Welcome! to the Native Title Newsletter in 2017

This year marks the 25th anniversary of the Mabo v Queensland [No 2] (1992) (Mabo) decision in the High Court of Australia. In recognising the rights of the Meriam people to their country in the Torres Strait Islands, the High Court held that through native title Australian law recognises Indigenous peoples’ held pre-existing rights to their land and waters and these rights survived to be protected by the common law.

Over two editions this year, AIATSIS celebrates the Mabo case and subsequent history of native title. Through our articles, we acknowledge both the successes and difficulties that native title has, and continues to bring, to Aboriginal and Torres Strait Island communities throughout Australia.

We will feature interviews, research articles, youth perspectives and community interviews.

Stay in the loop by subscribing to the Newsletter online or if you would like to make a contribution, please contact the NTRU for further information.

Image: Pannawonica Hill, WA. Provided by Royce Evans.
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Barbara Hocking: ‘THE INTELLECTUAL ARCHITECT OF THE MABO CASE’

Professor Jenny Hocking Monash University and Dr Barbara Ann Hocking

'Since time immemorial the Torres Strait Islands of the Mer (known as Murray), Danar and Waier and their surrounding seas, seabeds, fringing reefs and adjacent islets have been continuously inhabited by people called the Meriam people'.

Statement of Claim. Mabo (No. 2) 1989

In September 1981 Melbourne barrister Barbara Hocking presented a paper at the now famous conference, Land Rights and Future Australian Race Relations, at James Cook University in Townsville. The conference, widely seen as the origin of the Mabo cases, was organised by the Students Union and the Townsville chapter of the Aboriginal Treaty Committee and co-chaired by Eddie Mabo of Mer and Professor Noel Loos of James Cook University. Barbara Hocking's paper, 'Is Might Right? An Argument for the Recognition of Traditional Aboriginal Title to Land in the Australian Courts', was a bold exposition on the legal recognition of native title, that essentially set out the legal framework for what became the Mabo case. In this powerful and prescient piece Barbara argued that a case should be taken to the High Court in pursuit of the recognition of native title. Specifically, Barbara Hocking proposed that a 'test case [be] brought by a group of Queensland Aboriginals who still live on their tribal lands' in order for the common law, in her words, 'to be put to right'. Eddie Mabo led the claim on behalf of the Meriam people and the case bears his name. As the two lead plaintiffs, then gave instructions to Barbara Hocking as the barrister and Greg McIntyre as solicitor, to pursue precisely such a case in the High Court and to establish the principle rejected in Milirrpum v Nabalco Pty Ltd 1971 17 FLR 141 (Gove) - the recognition of traditional Indigenous rights to land in Australian common law. The writ and the statement of claim initiating the case were issued in the Brisbane Registry of the High Court in May 1982 on behalf of the five plaintiffs: Eddie Mabo, Dave Passi, Sam Passi, James Rice and Celuia Mapo Salee. Barbara Hocking prepared the first draft of this historic statement of claim that began with the compelling imagery and symbolism of the words, 'Since time immemorial'.

For the next five years the Mabo case would be the central goal of Barbara's legal work and the highest priority in her practice at the bar. Together with other lawyers later engaged on the case, she appeared in the High Court in several directions hearings and in the Queensland Supreme Court in October-November 1986 during Mabo v Queensland (No. 1) 1988, against the Queensland government's attempt to retrospectively abolish any such native title rights should they be found to exist, through the
**Queensland Coast Islands Declaratory Act 1985.** The Queensland government failed in this crude attempt to extinguish native title rights, before the Mabo case proper had even been heard, and was found to be in breach of the Whitlam government’s *Racial Discrimination Act 1975*.

As the Mabo case developed Barbara was engaged beyond the court-room, including in extensive field research on Mer, which she relished. She later recalled in an ABC Radio interview, that one of the highlights of her work on the Mabo case was a visit to Mer, meeting the Meriam people, the plaintiffs, their community and their families. Throughout the planning and development of the case, Barbara’s work was pivotal. Her foundational work with the Mabo case and the Meriam people built on decades of study in an area in which unpopular opinion encompassed not only the field itself but also the particular perspective she brought to it. Quite simply, she turned the notion of land rights and law in Australia on its head, arguing that the law could be used both for and against itself, to right a legal wrong and a lasting injustice by acknowledging native title and correcting the fiction of *terra nullius*. In this Barbara was driven by her abiding belief in the law and in the capacity of the law for progressive restitution through its correct application, despite its manifest flaws and attendant injustices. Against the prevailing pessimism that followed Gove, itself an appalling expression of judicial sophistry lacking both intellectual veracity and moral courage, she maintained her belief that the law nevertheless could be used to secure a proper and just outcome. In her view Gove simply reinforced the fact that the law had been wrongly applied, and knowingly wrongly applied, through the continued deference to *terra nullius*. The brazen inconsistency of Gove only served to underscore her view that this same flawed law, British law, would also be the means to secure native title – if only the law could be ‘set right’. It is for this courageous conceptual grasp of land rights law and title that Professor Peter Russell, in his 2005 book *Recognising Aboriginal Title*, described Barbara Hocking as ‘very much the intellectual architect of the Mabo case’.

