Title Act 1993 (Cth) and case law, which reduces incentive for parties to settle a claim. One suggestion arose for a clear, consistent but flexible national connection framework that would ensure a fairer process and recommended further research into how this framework would work. It was suggested that the content and meaning of native title should be revisited within the context of social justice for all Indigenous people. Some conference delegates wanted to see a national review of best practice settlement to promote national equity in settlement processes and outcomes.

The conference provided an invaluable opportunity to continue all these debates. The conference received extensive support from both industry and government including the Department of Families, Housing, Community Services and Indigenous Affairs, the Office of Native Title, Western Australia, Newmont, the Attorney General's Department, the Department of Employment Education and Workplace Relations, Indigenous Business Australia, the Department of Indigenous Affairs Western Australia and the Minerals Council of Australia. Next year the conference will be returning to Melbourne for its 10th year and will be hosted by the Wurundjeri people and co convened by Native Title Services Victoria.

Selected conference papers are available online: http://ntru.aiatsis.gov.au/conf2008/papers.html

What's New

Reviews and Reforms

Indigenous participation in Western Australia's resources sector

Chamber of Minerals and Energy of Western Australia

Legislation

Aboriginal and Torres Strait Islander Land Amendment Bill 2008 (Qld)

The Bill amends the *Aboriginal Land Act 1991* (ALA), the *Land Act 1994*, the *Land Court Act 2000*, the *Local Government (Aboriginal Lands) Act 1978*, the *Native Title (Queensland) Act 1993* and the *Torres Strait Islander Land Act 1991* (TSILA). The objectives of the Bill are aimed at improving the lives of Indigenous Queenslanders, through Indigenous land tenure reform that will:

- enabling home ownership and provide leases for social housing;
- provide greater certainty over the governance of townships and
- assist the transfer process for Deed of Grant in Trust (DOGIT)
- lands;
- facilitate the establishment of public infrastructure; and
- encourage economic development in Indigenous communities.

Click here for the explanatory notes.

Recent Cases

Australia

Wiri People v Native Title Registrar [2008] FCA 574

Application for a review of a decision of a delegate of the Native Title Registrar to not accept the Wiri People #2 Application for registration under s 190A of the *Native Title Act 1993* (Cth). The application had originally covered a larger area which was later reduced. The application was amended which reinstalled the larger claim, amended the description of the claim group and authorised a new applicant.

The amended claim means that the Wiri #2 Application now overlapped with another application, the Wiri Core Country Claim and was contrary to the certification provided by the CQLC. However the Wiri#2 applicants claimed that it was not for the CQLC to impose a description of their group of society but for the Wiri people to define how they are to be described. They argued that the delegate had misconstrued the principles of *Risk* and adjudicated between differing descriptions of

the native title claim group and that she had taken extraneous material into account. The Registrar argued that their role 'goes beyond merely accepting the correctness of an applicant's assertion' [12].

However Justice Collier noted that a native title group is not recognised merely by asserting themselves. It is also 'incumbent on the delegate to be satisfied that the claimants truly constitute such a group and the applicant should be seen to be authorised by all persons who relevantly hold the common or group rights'. [8]. His Honour also noted that the Registrar was entitled to consider information that as obtained as a result of searches conducted by the Registrar under s 190A(3)(b).

His Honour also confirmed that a decision of the Registrar is a purely administrative function and that the delegate 'was not satisfied that the applicant was authorised to make the application and deal with matters arising in relation to it by all the other persons in the native title claim group' based on the available material: [21]. That is, s 190C (4)(b) does not confine the Registrar or their delegate to the statements made in affidavit or the information provided in the application (cf authority in *Doepel* where the Registrar is not required to look beyond the terms of the application for the purposes of s 190C(2)). This also includes the consideration of an overlapping claim which had also been certified by the relevant representative body in the area. The overriding rationale of s 190C(4) is that the Registrar must be satisfied as to the identity of the claimed native title holders including the applicant.

