Native Title Newsletter

AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES
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Welcome!

to the Native Title Newsletter 2020

AIATSIS is determined to be part of helping all Australians reimagine what it means to be Australian and to forge a national identity that embraces and celebrates the unique cultures of Australia’s First Peoples.

For the past 27 years, the Native Title Research Unit (NTRU) has focused on maximising the recognition and benefits of native title by strengthening the voice of native title claimants and holders. We’ve done so by engaging and listening to the sector, coordinating information and conducting research on areas of need and impact and actively engaging in law and policy reform. Native title is much more than a legal process. It includes managing and understanding country as well as recognising the extensive knowledge and history held by Indigenous Australians to lead this process.

Over two editions each year, the Native Title Newsletter features articles, community interviews, research project reports and new resources to support the work of native title holders, their communities and supporting organisations.

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Erosion of land and damage to community infrastructure on Masig Island caused by storm surge and rising sea levels.

Credit: Peter Barnett, ClientEarth
In this issue we feature some of the many innovations of native title holders and traditional owners throughout the country in response to the existing climate change challenges we continue to face. We also reflect upon traditions and knowledge structures and how they influence the ways in which we manage a changing climate.

For example, this Gulumoerrgin seasonal calendar was created and used by the Larrakia people in Darwin and is packed with information about weather patterns, bush foods, breeding cycles and much more. It is one of many examples portraying the deep knowledge of Aboriginal and Torres Strait Islander people about their country and illustrates what country provides and how it is to be managed and cared for. Knowledge for sustaining country is embedded in management and cultural practices as the Aboriginal and Torres Strait Islander people assert themselves as custodians of their country – recognised formally in their native title rights and interests. Furthermore, the recent High Court decision set the legal precedence affirming Aboriginal peoples place in Australia.\(^1\)

The recent bush fires and other extreme weather events reflect the need to build upon existing knowledge structures and practices in a way that can support the effective management of our land and waters. The United Nations in their Declaration on the Rights of Indigenous Peoples recognises that special knowledges, traditional practices and cultural customs can contribute to a proper and sustainable management of the environment.\(^2\) This issue of the Native Title Newsletter is dedicated to the knowledges and longstanding practices of Aboriginal and Torres Strait Islander peoples and the powerful role it plays in helping us to better understand, mitigate and adapt to climate change. In this issue we feature voices from traditional owners across the country, updates on legal developments and emerging resources and research.

\(^1\) Love v Commonwealth of Australia; Thorns v Commonwealth of Australia [2020] HCA 3 (11 February).
The Galri Bila (Lachlan River) is a part of our livelihoods and the cultural heart of my mob – the Kalarie people from the area of Condobolin. The Lachlan River is the fourth longest river in Australia and runs from the Great Dividing Range in central NSW to the traditional land of the Wiradjuri people, who are also known as the people of the three rivers including Wambuul (Macquarie), Galari (Lachlan), Marrambidya (Murrumbidgee).

The Lachlan River and its floodplains provide a wide range of aquatic habitats such as pools, backwaters and billabongs, instream woody habitat and aquatic plants. The lower Lachlan floodplain has nine nationally important wetlands, including Lake Brewster, the Booligal Wetlands, the Great Cumbung Swamp and the Gum Bend Lake. It features one of the largest stands of river red gums in NSW and is one of the most important waterbird-breeding areas.

Part of the Galri Bila system is the Oxley River, located in Condobolin where my family and people are connected. The Galri Bila runs through our veins and breathes life into our stories and culture.

My elders have passed down dreamtime and family stories to me about the Bunyip and other creatures that make up the river system. When I was growing up they taught me about the billabongs and how to find certain spots along the river by using landmarks, trees and the layout of country. They also taught me about all the native local fish, birds and plants that depend on Galri Bila. My family and my mob all depend on the Galri Bila, just as our ancestors did, as a resource for hunting and gathering food.

Galri Bila isn’t just important to us because of natural resources, but because of its cultural significance. The river banks are shaded by tall red gums, many of which have Aboriginal scars and markings. The sacred and secret spots along the river system tell stories of the past.

