Report on Annual Conference, International Association of Sound and Audiovisual Archives (IASA) and Australasian Sound Recordings Association (ASRA). National Maritime Museum, 14-19 September 2008-10-30

The Native Title process is increasing its production and use of audiovisual materials in the form of early evidence, digital diaries, and other forms of documentation. Preservation of these vital documents requires specialist knowledge.

From 14-19 September, representatives from collecting institutions, world experts in preservation and digitisation of audiovisual materials, and the digitisation industry met in Sydney to evaluate what is being done to preserve collections, and how to deal with rapid format changes. One of the keynote speakers was Dr Jackie Huggins, well-known for her work in reconciliation, literacy, women's issues, and social justice.

Grace Koch, Native Title Research and Access Officer, was presented with the Special Recognition Award for Outstanding Service to IASA and the annual ASRA Award for services to sound archiving and to Indigenous collections. In July, Grace was appointed to the Board of the National Film and Sound Archive.

Grace with her awards from the International Association of Sound and Audiovisual Archives (IASA) and the Australasian Sound Recordings Association (ASRA).

What's New

Recent Cases

Australia

Eringa, Eringa No 2, Wangkangurru/Yarluyandi and Irrwanyere Mt Dare Native Title Claim Groups v The State of South Australia [2008] FCA 1370

Determination of native title by consent recognising the rights and interests of the Thalanyji people. See also the media release for more information.

Akiba on behalf of the Torres Strait Regional Seas Claim People v State of Queensland (No 4) [2008] FCA 1446

Interim determination concerning the Torres Strait Regional Sea Claim. The court ordered that the sea claim be split into two parts, to be called "Sea Claim Part A" and "Sea Claim Part B". Part A will be considered separately and before Part B. This will mean that the rights and interests of the Kaurareg People will determined at a later date and independently of the rest of the sea claim lodged by the Torres Strait Islanders.

Fesl v Delegate of the Native Title Registrar [2008] FCA 1469

The court dismissed an application for judicial review of decision by a delegate of the Native Title Registrar to register an Indigenous Land Use Agreement. The grounds for review centred on whether it was part of delegate's function to decide if the agreement presented was an ILUA and further, whether conclusion that the agreement was an ILUA was amenable to judicial review. An additional issue was whether the evidential requirements to justify the delegate's registration decision were satisfied and whether the delegate failed to consider relevant considerations. The applicant was unsuccessful in arguing that the agreement did not make lawful provision for the cultural heritage duty of care as required by the *Aboriginal Cultural Heritage Act 2003* (Qld). The court also considered whether there was no evidence or other material to justify the delegate's conclusion that the making of the ILUA had been authorised by the native title group as well as considering the proper construction of statutory

provisions for authorising an ILUA by a native title group. In this context the relationship between *Aboriginal Cultural Heritage Act 2003* (Qld) and *Native Title Act 1993* (Cth) was considered.

Fesl v Delegate of the Native Title Registrar (No 2) [2008] FCA 1479

This was a costs hearing associated with the unsuccessful application for review by a delegate of the Native Title Registrar to register an ILUA. The issue was whether circumstances of the case warranted departure from ordinary rule as to costs. The reasonableness of the review application and public importance of issues raised were considered along with the relevance of s 85A of the *Native Title Act 1993* (Cth). The court declined the application for costs.

Glasshouse Mountains Gubbi Gubbi people v Registrar, Native Title Tribunal & Anor, [2008] FCA 529

This case concerned the validity of the registrar's decision to remove the applicant's native title claim for registration on the Register of Native Title Claims. The court rejected the claim that the registrar was not empowered to decide whether to accept a claim for registration and likewise that the registrar is empowered to remove claims from the Register. From this finding, the registrar in this case was correct in removing the claim from the Register. The final ground of appeal: that the applicant was denied procedural fairness or natural justice through failure to grant an extension of time was also rejected. The court held that no extension of time was warranted in the circumstances.

Christine George & Ors on behalf of the Gurambilbarra People v State of Queensland [2008] FCA 1518

This was a 'show cause' proceeding on the Court's own motion asking why the present application should not be dismissed pursuant to s 190F(6) of the *Native Title Act 1993* (Cth). The Court considered the construction of s 190F(6) and the relevance of general law with respect to summary dismissal. In this instance where application had not been amended since consideration by the Registrar, and where it was not likely to be amended in a way that would lead to a different outcome once considered by the Registrar, there is no other reason why the application should not be dismissed.

Hayes on behalf of the Thalanyji People v State of Western Australia [2008] FCA 1487

Proposed consent determination pursuant to s 87 of the *Native Title Act 1993* (Cth). The question was whether the Court was satisfied that the order is within power having regard to the importance placed on mediation as primary means of resolving native title applications. The court recognised the need for power under s 87 to be exercised flexibly and that it is not conducive for respondents to conduct their own trial of the application to satisfy the Court. The Court took a flexible approach to the requirement of connection and continuity in traditional laws acknowledged and traditional customs observed, commenting that white settlement has inevitably had an impact of traditions. In recognising the native title rights and interests of the Thalanyji people, the Court turned to the requirement for proscribed bodies corporate pursuant to ss 55 and 56 of *Native Title Act 1993* (Cth).

