Information is required about:

- the determination of native title rights and interests;
- governance arrangements (including traditional owner decision-making powers) in Plans of Management or other management documents;
- perceived and real benefits of the determination and accompanying arrangements to the native title holders; and
- current State and Territory government policies.

Contributors would not have to cover all examples in a State or Territory and may wish to write only of a specific situation with which they are familiar. However, substantive documents covering the whole of a state or Territory would be ideal.

All expressions of interest and inquiries to toni.bauman@aiatsis.gov.au or phone 02 6246 1195.

What's New

Reforms and Reviews

Variation of Area of Representative Aboriginal/Torres Strait Islander Bodies 2008 (No. 1)

This instrument provides new boundaries for the North Queensland Land Council Native Title Representative Body Aboriginal Corporation Representative area, being the area identified as the 'Northern Queensland Region' as provided in the schedule to this instrument. This boundary variation commences at midnight on 30 June 2008.

Recognition of Representative Aboriginal/Torres Strait Islander Body 2008 (No. 1)

This instrument provides for the recognition of the South West Aboriginal Land and Sea Council Aboriginal Corporation as the representative body for the area specified in the Schedule until the end of 30 June 2010.

Native Title Ministers' Meeting 18 July 2008, Communiqué

Commonwealth, State and Territory Native Title Ministers met today in Perth for the first time since the Rudd Government took office. The theme for the meeting was 'Making native title work better'. In a watershed atmosphere of accord, all Ministers joined together in agreeing that a flexible and less technical approach to native title was needed throughout Australia. Ministers agreed that the backlog of native title claims and the time estimated to resolve them using current approaches are unacceptable. But Ministers also agreed that legislative change is not a panacea. Ministers discussed the value of adopting broad and flexible processes to embracing the opportunities native title negotiations already offer under the existing legislative framework, in the interests of all stakeholders. Ministers agreed it is the responsibility of all parties to adjust their attitudes and expectations. Ministers committed their Governments to taking a more flexible view of the ways to achieve the broad range of practical outcomes possible from native title processes — achieving real outcomes for Indigenous people and providing certainty for other land users.

Northern Development Taskforce Interim Report Kimberley June 2008

NDT Interim Report June 2008

NDT Interim Report Appendices June 2008

Queensland Local Government Template Indigenous Land Use Agreement

This template local government ILUA is the outcome of negotiations which took place for the specific purpose of developing a "model" or "template" ILUA covering a range of issues that commonly arise in mediations between Queensland local governments and native title claimants. The template gives parties using it the flexibility to address issues and aspirations that are specific to them. It will be used to help conclude local government involvement in claim mediation with the three native title claim groups involved in its development. The template will also be

made widely available as a tool to assist mediated outcomes between local government and native title claimants for other claims. The publication includes a commentary which provides a brief history of the template's development and also a clause-by-clause summary of the template.

ORIC. A guide to writing good governance rules for Prescribed Bodies Corporate

This good governance guide will help you to develop new rules for your Prescribed Body Corporate (PBC) or change your existing PBC rules to comply with the CATSI Act.

Recent Cases

Australia

Amoonguna Community Inc v Northern Territory of Australia [2008] HCATrans 254

This case involves a challenge to the Northern Territory's local government changes. It was argued that the provisions of the new *Local Government Act* are beyond the power of the Northern Territory Legislative Assembly and that the compulsory acquisition of Amoonguna's property is not on just terms.

Angelina Cox & Ors on behalf of the Puutu Kunti Kurrama & Pinikura People/ Wintawari Guruma Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd, [2008] NNTTA 90

Native title future act determination application concerning a proposed mining lease. Tribunal considered whether the grantee party had negotiated in good faith and found that the grantee had failed to do so.

Northern Territory of Australia v Arnhem Land Aboriginal Land Trust [2008] HCA 29 (Blue Mud Bay)

A detailed case note is published in this edition of the *Native Title Newsletter*.

Foster v Que Noy (No 2) [2008] FCAFC 137

Decision to determine the costs of an appeal against an application to replace an authorised applicant under s 66B of the *Native Title Act 1993* (Cth). The court needed to determine whether the decision to remove an applicant fell within the exclusive jurisdiction of the court (that is, s 81) and accordingly whether s 85 applies in relation to costs. It was found that the decision was 'one which directly affects the authority of the applicant to deal with a native title determination application referred to in s 61' and that s 85 applied.

Under s 85, according to Lee J in *Ward v Western Australia* (1999) 93 FCR 305 and endorsed by the Full Court in De Rose (No 3) at [8]-[10] 'the starting point is that each party to a proceeding will be left to bear his or her own costs unless the Court considers it appropriate in the circumstances to make a costs order.' The court found that the respondents had failed to establish any extraordinary circumstances and ordered each party to pay their own costs.