One example is the old Willow Bend Mission which was established on the banks of the river and is the site of a cultural ground. Dancing on the banks of Galri Bila was a big thing for our family. I remember being a young man and having my first experience of cultural dancing with the elders on the mission. I remember being next to the river, the burning fire and the smell of charcoal and smoke. I was shown our cultural practices by the men and women who were dressed up in possum skin cloaks and ceremonial feathers.

But things are changing for the Galri Bila and it is hurting our mob and the native local wildlife. Climate change, like extreme drought, has changed the way we live and hunt for food. The animal and plant life is disappearing without the water flowing through our country. Without vegetation, birdlife and animals it is hard to live off the country and gather food. It is going to be harder for future generations of our mob.

By PJ Williams, AIATSIS, traditional owner, Wiradjuri (Condobolin Kalarie)
There are a number of fish species that rely on good constant water, the better known being the Murray cod, the golden and silver perch and catfish. Traditional bush food gathering relies on the water system being full at the right time of the year.

Our people have already been affected by drought and without the river, the surrounding community is struggling. Wetlands are vulnerable to the impacts of climate change, including changes in rainfall, temperature and the effect of extreme weather events.

We need to protect our country and one way we can do that is by working with local council and government to train them in Indigenous land management and by taking action on climate change. Climate change can affect the ways of teaching cultural practices but even today my boys and I go on country to practice the ways of the past. Every year we meet up in May to have a men and boy’s camp on the river, sharing our knowledge of the country and water system and showing how important the Lachlan River is to us.

My experience growing up on country, swimming and fishing, dancing with my elders on the banks of Galri Bila is key to who I am today. The river flows through my veins and I’ll do what I can to protect it.

‘The Yolngu have cared for the land and have been custodians of the land for millions of years, since time began. And everything now...you look at climate change and all those things, everything’s starting to fall apart. If people would learn from us [how to look after the land] then things would be better...But it’s all that materialism and industry, the pollution, gas emissions and all that. It’s destroying the earth now.’ Dr Raymattja Marika

‘[I]t is the human populations that are interdependent of the natural world – and not the opposite – and that they must assume the consequences of their actions and omissions with the nature...Now is the time to begin taking the first steps to effectively protect the planet and its resources before it is too late...’ The Atrato Case

‘We learn from how to live well by giving our attention to the earth and taking direction from her.’ M Asch, J Borrows & J Tully

Indigenous conceptions of custodianship for land and waters have found little resonance within the legal systems of the nation-states. Following decades of Indigenous advocacy, some national governments and institutions have started to become aware of the sustainability of Indigenous understandings of the world and the potential of Indigenous practices in the context of environmental deterioration and climate change. As a result, different initiatives have been taken across the world to incorporate Indigenous cosmology and worldviews into mainstream environmental law. What do most of these initiatives have in common? They build on a concept developed by Christopher D Stone who, in his 1972 article ‘Should Trees Have Standing?’ proposed to extend the model of legal personality conferred on inanimate entities such as corporations and trusts to natural objects, such as trees and rivers. What is interesting about this model? This granting of legal status and the rights that come with it can be used as a means to reflect Indigenous conceptions of custodianship in relation to natural sites, features and ecosystems.