Behind: Mer (Murray) Island, Torres Strait Islands.
The architecture had begun decades earlier when Barbara commenced her legal studies at Melbourne University in 1947, graduating in Arts/Law in 1962 - 15 years and 4 children later. Struck by the absence of any study of Indigenous property rights in the law curriculum and by the neglect of a colonial legal history that would explain the erroneous presumption of the doctrine of ‘terra nullius’ in Australia, she then undertook a preliminary MA thesis at Monash University, Aboriginal Land Rights: An Australian Injustice. In 1971 Barbara Hocking graduated with a Master of Law from Monash University, for her ground breaking thesis Native Land Rights. In these theses, and in her books, articles, reports and conference papers over many years, which Barbara called her professional life’s work, she presented what was at that time an unheralded argument for the recognition at common law of a form of native title ownership in Australia, as it had been in other settler jurisdictions. As Peter Russell describes; ‘she was the first Australian scholar to explore this legal terrain’. It constitutes a body of work that has been described as ‘of the greatest legal and political significance’. Five years after the Mabo case began, Barbara Hocking retired from the bar and with that the impact of her work and the significance of her theoretical developments in native title law quickly became lost to history. The High Court’s final Judgment, in Mabo v Queensland (No2) 1992 (Mabo) was handed down on 3rd June 1992, finally recognizing original native title in common law as Barbara Hocking had always contended it should. Justice Toohey alone referred to her work, citing it only as ‘background’. Nevertheless, the High Court judgments essentially accepted the arguments Barbara had advanced throughout her body of work, principally her 1988 book International Law and Aboriginal Human Rights and her paper to the Townsville conference, which had been published in 1982 in E. Olbrei (ed), Black Australians. Over time a new generation of academics and scholars including Peter Russell have recognised the significance of the ‘intellectual architect of the Mabo case’ that others too frequently overlooked. She had begun her life’s work at a time when her analysis was legally and politically innovative and profoundly challenging, and she was to see her interpretation of the law of native title in Australia achieve mainstream acceptance. It was in recognition of her ground-breaking work that Barbara Hocking was awarded one of two Australian Human Rights Medal awarded by the Human Rights and Equal Opportunity Commission in 1992, for her contribution to the Mabo case and work over many years to gain legal recognition for Indigenous people’s rights. An Australian Human Rights Medal was also awarded in 1992 to the five plaintiffs in the Mabo case: Eddie Mabo, Dave Passi, Sam Passi, James Rice and Celiau Mapo Salee. The following year Barbara Hocking was awarded the inaugural Monash University Distinguished Alumni Award for her ‘visionary groundbreaking work on Aboriginal land rights [which] was, through the High Court of Australia’s Mabo decisions, recognised as a body of work of immense legal and political significance and an important milestone in Australian history’.

3 Russell, P. 2005. p. 194
4 Inaugural Monash University Distinguished Alumni Award
Reflections on 25 yrs of native title: AN INTERVIEW WITH JUSTICE DEBRA MORTIMER

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) invited the Hon Justice Debra Mortimer to be a presenter at the Youth forum at the National Native Title Conference in Townsville. She spoke with AIATSIS Legal Research Fellow Cedric Hassing and Senior Research Officer Stacey Little.

After graduating from Monash University with a Bachelor of Jurisprudence, and Bachelor of Laws with 1st Class Honours, in 1985 and 1987 respectively Her Honour was awarded Supreme Court Prizes for the first placed graduate for each degree. In 1987, Her Honour took articles with Goldberg & Window. In 1988 Her Honour was admitted as a barrister and solicitor of the Supreme Court of Victoria and from 1988 to 1989, Her Honour was an Associate to then Justice, Sir Gerard Brennan of the High Court of Australia.

It was on the advice of Sir Gerard Brennan that, after one year as his Associate, Her Honour went straight to the Bar in 1989. She was appointed Senior Counsel in 2003. Her practice included a significant amount of public interest, human rights and pro bono work, most notably in refugee law and anti-discrimination but in later years, environmental law. In 2009, the Law Institute of Victoria awarded Her Honour the Paul Baker Award in recognition of outstanding contribution in administrative or human rights work. In 2011, she was awarded the Victorian Bar’s Pro Bono perpetual trophy for outstanding contribution to pro bono work. In 2011 the legal team in which Her Honour was lead counsel, was awarded the Federation of Community Legal Centres Victoria Tim McCoy Prize, and the Australian Human Rights Commission Law Award and, in 2012, the Victorian Bar Public Interest and Justice Innovation Award in the Victorian Bar Pro Bono Awards. In 2011, Her Honour was appointed a Senior Fellow of the University of Melbourne Law School. Justice Mortimer was also the first woman to win the Law Council of Australia President’s Medal, the highest award of the national legal profession.1 Her Honour was appointed as a judge of the Federal Court of Australia on 12 July 2013.

Justice Mortimer was born in New Zealand. She reflected that: “One thing that is different is that you grow up with a much stronger appreciation of Maori culture - even when you are a Pakeha you grow up with a respect and knowledge of Indigenous Peoples.” As a consequence her interest in Human Rights Law and Indigenous Peoples and the Law has been a longstanding one.

In 1988 Mabo v State of Queensland2 came before the High Court of Australia during her Honour’s time as Associate to Justice Brennan. Her Honour reflected that without the decision in Mabo (1) there would have been no Mabo (2).3

We asked her Honour to reflect on native title law on the 25th anniversary of the judgment in Mabo v State of Queensland4

Above: Wulgurukaba Walkabout Dancers. National Native Title Conference 2017, Townsville, QLD. Credit: Communications and Public Engagement team, AIATSIS.
Justice Mortimer: I did a lot of public interest work as a barrister – some in Indigenous areas, refugee law and environmental law – and one of the things I learned and tried to apply was that you take small steps. You take one step and then you have some success with that and you try and build on it. But if you try and leap to the end of the process, you are working in a legal system that's inherently conservative. Change comes slowly. And sometimes that's for very good reason because sometimes you might think a big leap and a big change is a good idea, and then once you've made it, it turns out not to be and has unforeseen consequences. So particularly when you're trying to persuade judges to make a little bit of new law or go in a different direction, if you build on something that's well established then your chances of success are higher.

Whilst the Supreme Court of Queensland was hearing evidence on the facts in the Mabo litigation, Justice Martin Moynihan made the unprecedented direction to hear evidence on Murray Island, rather than in the courtroom in Brisbane. We asked Justice Mortimer for her thoughts on the impact that the hearing of evidence on country has on judicial decision-making since Moynihan J made that innovative direction.

Justice Mortimer: I think our court has a lot to be proud of about the way that it conducts its hearings on country. Because you know at the end of the day litigation is an exercise in persuasion. Proof is about persuasion: and context. You get all of those things from listening to evidence on country. And then of course aside from the actual context and the setting and the better understanding, the really well recognised difference in the way that Aboriginal and Torres Strait Islander peoples behave when they're talking about their country when they're on their country in comparison to how constrained they feel when they're in a courtroom situation – even if it's an informal courtroom in a hall. It's not the same for them and that is so obvious that it would have been a tragedy if we hadn't continued to build on what Justice Moynihan did and continued the development of on country hearings. I don't think there's a single judge on our court that has done on country evidence who doesn't understand the value of it – it's absolutely critical.

It's also a great privilege. You feel that you're sharing something that's very, very special. And I think that's part of what creates such a deep impression with the judges because I think they understand that what they're hearing is a great privilege.

