NATIVE TITLE NEWSLETTER

AUGUST 2012

AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

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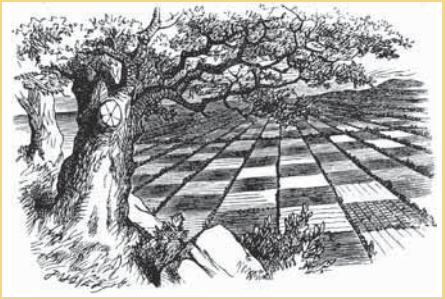
WELCOME TO THE NEW LOOK *NATIVE TITLE NEWSLETTER*

The *Native Title Newsletter* has been redesigned to enhance readability, with an emphasis on native title feature articles. The Newsletter will now be produced three times a year (April, August and December). Content that is published in the monthly publication *What's New in Native Title* will no longer be published in the *Native Title Newsletter* so as to eliminate duplication. This information — native title case law, Indigenous land use agreements, *Native Title in the News*, publications, events and professional development opportunities — will still be available through *What's New* and at http://aiatsis.gov.au/ntru/overview.html.

The Newsletter will continue to include feature articles, including Traditional Owner comments, articles explaining native title reforms, book reviews and NTRU project reports. The *Native Title Newsletter* is distributed to subscribers via email or mail and is also available at http://aiatsis.gov.au/ntru/newsletter.html.

We welcome feedback, which should be sent to: gabrielle.lauder@aiatsis.gov.au

National Native Title Confence 2012 **1**



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Cover image: Kaylene Malthouse, Nola Joseph, Dawn Hart, Coralie Cassady and Patricia Dallachy, Directors of the North Queensland Land Council (NQLC) Board, holding the Arrernte coolamon at the National Native Title Conference held in Townsville, July 2012. Credit: Kerstin Styche

Aboriginal and Torres Strait Islander people are respectfully advised that this publication may contain names and images of deceased persons, and culturally sensitive material. AIATSIS apologises for any distress this may cause.

Editor: Gabrielle Lauder, NTRU, AIATSIS
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ECHOES OF MABO:
Honour and Determination
NATIONAL NATIVE TITLE CONFERENCE 2012

Images: Errol Neal and Dr Neil Sterritt.

By Elizabeth Tsitsikronis

After a weekend of celebration with the Reconciliation Festival, the National Native Title Conference 2012 opened with a welcome to country and traditional dancing by Bindal and Wulgurakaba people, upon whose land the conference was held. The conference was convened by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and North Queensland Land Council. The Conference was held, at the Townsville Entertainment and Convention Centre from 4 to 6 June.

Over 700 delegates shared experiences and engaged in a wide range of debates. The delegates included native title holders and claimants, traditional owners, native title representative bodies and service agencies, representatives of the Federal Court, the National Native Title Tribunal and government, academics, consultants and industry representatives. The chair of the opening session, Errol Neal, announced that 'the opportunity to come together from across the country to review current native title practice, policy and law is an invaluable occasion.' He said it gave Aboriginal people a 'chance to stand on our own record' and 'influence the government in the directions they might take'.

This year's conference theme, 'Echoes of Mabo: Honour and Determination', was reflected throughout the conference through keynote and plenary speeches, debate forums, workshops and Indigenous talking circles covering topics focused on recognition, reform, revolution, leadership, legacies, families, youth, culture and country.

Every year the conference attracts a distinguished cohort of speakers, and this year was no exception. Dr Neil Sterritt, a member of the Fireweed Clan of the Gitxsan Nation in northern British Columbia and an authority on Aboriginal governance, delivered the Mabo Lecture. Dr Sterritt spoke about the legacies of *Mabo* in parallel to the landmark Canadian decision of *Delgamuukw*, and commented on the advantages of the incremental native title process in Australia. Gail Mabo, the daughter of Eddie Mabo, accompanied by her mother, Bonita Mabo, provided the introductory remarks to the Mabo Lecture and spoke about her recollections of growing up while her father pursued land justice through the Australian legal system.

The conference also featured a keynote address by the Attorney-General, the Hon. Nicola Roxon MP, who announced the reforms to native title which are intended to result in more efficient and cost-effective native title processes and claim settlements. The announced reforms focus on creating criteria for good faith negotiations, making native title land use agreements and claim resolutions more flexible and less technical, permitting parties to put aside historical extinguishment in parks and reserves, and deeming payments from native title agreements non-assessable for income tax and capital gains tax purposes.

However, in another keynote address Brian Wyatt, the Chief Executive of the National Native Title Council, stated the reforms were not enough. He said 'We can no longer tolerate our old people dying while successive governments simply tinker around the edges.' Wyatt and other Indigenous groups believe the process for native title claims should be changed; native title claimants should not have the burden of proof for establishing connection to land.

In her address entitled 'Recognising and encouraging honour and determination', June Oscar spoke about the 'courage to hold onto a belief, the courage to stand alone, the determination to keep going'. She also spoke as a Bunuba claimant about the key principles that guide the Bunuba people and focusing our energies on what we can all do to bring change. She suggested a 'new skill set may be required for these new times, skills which incorporate a blend of: activism, development of intellectual capacity, anchored by the knowledge and lived practice we hold of who we are and meeting the real truth by combining this knowledge with modern western thinking'.