Thus, in 2008, Ecuador became the first country to formally implement Indigenous cosmology into law by recognising the legal personhood of Pacha Mama (Mother Earth) and her inherent rights to be restored and protected in its Constitution.
Indeed, the act describes Victoria’s spiritual conception of stewardship. (Wilip-gin Birrarung murron) Act 2017 of the As for Australia, the recent passing of various matters, while holding people and local authorities concerning into relationship with Crown agencies defend her own interest by entering Whanganui River is empowered to as Tupua te Kawa. As a result, the four intrinsic Māori values known acting on her behalf according to the and is responsible for speaking and guardian or ‘human face of the river’ which serves as the statutory river embodiment of Māori ancestors and provides for it to have ‘all the rights, power, duties and liabilities of a legal person’ over her own catchments. These prerogatives are to be exercised by the Te Pou Tupua, a jointly-held (Māori and Crown) office which serves as the statutory river guardian or ‘human face of the river’ and is responsible for speaking and acting on her behalf according to the four intrinsic Māori values known as Tupua te Kawa. As a result, the Whanganui River is empowered to defend her own interest by entering into relationship with Crown agencies and local authorities concerning various matters, while holding people accountable for damage she suffered. As for Australia, the recent passing of the Yarra River Protection (Wilip-gin Birrarung murron) Act 201711 reflects the growing sensitivity of Victoria with regard to the Aboriginal spiritual conception of stewardship. Indeed, the act describes Victoria’s most iconic river as ‘one living and integrated natural entity’ that has a heart and spirit, and is part of the dreaming, while stressing the obligation of the traditional owners to keep her alive and healthy for future generations. Essentially, it provides the river with an independent voice by way of the Birrarung Council, a statutory advisory body composed of 12 representatives among whom two must be chosen by the Yarra’s traditional owners. Additionally, the act requires a strategic plan guiding the future use and development of the Yarra River to be established in accordance with Aboriginal cultural values, heritage and knowledge. Admittedly, one could argue that these Guardianship models are limited in scope and have a largely symbolic character. Indeed, as Te Pou Tupua is not a decision-making authority, it has a limited impact on the management of the Whanganui River, merely giving an indirect voice to the Māori people that affirms its value. Regarding the Birrarung Council, it is important to stress that its main purpose is not to act as a legal guardian, the Yarra River having not been granted a legal status at common law, but rather to ensure that different community interests – including those of the traditional owners – are involved in promoting and protecting the Yarra River. Nevertheless, these initiatives have the merit of attempting to integrate a more holistic approach to environmental matters within the western legal system, one that reflects Indigenous views on nature as an all-encompassing reality where country and its components are sensed as imbued with spirit and unique personalities living in harmony. In this respect, given the historical neglect of recognition of the complexity and benefits of the Indigenous conception of custodianship, these mixed approaches can be seen as a turning point in environmental protection. Indeed, they embody a shift from a conception of environmental law that recognises the value of nature in the context of the sovereign interests of humankind to one that regards respect and care for all living beings and their interdependencies as paramount.

Dan Morgan is a southern Yuin traditional owner with 18 years’ experience as Aboriginal Field Officer for National Parks and Wildlife Services (NPWS) and Member of the Biamanga Board of Management. He now works as Aboriginal Community Support Officer with South East Local Land Services (LLS).

How do you explain the current situation with the extensive bush fires in regard to global climate change?

I am glad that I don’t have to drive through the recently burnt areas every day. It would affect me mentally. It really affects us as custodians of the land as it is our cultural obligation to look after country. And to see country so devastated is a reflection onto us. It’s hard as we don’t have any say in how country is treated but we have to live with this aftermath. There are a lot of politicians saying things now but not much action. If it’s not happening now I don’t think that there is much hope.

I can’t really speak on behalf of community but I believe that there is climate change. Each summer seems to be getting hotter. I noticed little things like our middens along the foreshore are getting eroded by big seas. The watermark seems to become higher and higher. A lot of these midden areas are our burial grounds. The winters have been quite mild. We never ever had north-westerly winds in winter. Normally we only get west and southwest winds. It’s like the seasons are changing and with it our cultural season.

Can you explain the difference between a hazard reduction burn (HRB) and cultural burning?

Agencies in control of bush fire management are doing HRBs of quite large areas which are measured by the fuel loads they reduce per hectare and are repeated every seven years.

Within one or two days of spending time with Victor Steffensen [a traditional fire expert and leading educator in the matter] up north my whole perception of fire had changed. When I was working with NPWS I realised we were using fire the wrong way causing more harm than good. Returning home I started paying attention to the areas where we had previously done HRBs. In areas that we called a ‘doughy’ burn where the fire was patchy and did not burn through easily and reduce the surface fuel loads, I noticed a lot more native grasses and sedges. Areas we called a ‘good’ HRB, where fire carried through the landscape and reduced fuel loads I noticed a lot of thick, shrubby mid story species. Four, five, six years later there was more fuel load growing back then before the HRB.

The ‘good’ HRBs were hot fires that changed the chemistry of the soil and burned out the seed stock.
The plant species that came back were fire dominant species, thick shrubby plants that would fill out the mid story between the ground layer and the canopy of the forest. When a wild fire comes through it gives the flames a chance of climbing up into the canopy creating a wall of fire.

