

government organisations about any funding, training or programs that should be added to the Toolkits. Please contact us on 02 6246 1161 or email ntru@aiatsis.gov.au.

Workshop Reports

The Reports detailing the workshops held at AIATSIS for NTRBs from 5-6 December 2006 and PBCs 11-13 April 2007 will be available online at http://ntru.aiatsis.gov.au/major_projects/psc_rntbc.html

Tax, Trusts and the Distribution of Benefits

At the Senior Professional Officers Workshop conducted at the University of New South Wales in September 2006, representatives from the national Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) network met and discussed the problems that have emerged, the legal options available to claimants and the

outcomes this has produced. The outcomes and key themes of the workshop have been summarised in a research report.

The report is available online:

http://ntru.aiatsis.gov.au/major_projects/taxation_trusts.html

Staffing

Tony Lee has joined NTRU as a Visiting Research Fellow and will be working on the Prescribed Bodies Corporate Project. He is a Yawuru man from Broome and is the first Indigenous Member of the National Native Title Tribunal.

Corina O'Dowd and Thao Pham have joined the unit for six weeks as a part of the Aurora Project's student placement program. They are working on the NTRU's native title in the news service, case notes and updating the resource guide.

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WHAT'S NEW

Recent Cases

***Re Australian Jade Exploration Pty Limited & Ors* [2006] QLRT 78**

This case was heard by the Queensland Land and Resource Tribunal and concerns a mining lease application lodged by Australian Jade Exploration Pty Limited and native title groups, the Barada Barna and Kabalbara Yetimarla People, Durambal People #2, and the Koinjmal People. The State of Queensland is also a party.

***Re Carpentaria Gold Pty Ltd & Ors* [2006] QLRT 107**


This case concerns whether compensation should be paid under s 709 of the Mineral Resources Act 1989 by Carpentaria Gold Pty Ltd to the Birri People. It was noted by the Tribunal that an appropriate figure is reached having regard to the evidence that is adduced. It was found that since no evidence on the point was adduced, compensation could not be awarded.

***Lansen & Ors v NT Minister for Mines and Energy & Ors* [2007] NTSC 28**

The plaintiffs are registered Native Title Claimants to land and waters affected by the McArthur River Project. The court found that the defendants conceded the plaintiffs' had standing to bring the proceedings and that the first defendant, the Minister for Mines and Energy for the Northern Territory is and was at all material times responsible for the administration of the Mining Management Act 2001 (NT), the Mining Act 1980 (NT) and the McArthur River Project Agreement Ratification Act 1992 (NT). It was found that authorisation given by the Minister did not authorise the proposal for open cut mining. As a consequence, the proposed open cut mining operation is statutorily prohibited in the absence of an Authorisation: s 35(1) Mining Management Act 2001 (NT).

***Chapman on behalf of the Wakka Wakka People 2 v State of Queensland* [2007] FCA 597 (27 April 2007)**

Considered whether a person named as 'the applicant' unable or unwilling to act can continue to be authorised and consequently whether they are a proper or necessary party to the proceedings under O 6 r 9 FCR. The court also considered whether the



Register of Native Title claims can be amended to remove names of persons as applicant apart from s 66B.

Beattie on behalf of Western Wakka Wakka Peoples v State of Queensland [\[2007\] FCA 596 \(27 April 2007\)](#)

In this case the Federal Court considered whether a native title application can be struck out. This required a consideration of whether the application complies with s 61 of the Native Title Act, that is that authorisation requirements have been met. It was argued that the composition of claim group was based on families rather than a larger group. There was also a consideration of whether the claim was still properly authorised where the claim group is different from those identified as descendants. The issue was also raised in relation to whether there was a 'society' that continued to observe society laws. The court found that in the present case there is nothing to suggest the continued existence of a wider group, a society of Western Wakka Wakka persons who observe that society's laws. If such a group did once exist, all that remains are the descendants of one person and they are said to follow family customs and practices. Other issues considered by the court was whether the application complied with s 62 of the Native Title Act. It was found that s 62 had not been met in a number of respects including the failure to swear an affidavit by each of the persons who are said to be authorised, identify the area and boundaries. The court also noted that the case had been the subject of mediation since 1999 and there was an absence of any meaningful action to progress the matter and struck out the application under O 35 r 2.

Nicholson-Brown v Jennings [\[2007\] FCA 634](#)

This case involved an administrative review of the decision of the Minister to remove applicants from their position as inspectors under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) ('the Act'). Given that the decision followed a change in governmental policy not yet implemented in legislation the court needed to consider whether the Minister took into account irrelevant considerations, that is, whether new criteria in policy constituted an irrelevant consideration and whether policy contrary to the subject-matter, scope or purposes of the Act. The court also considered the issue of whether there had been a failure to take into account relevant considerations or whether decision made for an improper purpose. The court also considered whether the decision of the minister ultimately constituted a denial of procedural fairness. The court was also required to interpret whether the decision to remove applicants was authorised by the Act. In particular it considered whether the power to

remove can be implied where there is a power to appoint.