The State of Western Australia v Sebastian [2008] FCAFC 65

This decision involves two competing claims to native title over land and waters around Broome in Western Australia. The primary judge Merkel J had held that the Yawuru claimants possessed native title rights and interests over the whole of the claim area. On appeal the State argued that the northern portion of the Yawuru claim area was traditionally held by the Djugan people who were distinct from the Yawuru people. The state also argued that because they have a cognitive descent system, they no longer had an interest in the claim area under traditional law and custom.

The full Federal Court considered the reasoning of Merkel J in his decision and upheld the original judgment of Merkel J. In reaching their decision, the full Federal Court made extensive comment on how the requirements *Yorta Yorta* are met. They also considered whether s 47 B could be applied to the area of Broome and found that s 47B was capable of applying to areas within the proclaimed township.

Click here for a summary of the judgement.

Birri-Gubba (Cape Upstart) People v State of Queensland [2008] FCA 659

Consideration of an application by the State Government for costs order against applicants who wanted proceed with early preservation evidence but had failed to make adequate preparations for trial. The State had incurred significant costs in seeking to comply with the court's orders even though the applicants eventually sought to amend their claim. The court considered whether the applicant group had caused State to incur costs by any 'unreasonable act or omission' under s 85A(2), *Native Title Act 1993* (Cth) or s 43, Federal Court of Australia Act 1976 (Cth). It was held that the applicant had acted unreasonably and that it was unjust for the State to bear the costs. The applicants were order to pay 50 per cent of the State's costs.

Lapthorne v Indigenous Land Corporation [2008] FCA 682

Application to review authorisation of a native title claim. It was found that the applicant had not satisfied the elements of s 61(1) of the Native Title Act:

> Mr Lapthorne has not satisfied the requirements of s 61(1) of the Native Title Act 1993 (Cth) (the Act) by producing evidence required by that section read with s 251B, to show that he has been authorised by the Thudgari people to make this claim. Nor has he produced the necessary evidence to show that he is entitled under s 66B of the Act to replace the persons named as the applicant in the native title claim WAD 6212 of 1998 which has been brought by the Thudgari people in respect of the same land.

Griffiths v Minister for Lands, Planning and Environment [2008] HCA 20

Click here to download a detailed case note.

Illawarra Local Aboriginal Land Council v Minister Administering the Crown Lands Act [2008] NSWLEC 188

Aboriginal land claim where the Land and Environment Court considered whether the land was 'needed', or 'likely to be needed', for the essential public purpose of nature conservation; whether the land was 'used' or 'occupied'.

Bropho v State of Western Australia [2008] FCAFC 100

An appeal to the Full Court from a judgment of a single judge of the Federal Court: *Bropho v State of Western Australia* [2007] FCA 519. On 13 April 2007, where the primary judge dismissed the applications in each of two proceedings raising the same issues. The principal issues are whether the *Reserves (Reserves 43131) Act 2003* (WA) ("Reserves Act") and action taken under that Act contravene or are inconsistent with the *Racial Discrimination Act 1977* (Cth) (RDA). The reserves were used for the benefit if Aboriginal inhabitants however, following concerns for the safety of women and children on the reserves control was removed and eventually vested in the Aboriginal Affairs Planning Authority. In reaching their decision, the Court noted:

> …any interference with the enjoyment of [the property] right, provided that such interference is effected in accordance with the legitimate public interest (in this case to protect the safety and welfare of inhabitants at Reserve 43131), will not be inconsistent with s 10 of the RD Act. Indeed, although the authorities on s 10 of the RD Act recognise that there is no basis for distinguishing between different species of ownership of property, no property right, regardless of its source or genesis, is absolute in nature, and no invalid diminution of property rights occurs where the State acts in order to achieve a legitimate and non-discriminatory public goal.