The way we burn traditionally we break the land down into different country types according to the dominant tree species. When you drive down Middle Beach road to Bithry Inlet [in Tanja, at the south coast of NSW] it starts down at the beach with sand dune country. A lot of country types, like sand dunes are very sensitive and we don’t burn it often or not at all like rainforest. Once you come up the steps into the car park you get to coastal mahogany country. Then, just 50-80 meters further you come into coastal grey box and woolybutt country. Another 100 meters further down the road is spotted gum or full gum country. So, just within about one kilometre there are four to five different country types that need different types of fire regimes at different times.

In a modern day HRB you can have these different country types which need different fire regimes at different times to each other. They can be months or years apart but they are treated all the same. We end up with one country type with fire dominant species. When wild fires are coming through it thrives on these shrubs and explodes. It creates these massive mega fires.

Traditionally we burn these areas separately. Because traditional fire regimes have not been implemented for so long, the first burn is always a bit difficult and hotter than we want it to be. But we are trying to keep it as cool as possible. Once we get that first burn in, then it’s like a reset.

In a cultural burn we put one spot of fire in one area. We have a little ceremony and we’ll wait for five maybe ten minutes. This lets the birds, animals and insects smell the smoke and give them notice that there is fire and a chance to move away. Then we’ll go up to the fire and let the fire spread out. We are looking at all the insects, spiders and all that’s moving and we will let those insects decide how fast we pace the fire. It’s a lot more time consuming but it’s like anything, the more time you put in the better the outcome you get.

This first reset burn is like a blank canvas. We still have surface fuel loads, materials on the ground and a charcoal mulch layer that acts like bio-char. It creates good bacteria in the soil which then retains more moisture. By burning slow and cool the grass seeds will germinate and come back. We’ll get a knee-high layer of grasses and native sedges that acts even more like mulch. We might have more fuel load but also more moisture in the soil to suppress wildfires. That’s the difference between cultural burns and HRBs.

Because we haven’t implemented the cultural burning for so long tall native species have moved into other country types where they don’t belong. Country types are like gardens and need maintenance. If you don’t look after them they become full of weeds and get out of control. Using the right fire at the right time will weed those plants out but only if they are not over shoulder or head height, then it will become a manual handling job to get these plants out. That’s what we were testing after the Tathra bush fire where we burned six months after the fire. That could be a little early as the land is still in recovery mode. We were planning to burn individual little test patches at six months, twelve months and then every year to monitor what would be the best method, but we ran out of funding for the continuing program and only got to do the one six months burn.

We let the country tell us when to burn. Within each country type there are certain indicators. It could be a flower, a certain tree that is seeding, or when a certain grass cures. These indicators show us that this country type is ready to burn again. This can differ to the timeframes the agencies in control of bush fire management want to burn. It all depends on the health of the country.
Fire is like a medicine for that country but it has to be the right type of fire.

Cultural burns are more regular than the thresholds that are currently set on forest types. Scientists base their thresholds on different plant species that might become extinct if they are burned more frequently. Their evidence is based on a hot fire HRB and no research has yet measured the survival of these plants with the way we burn.

Cultural knowledge is quite scientific and has been proven for thousands of years but scientists ask for scientific evidence before we get an opportunity to practice cultural burning. Gathering scientific data is taking a long time. For us to get a healthy country again that could take a generation or maybe longer. How long do we have to wait for science to catch up with cultural knowledge?

Cultural burning has so many different layers. When we do workshops we always work with community. It’s about learning to read landscape again, being part of and playing a role in the landscape. Our role as humans was to apply fire at the right time only when the country told us to.

Seeing that cultural burning is a very slow process, what would you need to make it sustainable?

We would need Indigenous ranger groups up and down the coast working within their traditional lands with support by mainstream funding and carbon credits, so that during the cooler months we can get country back to health again. Aboriginal ranger groups need to lead this work with the wider community.

Last year we started the Murrah Flora Reserve Firesticks project that involve multiple government agencies, Aboriginal organisations and communities. There is a lot of interest within the communities along the south coast in cultural burning practices but before we can start to practise these on public lands, we need to meet government legal requirements.