Western Desert Lands Aboriginal Corporation v State of Western Australia and others (2008) 218 flr 362; [2008] NNTTA 22

Objection to expedited process for the proposed future act of granting exploration licences within the determination area. The issue was whether this procedure is available in relation to land the subject of a determination of native title rights and interests. The Tribunal considered whether s 7(2) of *Native Title Act 1993* (Cth) was relevant to the objection application because by finding the expedited procedure to be acceptable there would be an inconsistency with the *Racial Discrimination Act 1975* (Cth). The Tribunal found no basis for distinction between registered claimant and registered native title holder in manner in which expedited procedure operates. The objection applications were dismissed pursuant to s 148(a) *Native Title Act 1993* (Cth).

Australian Manganese Pty Ltd v State of Western Australia and others (2008) 218 flr 387; [2008] NNTTA 38

This involved an application for future act determination concerning the grant of a mining lease. Pursuant to s 38(2) *Native Title Act 1993* (Cth) there is no power to impose a condition for payment of compensation for the future act. The application was successful.

Crowe and Others a State Of Western Australia And Another (2008) 218 Flr 429; [2008] NNTTA 71

Application for the objection of an expedited procedure to grant an exploration licence in the determination area. With reference to the site protective regime, the issue was whether the act was likely to interfere with sites of particular significance. The Tribunal found that subject to s 237(b) of the *Native Title Act 1993* (Cth), the expedited procedure will not apply in this case.

Collard v The State of Western Australia [2008] FCA 1565

Collard v The State of Western Australia [2008] FCA 1564

Collard v The State of Western Australia [2008] FCA 1562

Collard v The State of Western Australia [2008] FCA 1563

Issue whether an application should be dismissed pursuant to subsection 190F(6)(b) of the *Native Title Act 1993* (Cth) following a failure to apply for a review of the decision after initially failing the Registration Test. The applicants noted that this was because they were awaiting negotiations with the South West Aboriginal Land and Sea Council and anticipated that they would reach some agreement over the traditional owners of the land in dispute. They also submitted that the land had cultural significance but the court found that the requirements of s 190F(6)(b) were not satisfied and that the application should be dismissed.

Wonyabong v The State of Western Australia [2008] FCA 1561

Allison v The State of Western Australia [2008] FCA 1560

Walker v The State of Western Australia [2008] FCA 1559

Walker v The State of Western Australia [2008] FCA 1558

Evans on behalf of the Koara People v The State of Western Australia [2008] FCA 1557

Issue whether an application should be dismissed pursuant to subsection 190F(6)(b) of the *Native Title Act 1993* (Cth) following a failure to apply for a review of the decision after initially failing the Registration Test. There was no evidence that it was likely that the application would be amended nor had the Representative Body received instructions from the applicant.

Morich v State of Western Australia [2008] FCA 1567

Issue whether an application should be dismissed pursuant to subsection 190F(6)(b) of the *Native Title Act 1993* (Cth) following a failure to apply for a review of the decision after initially failing the Registration Test. The Applicants failed to provide affidavits but made written submissions noting the difficulty of securing legal representation due to conflicts within the community. They also noted that there were significant sites within the claim area and it was not open to the government to remove the claim against their wishes. The application was dismissed but the court noted that it remained open to the applicants to lodge a further application or join another applicant group.

International

Wii'litswx v. British Columbia (Minister of Forests), 2008 BCSC 1139

Decision concerning the constitutional duty to consult. Extract from the decsion:

- The petitioners are the Hereditary Chiefs of the Gitanyow Nation ("Gitanyow"). They bring this petition on behalf of Gitanyow for judicial review of the decision of the respondent Mr.

W.I. (Bill) Warner, Regional Director of the respondent Minister of Forests ("MoF"), approving six forest licence ("FL") replacements pursuant to s. 15 of the Forest Act, R.S.B.C. 1996, c. 157, which cover portions of Gitanyow traditional territory. The petitioners allege that, in the course of making that decision, the respondent Crown failed to adequately perform its duty to consult with Gitanyow and accommodate its aboriginal interests, as mandated by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 [Haida], and *Taku River Tlingit First Nation v. British Columbia*, 2004 SCC 74, [2004] 3 S.C.R. 550 [Taku]. They accordingly seek relief in the nature of certiorari, mandamus, and prohibition, as well as related declaratory relief.

- The Crown acknowledges that it had a constitutional duty to meaningfully consult with Gitanyow in good faith, and to seek to accommodate its asserted aboriginal rights and title, in the course of the decision to replace the FLs. The Crown says that Mr. Warner and the MoF, on its behalf, engaged in a reasonable process of consultation, and provided interim accommodations appropriate to Gitanyow's interests. They argue that the petition should accordingly be dismissed.
- There is no dispute between the parties as to the applicable law, and little disagreement about the facts. The sole issue is the adequacy of the consultation and the accommodations reached in the course of the Crown's decision to replace the FLs.