Both Anglo European Australian culture and Aboriginal and Torres Strait Islander culture place great emphasis on ritual and ceremony in their own ways. People appreciate the importance of ritual and ceremony.

Her Honour was accompanied by Native Title Registrars of the Federal Court of Australia: Christine Fewings and Katie Stride. Registrar Fewings and Registrar Stride both reflected that the on country hearing contextualises the proceedings for all of the Parties involved.

Justice Mortimer added that the practice of hearing evidence on country has extended to other jurisdictions that the Court administers:

Justice Mortimer: The other thing that is happening is the fact that the court does on country hearings is filtering out into other parts of the court's jurisdiction. So for example we had a class action in negligence that required the Court to go and hear from witnesses who were not going to be able to give evidence in a normal sort of court setting. So we can go out to where we are needed – and the native title jurisdiction has influenced this practice.
In developments in the criminal law across jurisdictions; Aboriginal and Torres Strait Islander elders have become engaged in the sentencing process for Indigenous offenders. Whilst they are not charged with judicial decisions such as the finding of guilt or innocence they are included and consulted in the sentencing of offenders. The methods and setting for the Koori Court in Victoria has resulted in Indigenous sentencing courts becoming established forms of innovative justice practice in Australian jurisdictions. Justice Mortimer added that: “Aboriginal law can work well with western law and this is demonstrated in the sentencing outcomes of the criminal Koori Court process.”

Justice Mortimer is also very enthusiastic about engaging young native title holders.

Justice Mortimer. Just like any jurisdiction, the Native Title Act is a political compromise. And the Act is trying to accommodate a lot of competing interests. So it’s always going to be complex but I would hope that there are ways in which we could educate young native title holders a bit more – well, all native title holders, but young people coming up who have to step into the shoes of their elders. I would hope that there should be lots of scope for helping young people learn how to be involved in a PBC, what those responsibilities are about, introducing them to some of the legal concepts in native title. It would be great to see some programs developed around that even if we use this conference as an opportunity to get young people together to walk them through some of these concepts and take that knowledge back their communities and carry it forward.

Her Honour said that the broader community has little or no knowledge of native title law and more general understanding of this jurisdiction would be helpful across the board but especially with leaders of business and industry. Her Honour added that there is a present opportunity and need for commercial legal and financial advisers to provide pro bono assistance to registered native title bodies corporates – who are the Prescribed Bodies Corporate under the Native Title Act 1993, who hold native title rights as corporate trustees or agents. Using the native title conference to talk about these and other innovations is one of the many reasons why her Honour said that she enjoys attending the conference.

4 Mabo (2) 1992 175 CLR 1.
5 Her Honour also sat on Palm Island for one week when she heard evidence in the racial discrimination case Wotton v State of Queensland (No 5) [2016] FCA 1457.
6 Magistrates Court (Koori Court) Act 2002 Vic.
8 For information about Prescribed Bodies Corporate (PBCs) go to AIATSIS <http://www.nativetitle.org.au/about.html>.
To celebrate the 25th anniversary of *Mabo v Queensland (No2) 1992* (Mabo) case, 100 invited guests flew into Mer for the anniversary commemorations. One of these events was the Native Title Symposium held on the 2 June 2017, the eve of Mabo Day. The symposium was opened by Meriam speaker, Alo Tapim, and a dance performance by the Magaram clan of the Meriam people. Aboriginal and Torres Strait Islander leaders, native title holders and experts attended the symposium to consider the theme: ‘Our land is sovereign, where to from here?’ in a series of targeted discussions. Another symposium delegate, Ms Raelene Webb, QC, NNTT President, noted one of the highlights was hearing about the role of Meriam women in Mabo:

Of particular interest to me was the story of Celuia Mapoo Salee – the mother of the Mabo case. Yes, that is correct. Despite the repetitive reporting of the case being commenced by ‘five Meriam men’, the most influential in getting the case off the ground was a woman, who sadly passed away before the decision was handed down, as did Eddie Mabo and Sam Passi.¹

At the symposium, Torres Strait Islander leaders voted to call for a national public holiday to recognise the importance of the Mabo decision for all Australians.² The leaders also read the Zomered statement to Minister Scullion calling for a review of the current governance arrangements for the Torres Strait Region. Doug Passi, Chair of Mer Gedkem Le (Torres Strait Islanders) Corporation RNTBC, said any review of governance framework for the Torres Strait Region needs to reflect a structure that enables communities to have direct management and control over their own affairs. This will allow for greater self-autonomy and self-determination to be driven from each individual community at grassroots level. We want the right to determine our own structures and membership of our own institutions based on our own procedures.

Ned David, Chair of Gur A Baradhawar Kod noted that it is no surprise that Torres Strait Islanders, like most Indigenous peoples the world over, have always aspired for greater control over their affairs. The last 100 years is marked with numerous calls and events from Torres Strait Islander leaders seeking a better deal for Islanders. The 25th anniversary of the Mabo decision presented another great opportunity for Islanders to once again call on the two governments for bi-partisan support for a new agreement that will recognise traditional ownership of Torres Strait lands and waters with all the natural resources. The Zomered Statement is a unique call from Torres Strait Islander leaders for the development of a regional governance model that is based on and reflects the unique and distinctive traditional values, customs, traditions and spirituality of the Torres Strait.

It is worth noting the 80th anniversary of the 1st Councillors meeting on Masig on August 23 1937. One of the events made possible after a successful campaign led by the visionary Marou Mimi from Mer who instigated the Torres Strait Maritime strike in 1936.


Magaram dancers welcome delegates. Credit: Lisa Strelein, AIATSIS.

Young warrior at Koiki Mabo’s grave. Credit: Lisa Strelein, AIATSIS.

School captains, Adimabu Noah and Shorna Cowley, talked about their aspirations for their future. Credit: Lisa Strelein, AIATSIS.

Opposite page, L to R: TSI Regional Council member Mr Aven Noah, international guest, Gitxsan elder Neil Sterrit, GBK chair Mr Lui Ned David, Mer Ged Kern Le Chair Mr Doug Passi. Credit: Lisa Strelein, AIATSIS.
The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) has been organising and hosting the National Native Title Conference since the first one in Townsville 2001. The 2017 conference was held in Townsville, 5-7 June and was co-convened with the North Queensland Land Council (NQLC) on the traditional lands of the Gurambilbarra Wulgurukaba people.

