NTRU Project Page Updates

The NTRU has updated the Project Webpages for the following Major Projects:

- Connection
- Joint Management – information relating to joint management arrangements and native title in the ACT, NSW, SA and WA have been uploaded.

What's New

Legislative Reforms and Reviews

Australian Government,Discussion Paper on Expediting Indigenous Housing in Remote Communities, Attorney-General's Department, Department of Families, Housing, Community Services and Indigenous Affairs, Australian Government, Canberra, 2009.

This discussion paper focuses on reform of public housing and infrastructure in remote Indigenous communities and proposes a new specific process to facilitate these developments. The Government is considering amending the *Native Title Act 1993* (Cth) to include a specific future act process to ensure that public housing and infrastructure in remote Indigenous communities can be built expeditiously following consultation with native title parties but without the need for an Indigenous Land Use Agreement (ILUA).

For further information see:
http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/NativeTitleAmendments_DiscussionPaper.aspx

Australian Government, Overcoming Indigenous Disadvantage: Key Indicators 2009 Productivity Commission, Australian Government, Canberra, 2009.

Overcoming Indigenous Disadvantage 2009 (OID) is the fourth report in a series commissioned by heads of Australian governments in 2002, to provide regular reporting against key indicators of Indigenous disadvantage. The long term objective of the report is to inform Australian governments about whether policy programs and interventions are achieving positive outcomes for Indigenous people. This will help guide where further work is needed.

In March this year, the terms of reference were updated in a letter from the Prime Minister. The new terms of reference align the OID framework with COAG's six high level targets for Closing the Gap in Indigenous outcomes. The OID aims to help governments address the disadvantage that limits the opportunities and choices of many Indigenous people. However, it is important to recognise that most Indigenous people live constructive and rewarding lives, contributing to their families and wider communities. That said, across nearly all the indicators in the OID, there are wide gaps in outcomes between Indigenous and non-Indigenous Australians.

Australian Government, Reform of Indigenous heritage protection laws : Improving protection for Indigenous traditional areas and objects, Department of Environment, Water, Heritage and the Arts, Australian Government, Canberra, 2009.

This discussion paper canvasses possible reforms to the legislative arrangements for protecting traditional areas and objects, specifically the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The aims of the reform are twofold. First, to ensure that Indigenous Australians will have the best opportunities to protect their heritage. This could be done by using existing processes such as native title to secure agreements on heritage protection. Second, to cut duplication and red tape by establishing a nationally consistent approach to protecting Indigenous heritage based on best practice standards.

The deadline for submissions is Friday 6 November 2009. Additional information relevant to the proposals in this paper is available at
www.heritage.gov.au/indigenous/lawreform

Western Australian Government, Review of Approvals Processes in Western Australia, Industry Working Group, Western Australian Government, Perth, 2009.

This report suggests a two phased approach to improving approval processes in Western Australia. Phase one recommendations are essentially administrative and can be addressed without legislative change. Phase two recommendations require legislative change. The report stresses that the need to address and change the present flawed and complex approvals system is critical, and the time for implementing phase one recommendations is now.

Chapter 3 discusses native title and provides a case study example. The report notes that the effective and efficient administration of the processes contemplated by the *Native Title Act 1993* (Cth) is critical for the development of projects in remote and regional Western Australia. Most of the (reported) major native title agreements benefit a relatively small number of Aboriginal people and a few groups have received (and continue to receive) very large financial payments as a result of the development of multiple large projects within their claim areas. The report acknowledges the critical role played by the State.

Recent Cases

Ampetyane v Northern Territory of Australia [2009] FCA 834

The Ilkewartn and Ywel Anmatyerr peoples were granted, under section 87 *Native Title Act 1993* (Cth), an order for a consent determination determining native title rights and interests in their land and waters. In making the consent determination the central consideration was whether there was a free and informed agreement between the parties.

The determination covers an area of approximately 117 600 hectares of land located along the Stuart Highway approximately 15 kilometres south of Ti Tree and 130 kilometres north west of Alice Springs, comprising the eastern half of the Pine Hill Pastoral Lease. Where native title was found to exist, the native title holders were granted the right to: access and travel; live on the land; hunt, gather and fish; take and use natural resources; access, take and use natural water; light fires for domestic purposes; access and maintain sites and places important under traditional law and customs; right to conduct cultural activities; make decisions about the use of the land by other Aboriginal people governed by the native title holders laws; share or exchange natural resources; and be accompanied on the area by persons required to perform cultural activities, persons with rights acknowledged and assist, observe or record traditional activities.