Bell on behalf of the Barunggam People v State of Queensland [2008] FCA 840

Dismissal of an application to amend a native title application. It was found that the native title claim was fundamentally flawed.

Mineralogy Pty Ltd v Kuruma Marthudunera Native Title Claimants [2008] WAMW 3

Objection to grant of tenement. The objectors are the Kuruma Marthudurara Native Title Claimants who claim that they are 'registered native title applicants over the land on which the Applicant seeks to have the proposed tenement granted. The objectors believe that activities that might be allowed under the proposed tenement could have an adverse impact upon the exercise of native title rights, cultural heritage (including sites of significance) and lifestyles of the objectors. Work and activity allowed under the licence could also affect the environment and flora and fauna in the area, which would impact on the objectors, and the granting of the tenement would be contrary to the public interest.' Final recommendation that grant be refused.

Ronald Crowe & Ors (Gnulli)/Charlie Lapthorne & Ors (Thudgari People)/Western Australia/Zhukov Pervan, [2008] NNTTA 71

Consideration of proposed grant of exploration licence where it was found that the expedited procedure does not apply. Decision considered the flowing:

- gender restricted evidence
- whether act likely to interfere directly with the carrying on of community or social activities
- whether act likely to interfere with sites of particular significance

Billy Patch and Others on behalf of the Birriliburu People v State of Western Australia [2008] FCA 944

Consideration of the formal and substantive requirements of s 87A and whether the proposed consent determination was within the power of the court given the difference in description of native title holder group

in determination and native title claim group in application. It was found that it was still appropriate to make the order and an alteration would not constitute an amendment to the application.

International

Shilubana and Others v Nwamitwa [2007] ZACC 14

This is an application for leave to appeal against a decision of the Supreme Court of Appeal, substantially confirming a decision of the Pretoria High Court. It raises issues about a traditional community's authority to develop their customs and traditions so as to promote gender equality in the succession of traditional leadership, in accordance with the Constitution.

Mining Information Kit for Aboriginal Communities

A new educational tool, The Mining Information Kit for Aboriginal Communities, will inform Aboriginal communities across Canada about all the stages of the mining cycle from early exploration to mine closure. This information kit will help Aboriginal peoples better understand mining activities and identify the many opportunities that mining can bring to communities. This tool is conveniently designed in four modules corresponding to the main stages of the mining cycle. It provides examples of community experiences, positive relationships, and partnerships with mining companies. It also outlines the regulatory process to ensure Aboriginal peoples are well informed of the economic, social and environmental effects, benefits and opportunities in making decisions. The kit is the product of a partnership between Natural Resources Canada, Indian and Northern Affairs Canada, the Prospectors and Developers Association of Canada, The Mining Association of Canada, and the Canadian Aboriginal Minerals Association (CAMA).

Reports

Report of the Stolen Generations Assessor: Stolen Generations of Aboriginal Children Act 2006

Ray Groom / Department of Premier and Cabinet, State Government of Tasmania

The Stolen Generations of Aboriginal Children Act 2006 was passed unanimously by both Houses of Parliament in Tasmania in November 2006. The act made provision for a $5 million fund to provide payments to eligible members of the stolen generations of Aborigines and their children.
The legislation provided for the appointment of an independent assessor, with responsibility to assess the eligibility of applicants. The Hon. Ray Groom accepted the appointment as Stolen Generations Assessor in December 2006. The Act became operational on 15 January 2007. The office of the Stolen Generations Assessor also became operational on that day. This report provides background to the issue of the stolen generations in Tasmania and outlines the process for assessing applications and related matters.

Children on Anangu, Pitjantjatjara, Yankunytjatjara Lands Commission of Inquiry: a report into sexual abuse

Children in State Care Commission of Inquiry

This is the report of an inquiry to examine the incidence of sexual abuse of children on the Lands, the nature and extent of that abuse, and to report as to measures which should be implemented to prevent sexual abuse of the children and to address the consequences for the communities.