This year we celebrated the 25th anniversary since the High Court of Australia’s momentous Mabo decision. The Court recognised the continuity of Aboriginal and Torres Strait Islander peoples’ rights to lands and waters under Indigenous laws and customs, overturning more than two centuries of presumption that this country was not owned when the British asserted sovereignty.

The conference was attended by a record number of 884 delegates from around Australia and the Torres Strait, with over half of the delegates identifying as Aboriginal and/or Torres Strait Islander people.

Each year the conference attracts an expanding number of Indigenous organisations, native title holders and claimants, lawyers, academics and representatives from government agencies.

The conference program, of over 150 speakers from 73 presentations over three days, highlighted the engagement of native title holders with legislation and policy, and focused on the future of native title and what it may bring Aboriginal and Torres Strait Islander peoples through land reform, resource management and development and legal reforms around native title rights.

The AIATSIS CEO, Craig Ritchie, said the impact of the Mabo decision on Australian society was profound:

By acknowledging a wrong and seeking to make it right, the Mabo decision occupies a pivotal place in the Australian story and over the past 25 years, Aboriginal and Torres Strait Islander peoples have seized the opportunities the decision created.

The NTRB and PBC Program keynote speaker, Kevin Smith, CEO of Queensland South Native Title Services discussed issues facing native title holders in the immediate future and highlighted the need for national representation of and proper resourcing for PBCs.

Following this, the first day of the conference offered a range of sessions designed and inclusive of Native Title Representative Bodies (NTRBs), Service Providers (NTSPs) and Prescribed Bodies Corporate (PBCs) including the Indigenous Talking Circles and Youth Forum.

This year’s conference saw a focus on building stronger native title organisations with NTRBs and PBCs sharing information on regional service delivery and economic coordination, models for assessing and developing PBC capability,
Kevin Smith

lessons learned from developing through leveraging resources from native title agreements and settlements and opportunities for national PBC representation.

Dr June Oscar AO presented the 2017 Mabo lecture commemorating the 25th anniversary of the Mabo decision. Dr Oscar who commenced her term as Australia’s first female Social Justice Commissioner in April 2017 began her address with strength and emotion in her language Bunuba. For the many of her countrymen and women in the audience this was a poignant, powerful and emotional moment.

The public program on day 2 reflected back on Mabo with photographic presentation on the Mabo litigation and included a range of issues that native title claimants and holders are currently engaged with, from decision-making and authorisation to ethical native title research and principles of compensation.

One theme of the day was engagement of native title holders, including youth, with legislation and policy. This theme was explored through presentations and workshops on engagement with cultural heritage, land management – particularly fire and marine management, and partnerships in energy security.

Also, there was a focus on native title rights for fresh water and sea country, with presentations working with the frustration many Aboriginal and Torres Strait Islander peoples expressed to address new ways forwards for legal rights to and management to water. Minister Scullion announced the government was investing $20 million to support economic opportunities provided to Aboriginal and Torres Strait Islander people through Indigenous rights over sea and fresh water country.

At the 2017 Youth Forum delegates shared their stories and drew strength from common experiences. Break-out groups explored the challenges and opportunities for young Aboriginal and Torres Strait Islander peoples in native title processes in both their communities and nationally. Some of the challenges that were identified included feeling shame when speaking up at meetings, having adequate education on native title processes and being supported to assume leadership roles in their communities. Delegates finished by providing strategies as to how to further build and strengthen the Youth Forum at future National Native Title Conferences.

Our focus on youth included a powerful keynote address by Murrawah Johnson to the success of the Youth Forum. We look forward to seeing how the native title generation will further the conversation and work on constitutional recognition and treaty, and how their voices will shape our future policies.

Our speakers on Day 3, public program, considered the future of native title and what it may bring Aboriginal and Torres Strait Islander peoples through land reform, resource management and development and legal reforms around native title rights.

There was also a focus on the future of PBCs with continued presentations and discussions on resources for PBCs and economic and commercial development.

At a massive sold out conference dinner, 640 delegates and guests came together to celebrate the end of the 2017 conference. Delegates were entertained by Indigenous woman and 2014 X-Factor contestant Rochelle Pitt, and The Nightshift band who performed reggae, RnB, Hip Hop, Funk and Motown music. Both acts had delegates on their feet dancing the night away.

Video and audio of the conference presentations will be available on our conference page soon.

Media enquiries: Commsmedia@aiatsis.gov.au or 02 6246 1605

Credit: Communications and Public Engagement team, AIATSIS.
Youth Forum delegates.

Melicha Woodcock, Greg McIntyre, Bonita Mabo and Dr Bryan Keon-Cohen AM QC.

Women’s Indigenous Talking Circle panel: Sandra Creamer, June Oscar AO, Florence Watson, Leann Wilson and Joanne Cassady.

Credit: Communications and Public Engagement team, AIATSIS.
Gugu Badhun people and authors at the book launch at the conference.

June Oscar AO and Gail Mabo.

Kevin Smith and Glen Kelly.

Yarrabah Dancers.

Senator the Hon. Nigel Scullion, Minister for Indigenous Affairs, at the exhibition stall with Rob Chewying and Wally Stewart, NSW Aboriginal Fishing Rights Group.
An interview with

MERVYN MULARDY & WYNSTON SHOVELLER
FROM KARAJARRI TRADITIONAL LANDS ASSOCIATION

Interviewed by Bhiamie Williamson AIATSIS

Mervyn: Back at home we do a lot of hunting and fishing as well as ceremonies. We take our kids out and teach them culture, teach them different parts of their culture. We are very strong in cultural land management, looking after Country. As a cultural database manager I record old people, I record the old songs, the language, trying to preserve a lot of culture for our people. We love our hunting, we love our fishing. My son is a great hunter, he is always out there with the boat, he get some turtle for me, some fish for me, some dugong and sometimes he come back with story to tell me. You know, when he don't catch anything, he comes back and tells me, 'Oh Dad, the harpoon came out', but I don't want the story, I want the food!

Wynston: And as young fellas we go out fishing and hunting a lot, but my job is mainly just as a Ranger. Travelling and getting access the Country, you know, in the really remote areas of Country. We work on the land but we also manage the sea, the coastal site. And we live where we can maintain a sustainable use of being on the land.