Legislation

Amendments to the *Fisheries Act 1994 (Qld)*

New rules for Indigenous fishers that commence on 6 October 2008 have been introduced to provide a balance between fisheries sustainability and Indigenous traditional fishing rights. The changes recognise the important cultural role that fishing plays for many communities, but also acknowledges the need to protect our fish stocks for future generations.

The Act, as amended, can be found at http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/F/FisherA94.pdf

Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008

This Bill implements the conclusions of a 2006 review of the *Great Barrier Reef Marine Park Act 1975* (the GBRMP Act), aimed at ensuring a relevant modern robust regulatory framework that delivers efficient and effective protection and management of the Great Barrier Reef, assisted through amendments which provided for:

- The restoration of Indigenous expertise to the Great Barrier Reef Marine Park Authority
- Streamlining of environmental approval and permitting processes and requirements
- Enhancement of the investigation, enforcement and offence provisions, providing for a more tailored and targeted approach,
- Promotion of more responsible use of the park and the provision of new emergency management powers, and
- Improved alignment and integration between the GBRMP Act, the *Environment Protection and Biodiversity Conservation Act 1999* and other Commonwealth and Queensland legislation.

Journal Articles

Mansfield, J, 'Rethinking the procedural framework' *Native Title News* (2008) Vol. 8 Iss. 10 pp. 163-166
Hiley, G, 'Is native title as fragile as the public right to fish?' *Native Title News* (2008) Vol. 8 Iss. 10 pp. 166-167

Brennan, S 'Government expropriation for private profit hits Aboriginal land hardest' *Indigenous Law Bulletin* (2008) Vol. 7 Issue 6 pp. 2-3

Davis, M 'Indigenous rights and the constitution: making a case for constitutional reform' *Indigenous Law Bulletin* (2008) Vol. 7 Issue 6 pp. 6-8

Marks, G Ownership, sovereignty and coexistence: introductory remarks to ILA/HREOC seminar "Indigenous Peoples and Sovereignty", 14 November 2004 *Indigenous Law Bulletin* (2008) Vol. 7 Issue 6 pp. 21-23

Papillon, M 'Aboriginal Quality of Life Under a Modern Treaty: Lessons from the Experience of the Cree Nation of Eeyou Istchee and the Inuit of Nunavik,' *IRPP Choices*, vol 14, no. 9, August 2008.

Reports

Commonwealth Indigenous-specific expenditure 1968–2008

John Gardiner-Garden, Department of Parliamentary Services, Research Paper No.10, 2008, Canberra 2008.

This paper attempts to identify Commonwealth expenditure in the area of Indigenous affairs over the 40 years from 1968 to 2008 and to plot that expenditure by agency. This includes commonwealth spending on native title specific to NTRBs/NTSPs as well as the Federal Court and National Native Title Tribunal.

Speeches, Seminar Papers and Conference Presentations

French, R, Rolling a Rock Uphill? – Native Title and the Myth of Sisyphus, paper presented to the Judicial Conference of Australia National Colloquium, 10 October 2008.

Hooke, M 'Opening Address' paper presented at the Annual Sustainable Development Conference, Sky City, Darwin, Northern Territory, 15-19 September 2008.

Native Title in the News

National

02-Sep-08 NATIONAL **New chief justice takes reins of top court** Robert French, former Federal Court Judge was sworn in as the High Court of Australia's 12th Chief Justice 1 September 2008. *Border Mail* (Albury-Wodonga, 2 September 2008), 2; 'Top judge's tribute to Aboriginal history' *Australian* (National, 2 September 2008), 2; 'New benchmarks from the west to east' *Courier Mail* (Brisbane, 2 September 2008), 16; 'New Chief Justice proves he is fit to lead the way' *Age* (Melbourne, 2 September 2008), 6; 'Man of many talents has stomach for top job' *Sydney Morning Herald* (Sydney, 2 September 2008), 5; 'In fairness he trusts' *Canberra Times* (Canberra, 2 September 2008), 4; 'Sex drugs and rock and roll: hail the new chief' *Australian* (National, 5 September 2008), 29.

05-Sep-08 NATIONAL **New land deal for Aborigines** The Federal Government is considering the guarantee of $50 million per year for the Indigenous Land Corporation. The 'ILC was set up in 1995 by the Keating government to allay the concern that native title as recognised by the High Court in Mabo, provided limited material benefit to Aborigines and Torres Strait Islanders.'. To date the ILC has 'funded the purchase of 221 properties covering almost six million hectares.' There is no indication of how much land has been returned to Indigenous groups. *Australian* (National, 5 September 2008), 1.

19-Sep-08 NATIONAL **Water experts tap knowledge** Indigenous representatives from Australia, Canada, the United States, Guatemala and New Zealand gathered in Arnhem Land to 'discuss how indigenous people's rights to water should be acknowledged and advanced in water property regimes and water management systems'. *Southern Highland News* (Bowral, 19 September 2008), 4.

07-Oct-08 National **Indigenous leaders against elected body** The chairs of the Indigenous Land Corporation, Indigenous Business Australia and Aboriginal Hostels Ltd have 'argued in favour of a seven member advisory