June Ashwin & Ors on behalf of the Wutha People/Contact Uranium Ltd/ Western Australia, [2008] NNTTA 92

Future act decision concerning the application for a dismissal of an application under s 148 for a proposed grant of a Prospecting Licence. The application for dismissal was not upheld.

Gudjala People # 2 v Native Title Registrar [2008] FCAFC 157

Native title claimant application concerning the registration of an application, the Gudjala People Core Country Claim # 2. The second claim was intended to included areas within a central external boundary that were excluded from the "Gudjala People Core Country Claim" that had been filed on 22 March 2005. The second application was rejected by Registrar who, the primary judge found had made an error in law. At the primary hearing the judge found that the Registrar had erred in failing to accept the application for registration. The Court considered the criteria for registration focusing on the sufficiency of the asserted factual basis for native title rights and interests claimed and the relationship this has to

the statutory requirements for the contents of the application. The court also considered whether there was an unduly onerous standard applied in referring to the sufficiency of evidence in support of the application. The court noted that:

> …In substance, s 62(1) requires that the accompanying affidavit must contain evidence that the applicant believes the claimed rights have not been extinguished, believes none of the claimed area is covered by an entry in the Register, believes all the statements made in the application are true and that the applicant is authorised to make the application. The application must contain the details specified in s 62(2) and may contain details of the matters referred to in s 62(1)(c)….
> In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim.

The court found that the appeal against the decision of the primary judge should be set aside and the matter should be remitted to the primary judge for consideration.

International

R. v. Kapp, 2008 SCC 41

Constitutional law decision considering the implications of the right to equality and whether affirmative action programs are within this definition. The court considered the relationship between s. 15(1) and s. 15(2) of Canadian Charter of Rights and Freedoms and a communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours. The license meant that commercial, mainly non-aboriginal, fishers were excluded from the fishery at that time and a group alleged a breach of their equality rights on basis of race-based discrimination. McLachlin CJ and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ held that the communual fishing licenses fall within the ambit of the Charter and the claim of the commercial fishers was not successful. In reaching its conclusion the court noted that:

> Section 15(1) and s. 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. The focus of s. 15(1) is on preventing governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on enabling governments to pro-actively combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs, without fear of challenge under s. 15(1). It is thus open to the government, when faced with a s. 15 claim, to establish, that the impugned program falls under s. 15(2) and is therefore constitutional. If the government fails to do so, the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory.

Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests), 2008 BCSC 1020

Case concerning the duty to consult where there is a 'removal decision' made affecting the Hupacasath First Nation. In the decision, the court held that:

1. the Respondent Minister of Forests had, prior to the removal decision on July, 2004 (the "Removal Decision"), and continues to have, a duty to consult with the Hupacasath First

Nation ("Hupacasath") in good faith and endeavour to seek accommodation between their aboriginal rights and the objectives of the Crown to manage Tree Farm License 44 ("TFL 44") in accordance with the public interest, both aboriginal and non-aboriginal.

2. the Crown and the Petitioners will attempt to agree on a consultation process and if they are unable to agree on a process, they will go to mediation. If mediation fails, the Crown and the Petitioners may seek further directions from the court;
3. the Crown and the Petitioners will provide to each other such information as is reasonably necessary for the consultation to be completed and the Crown and the Petitioners will attempt to agree on the document exchange and if they are unable to agree, the matter will go to mediation.

Legislation

Native Title Act compilation as at 1 July 2008 Incorporating Amendments to: Act No. 26 of 2008

Indigenous Affairs Legislation Amendment Act 2008 No. 67, 2008

An Act to amend laws in relation to Aboriginal land in the Northern Territory, and for other purposes.

Publications

NTRU Publications

Memmot, P and Blackwood P 2008 'Holding Title and Managing Land in Cape York – Two Case Studies' *Research Discussion Paper No 21* , 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 Legal Strategic Plan' *Native Title Research Monograph No 2/2008,* Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Seminar Papers

Weir, J and Strelein, L, 2008, 'Water and Native Title' presentation delivered at the AIATSIS Seminar Series, *Indigenous Public Policy Responses from the Ground,* Canberra.

Abstract and audio file available online: http://www.aiatsis.gov.au/research_program/events2/seminar_series_2_2008

Conference Papers: National Native Title Conference 2009

Conference papers from the National Native Title Conference 2008 are now available online: http://ntru.aiatsis.gov.au/conf2008/papers.html