Mervyn: We was the first native title claim for the Kimberly Land Council (KLC). We was also one of the first PBCs set-up in Australia of which I was the Chairman for about eight years. But it’s been a struggle to find out how to structure our

Karajarri
PBC, our businesses, to fit with the government. Because of the lack of funding through government, and they don’t tell you this is how you set-up your PBC, we didn’t know what rules applied to Karajarri when we started. So we threw it back in their faces and said, ‘we don’t wanna set up the PBC how you want it, we wanna set up our PBC the way we wanna set it up’. In the early days of the government, we could say we wanna set it up our way. They tried to throw it back at us and say we aren’t going to fund you, but the government only funds us a little bit anyways. Not even someone’s wage you know? And yet they send mining companies to our Country and want to do all these agreement and this and that. But we managed to get some good governance structures in our PBC. We got a council of Elders and we got the Chairman and Directors. Culture always comes through in our decision making. We got cultural protocols that we have to abide by and we try to structure what we do within our cultural boundaries. Even when we set up ILUAs (Indigenous Land Use Agreements), we say to the government, ‘you got to listen to our culture, you can’t develop without thinking about our culture’. You know, if you are developing our community then you got to develop our culture as well. We say you can’t build on here until we get our old people to check it, to see if there are any important sites or other various sites where you build it. And then we send out our people to look over a place, to check out the place where they wanna build something. So they got to abide by our rules. We bring all that cultural development into other decision making, especially with ILUAs.

Wynston: And while it’s very important for our old people to be involved, it’s also very important for them old people to understand what we, as Rangers, do as well. That’s one of my main roles as a Karajarri Ranger, to work closely with the old people and make sure they know what we do and what we face.

Mervyn: We try to train the young fellas. You know in the future they gonna take over, and so we teach them in that cultural aspect of our law and the Country. Karajarri young people are well educated in Karajarri way as well as white fella way. The young people come to get guidance from the Elders for their culture and we do training sessions with them. And the younger people are incorporating what they learnt from the old people, so they can best manage the programs. So we try to make sure they are getting that knowledge and understanding. We try our best to mix that traditional knowledge with European knowledge.

You know, the young fellas are the ones that will take all this forward, so we try an give them as much guidance as we can but still supporting them to come up with their own ideas.

Wynston: You know, our old people fought so hard and for so long to get native title. It’s real important for us, that native title, cause it gives Karajarri people more control of our Country. It gives us more power to make decision over the Country. But at its heart, it doesn’t make big difference for us as Karajarri people, cause in our hearts we know we own that place.

Mervyn: We feel that native title is just another part of the journey, maybe use native title to push for a treaty. We would be happier if we were using native title to push for else, something beyond native title, that’s why it’s so important to keep our young people close, cause they gonna be the ones that come up with this stuff, they got the ideas. We hoping to get more from all of this, to do the best for our old people and also do the best for Karajarri people as a whole now and into the future.

Opposite page: Wynston and Mervyn at AIATSIS looking at the collection. Credit: Nell Reidy, AIATSIS.

Behind: Karajarri Country. Credit: Tran Tran, AIATSIS.
Fire has and will always be an integral component of Aboriginal peoples cultural livelihoods and Australia’s landscapes. There now exists many Aboriginal And Torres Strait Islander Ranger groups who perform fire management as part of their general operations. Collectively, these Ranger groups have and continue to contribute to a range of positive environmental outcomes including a significant decrease in severe fire events. Analysis of these programs however, reveals that they are limited mostly to northern and central Australia. The uneven geographical distribution of these programs has led some to question whether managing the land with fire can offer Aboriginal peoples in southern Australia what it has in the north. In Australia’s Capital Territory (ACT), this question is being answered through the ACT Aboriginal Cultural Fire Initiative.

Oral histories passed on by Aboriginal peoples matching western scientific observations through carbon dating, show that regular fire activity took place throughout Australia pre-1788. In the lands in and around the ACT, there is extensive evidence that Aboriginal peoples, including local Ngunnawal people, purposefully used fire to create a rich and ecologically diverse landscape (Gammage, 2011). It was in this landscape, rich with grassy plains, wetlands, woodlands, open forest, and fresh, clean water, that the first settlers established farms for grazing and other purposes. The first land grants in the ACT region were made in the 1820s with a number of settlers coming into Ngunnawal lands to graze on the open pastures. The towns of Goulburn and Queanbeyan were established by the mid-1850s. With the inundation of white settlers, the populations of Aboriginal people in the region were decimated through the introduction of diseases and violent frontier conflict. From the 1870s onwards into the 20th century, Aboriginal people throughout the region were forcibly moved onto missions throughout the Southern Tablelands and Riverina districts of NSW.

During that period, Aboriginal people were under the control of local Protectors and mission managers, and not free to move around as they had previously. It was not until the mid-1970s, following the success of the 1967 referendum and the subsequent abolishment of the Aborigines Protection Act 1909 (NSW) in 1969, that Aboriginal people were able to move more freely. From this time, many local Aboriginal peoples returned to their ancestral lands, with many Ngunnawal people returning to the ACT, Queanbeyan and other surrounding towns.

Due to this history of colonisation and displacement, Aboriginal peoples in the ACT as well as other groups with a similar history in south-eastern Australia, have found it immensely difficult to have their inherent rights and interest in their Country recognised. This is not to say that these groups do not continue to possess cultural knowledge such as stories, songs, language, dances and any other expression of an actively lived culture. Rather, it shows that the colonising state has narrow indicators of what constitutes ‘authentic’ culture and connection, and, often, Aboriginal groups in south-eastern Australia fall outside these imposed definitions of ‘real’ Aboriginal culture. Due to these and other colonial circumstances, Aboriginal groups in south-eastern Australia generally do not possess large parcels of lands or have sweeping rights to access, manage or utilise the resources of their Country. Much of the land that has been reclaimed (in some form) to date, has been small parcels of lands acquired through state based mechanisms such as the Aboriginal Land Rights Act 1983 (NSW), the Traditional Owner Settlement Act 2010 (VIC) or through joint or co-management arrangements of parks and protected areas. To date, Caring for Country activities in these areas such as cultural burning, have been limited to small-scale, one-off activities, mostly over these small parcels of land.