To get environmental outcomes could take a long time but what is measurable now is the social benefits. Cultural burning is a great opportunity for our communities with so many issues like alcoholism, substance abuse, domestic violence, imprisonment and unemployment. A program like this is connecting our community back to culture and country and provides a sense of pride and ownership for caring for country through traditional land management. There are employment opportunities and at the same time it creates a safe and healthy environment for everyone. It also creates positive relationships between the Aboriginal community and the wider community and is breaking down this social gap. It’s just a win-win situation. I am not sure why something is not in place already.

I’d like to see ranger groups working across private and public land under the one policy framework, Caring for Country. There needs to be legislation change to allow the rightful owners of this land to practice culture through traditional land management on public lands.


The development application for the approval of a new open cut coalmine near Gloucester in the Hunter Valley of NSW was rejected in a landmark decision of the NSW Land and Environment Court last year. Preston CJ refused the application for Gloucester Resources Limited’s (GRL) Rocky Hill Coal Project because it would have significant and unacceptable planning, aesthetic and social impacts, as well as emit greenhouse gases that would contribute to climate change. The Court also considered the adverse impacts of the project on the Aboriginal people of the region to be a determining factor in the decision.

The Rocky Hill Coal Project was to be developed, operated and rehabilitated over a period of 21 years. GRL estimated that the project would employ 110 people, with a target of 75 per cent local employees. The mine was overwhelmingly opposed by the community. The Department of Planning and Environment received 2,570 submissions, with 2,308 in objection and 261 in support. 2,294 letters were from individuals and 14 were from special interest groups, including the community group Gloucester Groundswell, which later became a party to the appeal. Of the approximately 90 per cent opposing submissions, 83 per cent were sent from the Gloucester postcode.

The main concerns related to the noise and dust created by a mine, the adverse impacts on the rural and scenic character of the valley, and the social impacts on the community. The contribution to climate change of a new coalmine was also of concern. The Minister for Planning found that the mine was not in the public interest and refused consent in December 2017. GRL appealed the decision to the Land and Environment Court.

Social impacts

Preston CJ found that the proposed project would cause unmitigated and significant negative social impacts. His Honour considered that the project would disproportionately affect disadvantaged groups within the community, particularly existing and future generations of Aboriginal people. The evidence brought before the Court established that the area surrounding the mine, which includes the Bucketts Range, is a unique and distinctive setting. The Court accepted that Aboriginal people have a deep connection to Country and the impacts of the mine on the cultural heritage and landscapes of importance to Aboriginal people would result in major social impacts.

Kim Eveleigh, local Aboriginal elder, stated:

“We are the Aboriginal people of this land, so don’t you dare ignore us, pay attention and listen as this is our Spiritual connection to our land, we the Gooreengai people belong to the Significa[nt] Buckan Valley in Gloucester it is our past, present and future. If you allow it to be destroyed you cannot fix it, stop it before it begins. Everything from our Ancestors has been removed all we have left is our Dreaming of our land...”
Most of the world’s existing fossil fuel reserves – coal, oil and gas – must be left in the ground, unburned, if the Paris accord climate targets are to be met. I say that because the exploitation, and burning, of fossil fuel reserves leads to an increase in CO2 emissions when meeting the Paris accord climate targets requires a rapid and deep decrease in CO2 emissions.

Preston CJ held that an open cut coalmine at the proposed area of the Gloucester Valley would be:

...in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape, proximate to many people’s homes and farms, will cause significant planning, amenity, visual and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided.

A developing jurisprudence

This decision joins a burgeoning number of cases across the world in which development applications have been refused by courts, in recognition of the cumulative causes of climate change, as well as the causal link between greenhouse gas emissions from local coal mining projects and climate change globally.

Climate change litigation may also lead to the development of new law. In March 2020, the High Court of New Zealand allowed the Climate Change Iwi Leaders Group’s case to proceed to trial. The group will argue that mining and energy corporations should be responsible to the public for their contribution to climate change and ordered to commit to zero net emissions by 2030, potentially through the development of a new tortious duty.