Publications

Strelein, L, 2008, Taxation of Native Title Benefits, Research Monograph 1/2008, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra

McAvoy T and Cooms V, 2008 'Even as the Crow Flies, it is Still a Long Way: Implementation of the Queensland South Native title Services Ltd Legal Services Strategic Plan' *Research Monograph 2/2008* , Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Native Title in the News

National

02-May-08 NATIONAL **Step refugee appeals racket, says former judge.** Former Federal Court judge Rodney Madgwick has said that 'native title does not work well and requires a total rethink'. *Financial Review* (National, 2 May 2008), 57.

09-May-08 NATIONAL **UN holds NY forum on Indigenous rights.** Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner and Race Commissioner of the Human Rights and Equal Opportunity Commission represented Australia at the New York forum. Mr Calma has also recently tabled two reports relating to Indigenous rights including the Native Title Report. *Lawyers Weekly* (National, 9 May 2008), 6.

12-May-08 NATIONAL **Mining body seeks curb on third-party access.** The Minerals Council of Australia has said that the government needs to stop third parties from having access to infrastructure facilities. According to the MCA, the 'solution to many of [the problems] lies in better federal-state co-operation, the elimination of duplicative and contradictory regulatory processes, institutions and intellectual capacity building the increased efficiency and operability of the native title system and more appropriate competition policy settings'. *Australian* (National, 12 May 2008), 31.

17-May-08 NATIONAL **Tribunal at centre of storm over fair deals.** Ciaran O'Faircheallaigh from Griffith University has 'argued that the lot of Aboriginal people has not improved during the mining boom, in part because the National Native Title Tribunal is 'biased' in favour of companies'. Traditional owners and mining companies usually reach agreements for dealings over the lands through the future act process. However, the six month limit on negotiations means that the Tribunal can arbitrate once the negotiation period has passed. Mr O'Faircheallaigh argues that 'this situation places mining companies in a position of undue power because they have little to fear from delaying negotiations...a situation which inherently disadvantages claimants'. *Age* (Melbourne, 17 May 2008), 4.

22-May-08 NATIONAL **Mining money must close gap.** Minister for Indigenous Affairs Jenny Macklin has said that 'Native title is critical to economic development'. Ms Macklin argues that 'while economic development for Aborigines and Torres Strait Islanders is complex and challenging, there is no doubt that properly structured property rights to land are a key component in expanding economic and commercial opportunities'. *Australian* (National, 22 May 2008), 14; 'Macklin's message: use hard won rights' *Australian* (National, 22 May 2008), 6; 'Indigenous poverty unmoved by mining boom' *Australian* (National, 8 May 2009), 8; 'Miners told to deal better hand from resources boom' *Sydney Morning Herald* (Sydney, 28 May 2008), 6.

22-May-08 NATIONAL **Labor to overhaul native title.** Indigenous Affairs Minister Jenny Macklin has said that 'native title legislation was too complex and had failed to deliver money to remote Aboriginal communities despite lucrative agreements with mining companies'. Ms Macklin said that changes to native title should be used as a part of the Federal Government's close the gap campaign and wanted 'direct payments to individuals minimised in favour of payments that create benefits for the whole community'. *Australian* (National, 22 May 2008), 1; 'Native Title Changes Focus on Economics' *Age* (Melbourne, 22 May 2008), 10; 'Time for a hard look at native title' *Northern Territory News* (Darwin, 22 May 2008), 3; 'An economic vision: native title reform offers communities a fresh start' *Australian* (National, 23 May 2008), 15.

28-May-08 NATIONAL **Tribunal overrun.** According to recent Senate estimates the National Native Title Tribunal expects to have work for the next 30 years. Acting tribunal registrar Franklin Gaffney said '135 applications had been determined in 15 years.' The estimate 'was based on the time it was expected to clear the backlog as well as consider new claims, now arriving at the rate of 20 to 40 a year.' *Townsville Bulletin*