In the ACT, Ngunnawal people are recognised as the Traditional Owners of lands and waters throughout the ACT (Maher, 2013). However, Ngunnawal people do not have any formally recognised rights to access
or manage the lands and waters throughout the ACT.

ACT Parks and Conservation Services (PCS) are the legislated body that has the responsibility to protect and manage national parks and conservation reserves throughout the ACT (Maher, 2013). Within PCS the ACT Fire Management Unit (FMU) carries the responsibility for the management of fire including prescribed burning.

Murumbung Yurung Murra (now Murumbung Rangers) was created in 2009 as a supporting and mentoring network for Aboriginal staff located in different units in PCS. As well as being a support network, the Murumbung Rangers now deliver cultural activities including ranger guided activities and cultural burning, and engages Traditional Custodians and Elders on issues relating to cultural and natural resource management. The Murumbung Rangers are located as various depots (or stations) throughout the ACT and are overseen by a new centralised Healthy Country Unit.

In 2015, The Murumbung Rangers commenced a process to re-introduce cultural burning into the planning and management of parks and nature reserves throughout the ACT. Since this time, the ACT Aboriginal Cultural Fire Initiative has achieved remarkable success. Some of the outcomes include:
- the creation of an identified Aboriginal Fire Officer within the FMU
- fire training opportunities for all Indigenous staff in the Murumbung Ranger network
- creation of guidelines for the identification, protection and reporting of cultural heritage sites
- embedded education and training on cultural and natural resource management (including cultural burning) in wider PCS networks
- created terms for non-Indigenous land management staff to volunteer on cultural land management activities (two-way learning pathways)
- outlined research priorities
- conducted site assessments in various culturally significant areas
- created terms to re-initiate cultural burning including the allocation of staff and resources.

Above: Cultural burn at Gibraltar Peak, ACT. Credit: ACT Parks and Conservation Services.
Caring for Country is a vital aspect of healthy livelihoods for all Aboriginal people. With the growing effects of climate change as well as other localised environmental impacts such as invasive weeds, feral animals, urbanisation, deforestation and others, cultural knowledge of using fire to manage Country is an important part of the future of land management in south-eastern Australia. Embracing Aboriginal peoples’ cultural knowledges and perspectives has been shown to offer immense benefits to not only Aboriginal peoples, but all peoples. It is not about ‘going back’, but forging new pathways, developing new knowledges, and respecting and supporting that the ancient knowledges offered by Aboriginal peoples is part of our common future, and the future of land and water management throughout every part of Australia.

Above: Cultural burn at Jerrabomberra Wetlands, ACT.
Behind: Cultural burn at Gungaderra Grasslands Nature Reserve, ACT.
Credit: ACT Parks and Conservation Services.
An interview with
AUNTY MERLE CARTER
DEPUTY CHAIRPERSON
OF THE KIMBERLEY
LAND COUNCIL

Interviewed by Cedric Hassing, AIATSIS

ON 8 JUNE 2017 AT THE national native title conference in Townsville, AIATSIS legal research fellow and AIATSIS communications manager Bryce Gray spoke with the Deputy Chairperson of the Kimberley Land Council, Ms Merle Carter.

Merle Carter: I'm from the Kimberley, in Kununurra. I live in Kununurra on Miriuwung country. I'm a Gajerrong senior woman and also a Bunuba senior woman. And I'm the deputy chair of the Kimberley Land Council. I'm also the chairwoman of the Kimberley Aboriginal Law and Culture Centre in Fitzroy crossing. The story that I'd like to tell is about the Yiriman Project,1 in Fitzroy crossing.

I've been involved with the Kimberley Land Council for a number of years - on and off, maybe 15 years. And now I'm the deputy chair, and it's like you earn your place at the table, and the respect of the people. And I'm very honoured to represent the people of the Kimberley Land Council as their deputy.

A number of years ago, the old people - four different language speaking groups - they were very concerned about their young people losing connection to their country, culture, and language. So they formed this Yiriman Project,2 in which they took them out to the bush, to reconnect them with their country and language and their culture. It's a real success and I think that it should be spread out further through the Kimberley. We take our young people out to the bush. I've done a number of trips with the woman groups in Fitzroy Crossing, where the old people teach them about the land, about themselves - you know, who are you? What are you doing here - and they teach them about parenting and practical life skills, also, teaching them about their country and their culture - like the bush medicines, the artefacts, the beads and which trees they can collect them from ... it's a really big job, you know? And it's a real success. The young people they want to stay out in the bush with their elders; they don't want to go back into town, they want to keep on learning. So it should be spread out, I think, throughout the Kimberley. And the men work with the juveniles that are pending court, so they take them out to the bush and they go on an 11 day track with the camels and teach them how to respect themselves first, and then respect for country and other people. Because our culture is mainly based on respect - you've got to have respect for yourself first, other people, country, culture, other people's property and all that. So that little word - respect - holds a lot of weight.

And the old ladies, they're the teachers. We've got 5 old girls, and they're very strong in their culture and with their language, and they teach the young ones - they pass down all that knowledge, and this is the intergenerational teaching. So it's not lost when the old people are gone - we've got young people that can carry on, you know?

Cedric Hassing: Re-enforcing Indigenous law and the authority and guidance of elders can help to provide both young Indigenous people and the Courts with demonstrated proof that the community cares for them and values them. It may also provide evidence of mitigation and an opportunity for the Court to be guided by elders employing culturally appropriate techniques for rehabilitation of young offenders and or the protection of children at risk. This may assist with sentencing and better sentencing outcomes. It helps to heal and strengthen the community.

We asked Aunty Merle how she and her many country women felt when she saw Dr June Oscar AO the first female Aboriginal and Torres Strait Islander Social Justice Commissioner begin this year's Mabo lecture in Bunuba language?

Merle Carter: We were overwhelmed with emotion. She's my aunty and she makes me feel very proud. She is a remarkable wonderful woman and leader.

[Having native title gives us the right to negotiate, and puts us at the table. And we don't always get what we negotiate for, but it's workable. 85% of the Kimberley is determined native title. So once we get it all covered, then Kimberley Land Council will focus on the PBCs. Because Kimberley Land Council was a land council before it became a representative body. And next year we'll be celebrating 40 years of the Kimberley Land Council. See http://klc.org.au/about-us.