References:
2 Ibid 17.
3 Ibid 20.
5 Ibid 22.
6 Ibid 421.
7 Ibid 410.
8 Ibid 122.
9 Ibid 351.
10 Ibid 121.
11 Ibid 345.
12 Ibid 351.
13 Ibid 421.
14 Ibid 422.
15 Ibid 513.
16 Ibid 515.
17 Ibid 446.
18 Ibid 699.

Early morning mist in the Gloucester Valley.
Credit: Gloucester Groundwells, https://www.flickr.com/photos/125003186@N06/with/15720505716/
I am Yessie Mosby, a traditional owner of Masig Island in the sixth generation. I am also a Director of Masig PBC. I am a plaintiff in the case against the Australian Government that we have taken to the United Nations (UN).

I lived in the western parts of the Torres Strait all my life but moved to Masig Island ten years ago. In all this time I came back to Masig in the holidays and I didn’t pay attention to the effects of climate change then. Not until my adulthood, when I settled here with my wife and became a father. It is sad to see how the land is eaten away, the inundation of the island, the erosion. Seeing how we move further into the island. It is a coral cay island which is very flat and there is no higher ground. We can’t move any further inland.

The houses are on stilts and were provided to us by the government. Back then nobody ever lived on stilts but on ground level houses. This particular time of the year we are very vulnerable to high tides and the monsoon.

**What do you do when the island gets flooded?**

When a king tide comes we keep our children away from the tides especially during cyclone season. The whole community is walking around trying to save what’s possible. We don’t sleep even during the night. We live in fear where we will go to. We are concerned where we are relocated to in the future. We are not talking about 100 years, but 30 to 50 years. We have our ancestors here, they are tying us to our land. We don’t want to leave our loved ones behind. [For the future when we die] put us in tombs so we can be relocated with our families.

Some elders say when it's time to leave they don’t want to go. They want to die and stay on the island.

Me and my wife, we are thinking about where our children will be [in the future]. We are very family oriented because we are surrounded by oceans. When we relocate to the mainland we will be cut [off from each other] and families will be spread out. We'll be a living people with an extinct culture and tradition.

It's very hard for people here. The majority in Australia has forgotten that we have two different Indigenous people, something Australia should be very proud of and protect. When Australia doesn’t know about us, then the world doesn’t know about us. Who is going to help us then?

Our culture dates way back beyond Christianity. Something we Indigenous Australians are very proud of. That one of these Indigenous peoples is going to be evicted from their island, washed away from the ocean should be prevented now by the Australia government. Stop the mining and burning of coal immediately.
For our people sovereignty is about our life. Nothing is greater than our survival. We tried our best in asking for help but we didn't know how. We Torres Strait Islander fight together. That cause [the threat to our islands] needed all of us to join in together as Torres Strait people. We have the right to live and to have our culture, that's why we came together. We knew Sophie [Marjanic, lead lawyer in this case], she used to see the struggles we are facing. Bear in mind, we Torres Strait Islanders all learned English at school. She understood how we are connected to the motherland, our islands, we expressed our feelings and fear [to her]. She asked how we want to go about this. We said we want to take this to the UN.

In December the government announced that it will provide additional $25 million infrastructure package for the Torres Strait.

We are happy and grateful that the government is helping us, but that is not stopping anything. In the future there will be none of us [on the islands]. I am a very cultural person and speak more than one language, I am very proud. Here on the island I teach our children where we come from and how we survived before. I have not much time left as we might have to be relocated.

We have a plan here for our own people but we don't know if the government has other plans. It would be really good if we get an outcome very soon.

The case against the Australian government is not resolved yet but do you see the funding as a success?

I think we'll be successful once we see sea walls being built. We already got a quarter of a metre [of land] taken away. At the moment we are using materials like pallets and sand bags for protection. The sea walls will help with keeping us on the island longer. It might add another 5 years to the final date and will help to stop the erosion.

Next year we are looking to sail our 72 foot long canoes down to Brisbane to protest and give talks and then to Sydney through Canberra to the Bass Strait.