Banks v State of Western Australia [2009] FCA 703

The Jiddngarri application, relating to part of the Kimberley region of Western Australia, had twice previously failed the registration test. In those instances, the Registrar's Delegate had decided that the claim did not satisfy all the merit conditions of the registration test in section 190B of the *Native Title Act 1993* (Cth) (NTA). In this case, the Court was satisfied that the application had not been amended since the Registrar's decision, and was not likely to be amended in a way that would lead to a different conclusion being reached. Consequently, the application was dismissed by the Court pursuant to its discretionary power under section 190F(6) NTA.

BHP Billiton Minerals Pty Ltd, Itochu Minerals & Energy Of Australia Pty Ltd and Mitsui-Itochu Iron Ore Pty Ltd v Martu Idja Banyjima (Mib) Native Title Claimants (Wardens Court)

The Martu Idja Banyjima Native Title Claimants objected to the grant of a miscellaneous licence to three mining companies in the Wardens Court. The objections were that the purposes were not directly connection with mining operations, it was inconsistent with the *Iron Ore (Mount Newman) Agreement Act 1964*, and that it was not in the public interest. The Warden dismissed the objection and granted the licence.

Champion v State of Western Australia [2009] FCA 941

In this case the respondents sought under section 190F(6) *Native Title Act 1993* (Cth) for the court, on its own motion, to dismiss an application that had not been amended since it failed the registration test. The court held there was no reason why the application should not be dismissed.

Davis-Hurst on behalf of the Kattang People v Minister for Lands [2009] FCA 725

In this case the judge dismissed two notices of motion in which the respondent sought to keep a court application active contrary to orders made by a previous judge. The previous orders granted leave to discontinue the proceedings in relation to two parcels of land as a result of a Memorandum of Understanding between the Director-General of the Department of Environment and Climate Change (NSW) and the Saltwater Tribal Council (Aboriginal Corporation).

Dodd on behalf of the Wulli Wulli People v State of Queensland [2009] FCA 793

In this case a motion to give effect to a resolution adopted at a native title claim group meeting was adjourned. The reason was that there were claims that the resolution was affected by the inclusion of votes by people who were not members of the claim group. Justice Dowsett held that

the application be adjourned to allow further investigations.

FMG Pilbara Pty Ltd/ Wintawari Guruma Aborginal Corporation; Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia [2009] NNTTA 63

FMG Pilbara Pty Ltd, as the potential grantee of a mining lease, made an application pursuant to section 35 of the *Native Title Act 1993* (Cth) for a future act determination under section 38 of the Act. This application was made on the basis that the negotiating parties had not been able to reach agreement within six months of the State of Western Australia giving notice of its intention to do the future acts. The future acts were the grant of two mining leases under the *Mining Act 1978* (WA) on land that was overlapped by land held by the Wintawari Guruma Aboriginal Corporation. It was decided that FMG Pilbara Pty Ltd and the State of Western Australia had negotiated in good faith with the relevant native title parties, and consequently the Tribunal did have the power to conduct an inquiry and make the future act determination as requested by FMG Pilbara Pty Ltd.

FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia, [2009] NNTTA 91

On 23 April 2008 the Western Australian Government gave notice under section 29 of a future act – a proposed mining lease in the registered claim of the Yindjibarndi people. After a six month period the proposed lessee (FMG Pilbara Pty Ltd) applied for a future act determination under section 38. Although the Yindjibarndi people challenged the National Native Title Tribunal's power to make the decision by arguing FMG and the Government had not negotiated in good faith, this claim was rejected on 24 April 2009.

In this case the Tribunal considered the substantive question of whether the lease should be granted. Overall it was held that the Tribunal should make the determination on the condition that the four extra conditions proposed by the Government were imposed. This would significantly mitigate the impact the grant of the proposed lease. If no conditions were imposed the lease would have a significant impact on the capacity of the native title holders to access and use the area, including conduct ceremonies and protect sites. It would also have a significant impact on Yindjibarndi morale.

Jinibara People v State of Queensland [2009] FCA 816

In this case notices of motion that sought to join parties to a native title claim were dismissed. The court held that the requirements for joinder under section 84(5) *Native Title Act 1993* (Cth) had not been met.