2 ibid.
The National Cultural Flows Research Project

Rene Woods and Grant Rigney Murray Lower Darling Rivers Indigenous Nations
Luke Smyth AIATSIS

The National Cultural Flows
Research Project is an innovative collaborative research project driven by the Aboriginal nations of the Murray-Darling basin. The project is developing a framework and solid evidence base for understanding Aboriginal values relating to water, and estimating water requirements. The long-term aim is to encourage the adoption of cultural flows into Australia’s water management regimes, by supporting traditional owners to make their own cases for cultural flows allocations.

A formal definition of cultural flows was endorsed by the Murray Lower Darling Rivers Indigenous Nations (MLDRIN) in 2007, in what is called the Echuca Declaration. It defined cultural flows as ‘water entitlements that are legally and beneficially owned by Indigenous Nations of a sufficient quantity and quality, to improve the spiritual, cultural, environmental and economic conditions of those Indigenous Nations.’

Rene Woods, a Nari Nari man from southwest New South Wales, is the chair of MLDRIN and represents that organisation on the project’s Research Committee. He says that the research grew from the need to answer a single question; ‘We were constantly being asked how much water we needed. Getting the project started took a lot of hard work and good key people within some of the agencies that pushed it internally.’

The project is the result of years of advocacy and relationship-building by both MLDRIN and the Northern Basin Aboriginal Nations (NBAN). Its Research Committee comprises representatives from MLDRIN, NBAN, the Northern Australia Indigenous Land and Sea Management Alliance, the National Native Title Council and various Commonwealth and basin state and territory government agencies, including the Murray-Darling Basin Authority.

The first component of the field research involved developing and testing methodologies for identifying Aboriginal values relating to water. Interviews with Aboriginal people connected to the two case study sites – the Toogimbie Wetlands near Hay, NSW, and Gooraman Swamp near Weilmoringle, NSW – have found strong evidence for significant cultural, economic, health and wellbeing outcomes from water ownership.

In the next stage, hydraulic and hydrological modelling of the case study sites was used to develop methodologies for quantifying how much water, and what kinds of flows, are needed to sustain these positive outcomes. The findings have been used to create easy to understand tools that groups can use to determine the cultural flows they need to get their desired outcomes.

Environmental flows – ensuring there is enough water of sufficient quality and quantity, and at the right times and places, to sustain riverine ecosystems – are accepted as a...
necessary part of water management in Australia. Cultural flows, however, only began attracting serious interest from basin governments more recently. Rene estimates that ‘cultural flows is now where the environmental water discussion was twenty-five years ago.’

The key feature that separates cultural flows from environmental flows and other water allocations is that they are owned by Aboriginal nations for their own benefit. With this ownership comes greater agency for nations to manage their own country and resources as they see fit. Currently, there are no cultural flows allocations in the Murray-Darling basin; however, MLDRIN is working with southern basin state governments to have already existing environmental flows releases targeted at areas and at times that will support Aboriginal values.

Grant Rigney, a Ramindjeri Ngarrindjeri man from the Coorong Lower Lakes area of South Australia, also represents MLDRIN on the project Research Committee. He explained the kinds of opportunities adequate cultural flows allocations could provide:

You’re talking so many different business activities if you choose to go down that path, plus watering of country in cultural flow events to get specific outcomes, and topping up of environmental watering events if nations decide it’s needed. I believe a lot of nation groups would also be looking at mechanisms to ensure there’s enough water for everyone’s country.

While the focus of the project is on the Murray-Darling basin, the Research Committee expects the findings of the project will be useful to groups across the country. According to Grant,

One of the big windfalls, I think, for the cultural flows research is it will create a robust tool that can help nations with their water planning. It might support arguments around water and native title; it might help with engagement with other stakeholders. It can build their capacity to engage in this space, and the agency of their nation.

Rene believes that access to these tools will support further dialogue between Aboriginal nations and governments on the issues of cultural flows and water rights in general:

It backs up that argument that if there’s not a certain flow in the river at this time of year it’s restraining on our native title and our values across the landscape, and that’s detrimental to our country. That tool’s going to be beneficial to that discussion into the future as well.

The Research Committee aims to have the project research tools publicly available for use late this year or early next year. You can find out more about the project at www.culturalflows.com.au


Above: The project Research Committee at the Toogimbie Wetlands IPA. Credit: A Maguire.
Kuruma Marthudunera decision making in native title:

FINDING A PATHWAY THROUGH THE CULTURAL, LEGAL AND ADMINISTRATIVE MAZE

Ashleigh Blechynden AIATSIS

Missed this year’s Native Title Conference? Here in an overview of the presentation from Graham Castledine, Royce Evans and Elaine James from the 2017 National Native Title Conference.

The presenters

Elaine James is a traditional owner from the Robe River Area. She is a member of KMAC’s Heritage Advisory Committee.

Graham Castledine is a partner in the legal firm Castledine Gregory and has specialised in native title and related matters for over 20 years. He has recently been doing work with the Kuruma Marthudunera RNTBC (KMAC PBC) as an external legal advisor up in the Pilbara region of Western Australia.

Royce Evans is a Kuruma Marthudunera man from the Robe River Area in the Pilbara. He is the Cultural Heritage Officer for KMAC.

Above: Elaine James, Graham Castledine and Royce Evans. Credit: Royce Evans.
The presentation

PBCs are held accountable to corporate governance requirements under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act), the Native Title Act 1993 (Cth) (NTA) and within their own constitutions. PBCs are also accountable, however, to their communities in upholding cultural obligations, responsibilities and practices such as culturally appropriate decision-making structures and processes.

This presentation highlighted how this multiple accountability creates a ‘cultural, legal and administrative maze’ which can sometimes cause tensions within groups, particularly in relation to the decision-making processes.

A legal advisor and mediator for a number of PBCs, native title lawyer Graham Castledine, has observed the difficulties in the way that ‘traditional’ decision making is positioned within the NTA and the challenges that the current regime poses for PBCs. He remarked,

I think the current regime is too onerous. I’ve seen a lot of groups really struggle with the multiple accountability of traditional decision making, the CATSI Act, the rulebook... This is a huge struggle and a process that has placed an almost impossible burden on groups. It brings to mind that notion of setting up a system to help people fail.