It’s very sad to see how the Torres Strait that contributes almost nothing to climate change is experiencing it the most.
In May 2019 eight Torres Strait Islanders Yessie Mosby, Nazareth Warria, Keith Pabai, Stanley Marama, Nazareth Fauid, Ted Billy, Daniel Billy, Kabay Tamu took a claim to the United Nations (UN) against Australia for inaction regarding climate change. The plaintiffs are supported by Gur A Baradharaw Kod Sea and Land Council1 and pro bono legal advice from the UK based company ClientEarth. The plaintiff’s claim, that by failing to take action to mitigate or adapt to climate change, Australia has violated the complainants’ human rights under the International Covenant on Civil and Political Rights (ICCPR).2 According to the claim group the following rights have been violated:

- Article 2 in its interrelation to the articles below;
- Article 6 the right to life;
- Article 27 right of indigenous minorities to enjoy their culture;
- Article 17 the right to be free from arbitrary interference with privacy, family and home; and
- Article 24 rights of the child.3

The Torres Strait Islander group argued that not to reduce greenhouse gas emissions and to provide sufficient defence and resilience measures constitutes a clear violation of the islanders’ rights to culture, family and life.4 This landmark case is the first to detail and assert that the issue of climate change is a human rights issue.

The plaintiffs ask for immediate and long-term measures from the Australian government including that:

- they decrease emissions by at least 65 per cent below 2005 levels by 2030 and go net zero by 2050;
- they phase out thermal coal for domestic use and international export; and
- that a minimum of $20 million is committed to emergency measures for the islands, such as sea walls and long-term adaptation measures.5

While the case is still unresolved in December 2019 the Australian Government announced a $25 million Torres Strait infrastructure package to construct seawalls, repair and maintain jetties, and re-establish ferry services between Saibai and Dauan islands.6 Meanwhile the Torres Strait Regional Authority continues to work on mitigation and adaption strategies.7


3 ClientEarth, Torres Strait climate case: FAQ, ClientEarth, n.d


Since the original Mabo (No 2) decision, we have been seeking to move towards a more equitable and clearer understanding of how Aboriginal and Torres Strait Islander connection to country can be recognised and how this can be reflected in the courts and legal processes. There have been a number of significant cases and amendments to the Native Title Act 1993 (Cth) (NTA) that have sought to ‘define’ native title recognition and the scope of rights and interests held by Aboriginal and Torres Strait Islanders to their land.

One of these significant cases was outside the native title sector and lay in constitutional law. In Love and Thoms the question was can an Aboriginal person be deported under the Australian Constitution. In February this year, the High Court determined (by majority of 4:3) that Aboriginal people are outside of the Commonwealth’s ‘aliens’ powers under s 51(xix) of the Constitution. The impact of this decision is that any laws made under this constitutional power – including the Australian Citizenship Act 2007 – do not apply to Aboriginal people including those born overseas. In reaching its decision the court adopted the approach taken in the original Mabo (No 2) decision to reaffirm the connection held by Aboriginal and Torres Strait Islander peoples to their lands expressed through traditional laws and customs.

The Mabo (No 2) decision recognised that native title exists under Australian common law and led to the establishment of the NTA – our national legislation that regulates the legal recognition and protection of native title rights and interests as well as how native title interacts with existing or potential future rights and interests.

The question of law in the Love and Thoms decision was whether those men could be considered aliens under the meaning of s 51(xix) which gives the Commonwealth powers to determine whether someone is citizen and define the characteristics of citizenship. The main argument made by Love and Thoms was that the common law of Australia recognises the unique connection which Aboriginal people have with land and waters in Australia and that this recognition would be contradicted by the ‘alien’ power under the Constitution.

In their judgements Bell, Nettle, Gorden and Edelman JJ found that Parliament did not have the power to treat an Aboriginal person as an ‘alien’. What is significant about the decision is that the High Court reaffirmed the continued cultural, historical and spiritual connection that Indigenous peoples have to country or ‘the territory of Australia’ regardless of whether or not they were born here or hold citizenship.

The major distinction between the dissenting judges and the majority was whether Mabo (No 2) was relevant to their interpretation of the Constitution. Chief Justice Kiefel reaffirmed common law recognition of native title:

Mabo (No 2) held that the common law recognises a form of native title to land and waters which has survived the acquisition of sovereignty by the British Crown. At the inception of the common law its protection was extended to the holders of a common law native title, which was a burden on the Crown’s radical title.