Kuuku Ya'u People v State of Queensland [2009] FCA 679

This case involved a consent determination recognising that native title rights and interests exist over the land and waters in the Determination Area in Far North East Queensland. The Kuuku Ya'u people hold exclusive rights to possession, occupation, use and enjoyment of a specified area of land within the Determination Area, which does not include water. As to the remainder of the Determination Area, the Kuuku Ya'u people hold non-exclusive native title rights and interests. These non-exclusive rights and interests include the right to hunt and gather, use the natural resources in specified areas, camp on the land, and maintain and protect significant and important sites and places under traditional laws and customs. The nature and extent of the non-exclusive native title rights and interests varied across the determination area. It was agreed that there were no native title rights and interests in relation to minerals and petroleum.

Sambo v State of Western Australia [2009] FCA 940

In this case the respondents sought under section 190F(6) *Native Title Act 1993* (Cth) for the court, on its own motion, to dismiss an application that had not been amended since it failed the registration test. It was held that because there was a reasonable and imminent possibility of the application being amended in a way that could give rise to its registration the application would not at the current stage be dismissed.

Wik and Wik Way Native Title Claim Group v State of Queensland [2009] FCA 789

The Wik and Wik Way Peoples were granted an order for a consent determination determining native title rights and interests in their land and waters. The background to the determination was the Western Cape Communities Co-Existence Agreement, an indigenous land use agreement (ILUA), signed between the traditional owners and a range of other parties. Under the Co-Existence Agreement traditional owners were required to

commence native title determination applications over land in the ILUA. There were two native title determinations preceding the current case.

In this case the land and waters were broadly described as the land and waters on the western side of Cape York Peninsula landward of the high water mark at mean spring tide of the sea of the Gulf of Carpentaria, bounded to the north by the Embley River and to the south by the Edward River and extending in the east to the upper reaches of the watercourses that drain into the Gulf of Carpentaria.

The Wik and Wik Way Peoples were granted non-exclusive rights to: live on the determination area; access, move about and use the area; use natural resources for personal, domestic or non-commercial communal needs; maintain and protect significant sites and places; conduct social, religious, cultural, spiritual and ceremonial activities; and hunt and gather on the area for personal, domestic or non-commercial communal needs.

Wilson v Northern Territory of Australia [2009] FCA 800

This case involved a consent determination recognising the native title rights and interests of fifteen Mudburra or Jingili or mixed Mudburra/Jingili estate groups over almost 144 hectares of land in Elliott. The determination area is to the south east of the determination area in *King v Northern Territory of Australia* [2007] FCA 944 (Newcastle Waters matter). Exclusive possession was recognised over parts of the determination area. In relation to the non-exclusive areas a range of rights and interests were recognised including, amongst others; the right to access, hunt and fish, gather and use natural resources, conduct cultural activities and ceremonies and protect significant sites and places.

Native Title Publications

Articles / Books

Hayley Bennett and GA Broe, 'The neurobiology of judicial decision-making: Indigenous Australians, native title and the Australian High Court', Public Law Review, vol.20, no.2, 2009, pp.112-128.

Adam MacLean, 'Frameworks to settling native title', Indigenous Law Bulletin, vol.7, no.12, 2009, pp.27-30.

Juanita Pope and Toni Bauman (eds), ' "Solid work you mob are doing" : Case studies in Indigenous Dispute Resolution and Conflict Management in Australia', Report to the National Alternative Dispute Resolution Advisory Council by the Federal Court of Australia's Indigenous Dispute Resolution & Conflict Management Case Study Project, 2009.

Patrick Sullivan, 'Policy change and the Indigenous Land Corporation', AIATSIS Research Discussion Paper 25, 2009.

Siiri Aileen Wilson, 'Entitled as against none: how the wrongly decided *Croker Island* case perpetuates Aboriginal dispossession', Pacific Rim Law and Policy Journal, vol.18, no.1, 2009, pp.249-280.

Simon Young, 'Cultural timelessness and colonial tethers: Australian native title in historical and comparative perspective', Australian Indigenous Law Review, vol.12, no.1, 2008, pp.60-68.

Speeches

Justice J.A. Dowsett, 'Beyond Mabo: understanding native title litigation through the decisions of the Federal Court', paper delivered to LexisNexis Native Title Law Summit, 15 July 2009.

Chief Justice French, 'Native Title – A Constitutional Shift?' JD Lecture Series, University of Melbourne Law School, 24 March 2009.

Graeme Neate, 'Negotiating comprehensive settlement of native title claims', paper delivered to LexisNexis Native Title Law Summit, 15 July 2009.

Other

National Native Title Tribunal, Guide to Sources of Assistance and Funding for Prescribed Bodies Corporate, July 2009.

National Native Title Tribunal, Guide to Australian Government Funding Sources, July 2009.