Graham commented on the difficulties faced by many PBCs in working out decision making processes that both fit with the requirements of legislation and within the context of the native title group.

All PBCs are registered under the CATSI Act. The CATSI Act sets out some requirements for making both kinds of decisions - both native title decisions and non-native title decisions. And of course, PBCs have to have their rulebooks. Now, most rulebooks, and some provisions of the CATSI Act operate on a fairly typical, contemporary, Western governance model... When groups come together and try to make a decision that both complies with their traditional decision making process and requirements of the CATSI Act and the rulebook, you can get all sorts of conflict.

To navigate this maze, PBCs are establishing decision-making processes that are culturally appropriate and rigorous enough to withstand native title compliance. One example of this is the Kuruma Marthudunera Aboriginal Corporation RNTBC (KMCA).

Above: Dust storm on country. Credit: Provided by Royce Evans.
The KMAC Example

- KMAC is a recently established PBC who had their native title determined in November 2016.
- They have had a successful determination in one area of their traditional lands and have a pending claim on another area.
- Their traditional lands are in the Pilbara region of Western Australia, within the shire of Ashburton. This area includes part of the Fortescue River and the complete river system of the Robe River.
- KMAC have recently implemented a new practice for making native title decisions.

KMAC’s decision making process

KMAC have two types of decision making processes for low and high impact agreements.

**Low impact** decisions are related to low invasive activity such as exploration and prospecting licenses. KMAC has standing instruction from the community for how to act on these types of decisions, meaning that the KMAC board follows an agreed upon process of taking advice from the Heritage Advisory Committee before signing off on all lower impact agreements.

**High impact** decisions are major proposals involving mining and ILUAs. All high impact decisions must go the broader native title holding group who decide on the terms of agreement and provide instruction to the KMAC board.

KMAC have a strong focus on ensuring that their community are properly consulted when making high impact decisions. Elaine explained,

> This corporation we set up, it was all designed by our people so if there is any advice or agreements that want to go through you have to take it back to the community to agree on things. We don’t go along ourselves and leave our community behind. We take them along with us.

The native title holder group, the KMAC board, the Negotiations Advisory Committee and the Heritage Advisory Committee all have an important role to play in making high impact decisions. Royce elaborated,

> The community decides on the terms of the agreement and provide instructions to the PBC. It is the role of the PBC and the board of directors to balance social, commercial and cultural interests of native title holders in high impact negotiations and receive advice from the Negotiations Advisory Committee and the Heritage Advisory Committee to consult with and make presentations on high impact decisions.

Heritage Advisory Committee (HAC)

The HAC provides advice to the KMAC Board and management on matters relating to cultural governance, heritage and custodianship of country. The HAC also have a two representatives on the Negotiations Advisory Committee.

The HAC members are appointed directly by the community based on their recognition as key cultural and heritage knowledge holders and their ability to share their knowledge and educate others.

Negotiation Advisory Committee (NAC)

The NAC works with KMAC to negotiate the terms and conditions of high impact agreements. The NAC’s job is to gather and provide advice to inform and influence successful negotiations.

The NAC is made up of,

- representatives from the KMAC board
- representatives from the Heritage Advisory Committee
- representatives from the Working Group (community appointed negotiators for the native title claim)
- representatives from the KMAC Management
- representatives from the broader community
- legal and commercial advisors.

NAC acts on the direction of the native title holders and the board. They provide advice to the Board on the terms and conditions of negotiations.

Summary

KMAC positions their community at the centre of their decision making process for high-impact decisions. They further draw upon two committees - the HAC and the NAC - to provide expert advice and represent the community’s interests in the negotiation process. This structure helps KMAC ensure that their decisions meet compliance requirements and have the best possible outcomes for their community.

KMAC’s model of decision making is just one example of how PBCs structure themselves to make decisions. It is important to note that there is no ‘one size fits all’ approach- PBCs across Australia utilise a range of different decision making processes including majority voting, family group voting, consensus voting and the use of elder’s councils and committees. This presentation underlined the necessity for PBCs to find a decision making process that works best for them and their community. Graham concluded,

> In the end I think it is incumbent on every group to say- What is a structure that is going to help us develop our community and empower people? That is really the challenge.

Visit the AIATSIS website to view the full presentation:
If your PBC or TOC is interested in becoming a member of the NNTC please contact Carolyn Betts at carolyn.betts@nntc.com.au for an expression of interest form and further information.
Current Projects

DECISION-MAKING IN NATIVE TITLE

Working closely with community partners, this project involves community and family engagement and research to produce clear and accessible information on decision-making structures and processes to assist Aboriginal and Torres Strait Islander corporations in their governance policies and procedures.

Want to be involved as a project partner?

For further information about the Decision-Making in Native Title project please contact:
Dr Belinda Burbidge – belinda.burbidge@aiatsis.gov.au or 02 6261 4226

PBC CAPABILITY PROJECT

The Prescribed Bodies Corporate (PBC) Capability Project is a collation and analysis publicly available and organisational data about the current size, function, operational and economic capacity of PBCs and RNTBCs around Australia and the Torres Strait Islands to develop a long-term picture of the patterns, trends and changes across the PBC sector to better inform native title organisations and provide policy advice.

Would you like to be involved in this project?

For further information about the PBC Capability Project please contact:
Dr Belinda Burbidge – belinda.burbidge@aiatsis.gov.au or 02 6261 4226

MANAGING INFORMATION IN NATIVE TITLE (MINT)

The MINT project investigates the challenges of culturally appropriate management, storage, use and return of native title materials. The project team are currently drafting national guidelines and exploring options for a case study with a NNTRB/NTSP and PBC.

Is your organisation in the process of or thinking about handing back native title materials to community?
If so, please contact:
Alexandra Andriolo – alexandra.andriolo@aiatsis.gov.au or 02 6261 4223

NATIVE TITLE PRECEDENTS DATABASE

The major output of the Native Title Representative Bodies Knowledge Management Project is the Native Title Precedents Database. It is Australia's only national database for Native Title Representative Bodies and Native Title Service Providers (NTRB/NTSPs). Its secure environment allows each organisation to share agreements, legal advices, court documents and other resources confidentially.

If you would like to know more about the database, please contact:
Stacey Little – precedents.database@aiatsis.gov.au or 02 6261 4227

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