Minara Resources Ltd (Acn 060 370 783) v Ashwin & ORS [\[2007\] WASCA 107](#)

This case concerns the validity of a Statement of Claim in representative proceedings over a contract.

Lansen & Ors v NT Minister for Mines and Energy & Ors [\[007\] NTSC 36](#)

This case concerns costs where it was noted that: In the circumstances it seems to me just that the plaintiffs should have their costs of the proceedings including the trial save those costs incurred with respect to the causes and issues abandoned prior to trial and the defendants should have their costs wasted on the causes and issues abandoned by the plaintiffs prior to trial [12]

Roy Kennedy v Director-General of the Department of Environment and Conservation and Another [\[No. 2\] \[2007\] NSWLEC 271](#)

This case concerns whether proceedings have been brought in public interest and whether additional or special circumstances are present. The court considered whether usual order as to costs should be made.

Corowa v Geographe Point Pty Ltd & Anor [\[No. 2\] \[2007\] NSWLEC 272](#)

This case concerns whether proceedings have been brought in public interest and whether additional or special circumstances are present. The court considered whether usual order as to costs should be made. It was noted that:

Mr Corowa's affidavit established that he brought the proceedings in the public interest and not for any private gain. Mr Corowa is a leader of his people born and raised on the Tweed. Mr Corowa's mother and other community members had tried to prevent the bulldozers clearing the land. He acted solely to obtain the rehabilitation of the land, which contained an endangered ecological community. He did this for the benefit of the wider community and future generations, indigenous and non-indigenous.

Native title determinations: Ngarla and Ngarla #2 (Determination Area A) [\(unreported, FCA, 30 May 2007, Bennett J\)](#)

Moses v State of Western Australia [\[2007\] FCAFC 78](#)

This involved a determination of native title rights and interests under s 223(1) of the NTA. The court considered whether the description of native title holders was sufficient. A determination was also made in relation to the prescribed bodies corporate under ss 56(2) and 57(2).



***Dale v Moses* [\[2007\] FCAFC 82](#)**

This involved an appeal from native title determination of a single judge who dismissed the appellants' claim to native title in the determination area but found another native title claim group, the Ngarluma people and Yindjibarndi people, held non-exclusive native title. The claim was dismissed on basis that they were not a group with continuing connection and were not differentiated from Ngarluma people and Yindjibarndi people. The case also considered the transmission of native title rights and interests. It was found that the appellants' case at trial regarding an area known as "the Burrup" was based on alleged transmission of native title rights and interests from two Aboriginal persons said to be sole surviving members of group which originally inhabited the Burrup. The court also considered whether Members of the Yorta Yorta Aboriginal Community v Victoria (2003) 214 CLR 422 precluded inter-societal transfer of native title rights and interests.

***Department of Land Affairs and Others v Goedgelegen Tropical Fruit (Pty) Limited.* [Constitutional Court of South Africa 6 June 2007](#)**

The Court gave judgment in a case concerning the rights of former labour tenants to restitution of land rights under the Restitution of Land Rights Act 22 of 1994. Section 2 of the Act provides for entitlement to restitution of rights in land where persons or communities were dispossessed of their rights as a result of past racially discriminatory laws or practices.

***Wilma Freddie and Others on behalf of the Wiluna Native Title Claimants/Western Australia/Globe Uranium Ltd.* [\[2007\] NNTTA 37](#)**

This case involves the proposed grant of exploration licence for uranium under the future acts regime. It concerns an expedited procedure objection application where the court considered whether the act is likely to interfere directly with the carrying on of community or social activities; whether act is likely to interfere with sites of particular significance; whether act is likely to cause major disturbance to land or waters; or whether the fact that the exploration is for uranium affects consideration of s 237.

***Native title determinations: Deniliquin Local Aboriginal Land Council v Minister for Lands & NSW Native Title Services Limited* [\(unreported, FCA, 14 June 2007, Jacobson J\)](#)**

***Guisepe v Registrar of Aboriginal Corporations* [\[2007\] FCAFC 91](#)**

This case concerns the validity of the appointment of an administrator to an Aboriginal corporation. The court noted that the period of one day to show cause against appointment of an administrator was not a

reasonable period as expressly required by the statute and that the consequent appointment of the administrator was invalid. It was found that the primary Judge underestimated the difficulties faced by the corporation in responding to the notice and overestimated the urgency of the situation. However it noted that there was no denial of natural justice where the show cause notice was based only on the decision to cease funding to the corporation and not the causes for that decision and no opportunity given to respond to those causes. The court also looked at whether the minister had the requisite authority to approve the appointment of the administrator where the approval was minuted prior to authorisation of minister in question.

