference by the intervention; and Bawinanga wants its considerable assets protected from seizure'. *Australian* (National, 7 March 2008), 29.

25-Mar-08 NATIONAL **Legal Aid tops attorney-generals agenda** South Australian Attorney General Michael Atkinson will 'host the first Standing Committee of Attorney General' and will 'also urge state and federal attorney general to follow his state lead in settling