

## What's New April 2008

### Cases

#### Australia

##### *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 Tribunal* [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 notice to respond to the Registrar and provide further materials to comply with the amendments. Accordingly there was no 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 Boorah 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 administer 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 Determinations

- See the [National Native Title Tribunal website: Browse Determinations](#).
- The [Native Title Research Unit](#) also maintains a [Determinations Summary](#) which provides hyperlinks to determination information on the Austlii, NNTT and ATNS websites.
- The [Agreements, Treaties and Negotiated Settlements \(ATNS\) Database](#) provides information about native title consent determinations and some litigated determinations.

## Native Title in the News

- [NTRU Native title in the News](#)

## Publications

### Reports

**Australian Government, Department of Climate Change, *The impacts and management implications of climate change for the Australian Government's protected areas - discussion paper*, Canberra, 2008.**

The Australian Government, represented by the Department of Climate Change (DCC) (formerly the Department of Environment and Water Resources), commissioned Hyder Consulting to assess the impacts and management implications of climate change for the Australian Government's protected areas.

## Training and Professional Development Opportunities

- See the [Aurora Project: Program Calendar](#) for information about [Learning and Development Opportunities](#) for staff of native title representative bodies and native title service providers.

## Events

- [NTRU events calendar](#)

(Sourced from NNTT Judgements and Information email alert service and the Federal Court's Native Title Bulletin)