Kiefel CJ also noted however, that while connection is based on traditional laws and customs this cannot be applied to the whole continent of Australia. For Kiefel CJ ‘alien’ describes a person’s lack of formal legal relationship with the community or body politic of the...
country with which they content to have a connection. She further noted that traditional laws and customs provide evidence of connection to country but are not recognised or regulated by the common law. Gageler J also accepted the common law recognition of native title but did not view a continuing connection to land as a means of granting automatic citizenship, nor should s 51 (xix) be limited by race. Keane J noted that Mabo (No 2) does not recognise formal legal status ‘between an individual and a sovereign power’ but:

This connection is:

a matter of history and continuing social fact, an Aboriginal society’s connection to country is not dependent on the identification of any legal title in respect of particular land or waters within the territory.

Gordon J also expressed the unique connection that Aboriginal Australians have to land and waters:

Native title is a significant acknowledgement of the position of Indigenous peoples that took place long after Federation. Native title recognises that, according to their laws and customs, Aboriginal Australians have a connection with country and have rights and interests in land and waters. But those laws and customs are not limited to rights and interests. They entail obligations consistent with Aboriginal Australians being custodians of the land and waters. It is connection with land and waters that is unique to Aboriginal Australians. As history has shown, that connection is not simply a matter of what the common law would classify as property. It is a connection which existed and persisted before and beyond settlement, before and beyond the assertion of sovereignty and before and beyond Federation. It is older and deeper than the Constitution. And the connection with land and waters that is unique to Aboriginal Australians does not exist in a vacuum. It was not and is not uniform. It was not and is not static; cultures change and evolve. And because the spiritual or religious is translated into the legal, the integrated view of the connection of Aboriginal Australians to land and waters is fragmented. But the tendency to think only in terms of native title rights and interests must be curbed.

The decision flowed from two Indigenous men, Brendan Thoms and Daniel Love who had failed their migration character tests and taken into immigration detention under the Migration Act 1958 (Cth). Thoms and Love were both born overseas and living in Australia – Thoms a descendant of the Gunugu People recognised as a common law native title holder and born in New Zealand and Love a descent of the Kamilaroi people, recognised as an Elder, and born in Papua New Guinea. They were both sentenced for different offences under the Criminal Code (Qld) and based on their convictions, their Australian visa were cancelled under the Migration Act 1958 (Cth).

1 Mabo v Queensland [No 2] (Mabo (No 2), (1992) 175 CLR 1
2 Love v Commonwealth; Thoms v Commonwealth (2020) [2020] HCA 3 (Love and Thom) under s 51 (xxx) the Commonwealth has the power to make laws “for the peace, order, and good government of the Commonwealth with respect to: … naturalization and aliens”.
3 Mabo (No 2) 70 (Brennan J).
4 Love and Thom [27] citing Mabo (No 2), 57-58 (Brennan J). Bell J also recognised the ‘unique connection that Aboriginal Australians have to the land and waters of Australia’ and that at ‘the time of European settlement there existed antecedent rights and interests in the land and waters of Australia possessed by the indigenous inhabitants sourced in traditional law and customs and alienable only by that body of law and custom: [52],[70].
5 Ibid [32].
6 Ibid [18], [32].
7 Ibid [38].
8 Ibid [128] and [133 – 134].
9 Ibid [194].
10 Ibid [71].
11 Ibid [74].
12 Ibid [272].
13 Ibid [277].
14 Ibid [362-363].
15 Migration Act 1958 (Cth) S 189. At the time of the High Court decision, the Department of Home Affairs decision to cancel Daniel Love’s visa had been revoked under s 501 CA(4) of the Migration Act and he had been released from immigration detention.
16 Ibid S 501 (3A)
Further reading on CLIMATE CHANGE


Steffensen, V 2020, Fire Country: How Indigenous fire burning could save Australia, Hardie Grant.


Steffensen, V 2020, Fire Country: How Indigenous fire burning could save Australia, Hardie Grant.
The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and NTSCORP have made the decision to postpone the National Native Title Conference 2020 to **18 – 21 October 2020**, as a result of the changing and widespread impacts of COVID-19.

The call for papers deadline for submissions is **Friday 29 May 2020**; however, decisions to accept abstracts will be made on a rolling basis.