***Mclvor v The Registrar, Indian and Northern Affairs Canada* [2007 BCSC 827](#)**

In considering the discriminatory effect of legislation, the Court found that that s. 6 of the 1985 Act violates s. 15(1) of the Charter in that it discriminates between matrilineal and patrilineal descendants born prior to April 17, 1985, in the conferring of Indian status, and discriminates between descendants born prior to April 17, 1985, of Indian women who married non-Indian men, and the descendants of Indian men who married non-Indian women.

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

Legislation

[Review of the Mineral Resources Act and the Fossicking Act \(Qld\)](#)


The Department of Mines and Energy (DME) is seeking feedback in its review of the Mineral Resources Act and the Fossicking Act. A discussion paper has been prepared to guide your feedback. The Review of Queensland mining legislation discussion paper (PDF, 372 kB)* includes details on how to reply. Closing date for submissions is 4.30pm 17 August 2007

[Victorian Heritage Services Overview: Aboriginal heritage legislation in Victoria](#)

The site has links to Information Sheets explaining the workings of the 2006 legislation which began on 28 May 2007.

[Aboriginal Cultural Heritage: A new era of heritage protection begins in Victoria](#)

On 28 May 2007, a new system of Aboriginal heritage protection in Victoria will come into force. Cultural heritage management plans are a significant feature of the new regime, with draft regulations setting out when these plans will be required. Arthur



Allens Robinson Partner Chris Schulz and Senior Associate Penny Creswell provide a summary of the proposed requirements for Aboriginal heritage plans.

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

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Publications

Behrendt, Jason 'Changes to native title since Mabo' (2007) 6 (26) *Indigenous Law Bulletin* pp. 13-14.

Cairns, Alan C. 'Report of the Royal Commission on Aboriginal Peoples: Aboriginal nationalism, Canadian Federalism and Canadian democracy' (2007) 70 (1) *Saskatchewan Law Review* pp. 99-121

De Soyza, Anne 'Settling claims in Midas' land: the Goldfields after Harrington-Smith v Western Australia (No. 9)' (2007) 8 (2) *Native Title News* pp. 21-26

Howitt, Ritchie 'Scales of co-existence: tackling the tensions between legal and cultural landscapes in post-Mabo Australia' (2006) 6 *Macquarie Law Journal* pp. 49-64.

McKenna, Marshall 'Wongatha - a question of framing?' A (2007) 26 (1) *Australian Resources and Energy Law Journal* pp. 43-50.

Hughston, Vance 'Native title and the Bennell decision' (2007) 6(26) *Indigenous Law Bulletin* pp. 6-9.

Neate, Graeme 'New powers and functions of the National Native Title Tribunal' (2007) 6 (26) *Indigenous Law Bulletin* pp. 10-12.

O'Faircheallaigh, Ciaran 'Native title and mining negotiations: a seat at the table, but no guarantee of success' (2007) 6 (26) *Indigenous Law Bulletin* pp. 18-20.

Sansom, Basil 'Yulara and future expert reports in native title cases' (2007) 17(1) *Anthropological Forum* pp. 71-92.

Storey, Matthew 'Dealing in native title' (2007) 26(1) *Australian Resources and Energy Law Journal* pp. 56-68.

Tonkinson, Robert 'Aboriginal 'difference' and 'autonomy' then and now: four decades of change in a Western Desert society' (2007) 17 (1) *Anthropological Forum* pp. 41-60.

National Native Title Tribunal

['Hot Tubbing' anthropological evidence in native title mediations](#)

National Native Title Tribunal, 2007, [Guide to Sources of Assistance and Funding for Prescribed Bodies Corporate](#).

Government Publications

Human Rights and Equal Opportunity Commission, 2006, [HREOC Native Title Report 2006](#)

[The long road to statehood : Report of the inquiry into the federal implications of statehood for the Northern Territory](#)

State Attorney-General's Chambers, 2004 (updated 15 January 2007) [Native Customary Laws And Native Rights Over Land In Sarawak](#)

Office of Native Title, 2007 [Lessons Learned: An evaluation of the framework of the negotiations for the Ord Final Agreement 2006](#)

Productivity Commission 2007, [Overcoming Indigenous Disadvantage: Key Indicators 2007](#).

Federal Court

Federal Court Notice to practitioners - [Conduct of Native Title Proceedings in the Federal Court of Australia](#)

Other

[Cape York Institute. From Handout to Hand UP ; Cape York Welfare Reform Project](#) Aurukun, Coen, Hope Vale, Mossman Gorge Design Recommendations May 2007

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