The conference program also featured the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda; the Foundation Chair of Australian Indigenous Studies at the University of Melbourne, Professor Marcia Langton; the lawyer with the conduct of the *Mabo* case from 1981 to its conclusion, Greg McIntyre SC; and the Minister for Families, Community Services and Indigenous Affairs, the Hon. Jenny Macklin MP.

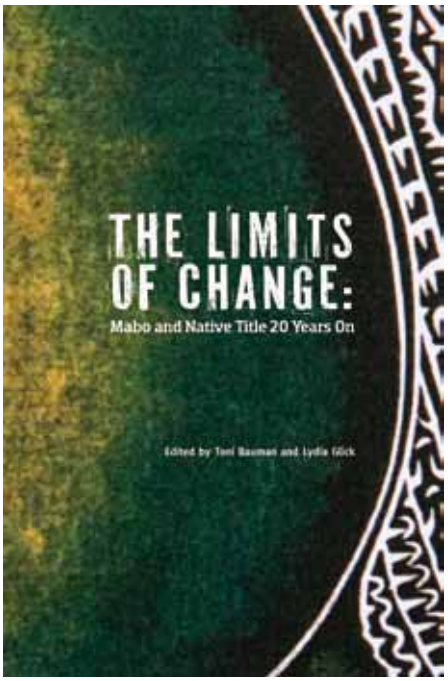
Other guests included Ramy Bulan, who is an Associate Professor at the Faculty of Law, University of Malaya, where she teaches Equity and Trust in the undergraduate program and Issues Relating to Minorities and Indigenous Peoples in the LLM program. Ramy was on the panel of "The Legacy of Mabo: Reflections on Native Title 20 years On".

The AIATSIS Chairperson, Professor Mick Dodson AM, said that this year's conference was the time to 'survey the inequities' that exist in processing the native title applications.

The conference organisers ensured that Indigenous people were strongly represented in the conference program. This year's program consisted of one day of closed workshops for Indigenous people and their native title representative bodies and service providers, followed by two days of a public program which included Indigenous talking circles, women's forums, workshops and panel discussions as well as the delivery of conference papers.

Throughout the conference, delegates were able to browse and purchase goods from the conference trade fair, which enabled local Indigenous people to exhibit, display and sell art, craft and other products. Some of the stalls included the 3 Sisters who sold local arts and crafts; Merisa Crafts, who sold jewellery and clothing; and AIATSIS / Aboriginal Studies Press.

Next year's conference will be co-convened by AIATSIS and the Central Land Council and will take place at the Alice Springs Convention Centre from 3 to 5 June 2013.



PAPERS, AUDIO AND POWERPOINTS FROM THIS YEAR'S CONFERENCE WILL BE AVAILABLE SHORTLY ON THE NATIVE TITLE RESEARCH UNIT WEBSITE AT HTTP://WWW.AIATSIS.GOV.AU/NTRU CONFERENCE.HTML

The conference also marked the launch of the AIATSIS publication *The Limits of Change: Mabo and Native Title 20 Years On*, edited by Toni Bauman and Lydia Glick. This is an unprecedented collection of commentary and reflections on the *Mabo* case as well as the enactment and operation of the *Native Title Act 1993* (Cth). To purchase this publication or for more information go to http://www.aiatsis.gov.au/ntru/publications.html.

Above: *The Limits of Change: Mabo and Native Title 20 Years On*; Mrs Bonita Mabo shaking hands with media delegate Jeff McMullen. Credit: Kerstin Styche.

NATIVE TITLE CONFERENCE 2012 KEYNOTE ADDRESS BY THE ATTORNEY-GENERAL, NICOLA ROXON MP

Above: Attorney-General Nicola Roxon and the Hon. Jenny Macklin MP.
Credit: Kerstin Styche.

On 6 June 2012, speaking at the National Native Title Conference, the Attorney-General announced that the Australian Government would progress a package of legislative reforms to the Native Title Act 1993 *(Cth).*

Attorney-General Nicola Roxon MP

To build on [past] reforms, today I would like to talk to you about the next steps we want to take with you to further improve native title.

Under the right to negotiate native title, agreements must be negotiated in 'good faith'. Unfortunately, many would argue that some parties have been paying little more than lip service to the good faith provision.

So, the government will seek to legislate criteria to outline the requirements for a good faith negotiation. No longer will parties be able to sit back and wait for the clock to tick down until an arbitrated outcome is available to them.

The government will consult closely with Indigenous groups, state and territory governments, farmers, miners and others on the terms of this legislative reform. Much work has already been done that now needs to be acted upon.

We've also heard, including from many people in this room, the need to make native title agreements and claim resolutions more flexible and less technical. That's why we also plan legislative change to reform Indigenous land use agreements. These voluntary agreements will be made more flexible. A wider range of topics will be able to be negotiated on between Indigenous groups and land rights holders.

Thirdly, the government will work with stakeholders to allow parties to agree to put aside issues of historical extinguishment in parks and reserves. Our discussions may even identify a wider application of this concept if there is broad support for change.

Time and money will be saved by parties forming agreements over native title, rather than just automatically resorting to litigation.

Lastly, you'll be pleased I can finally clarify the tax treatment of payments from native title agreements — income tax and capital gains tax will not apply; an issue many of you have called for and we are able to agree to today.

This will fit with strong Indigenous involvement in the reforms to the not-for-profit sector.

I want to emphasise today that the government will be listening and meeting with you and others about these proposed changes. I am looking forward to working with you all on how to speedily implement these important legislative reforms.

I know that there are people that have argued for more radical changes. But incremental change is lasting, and our government has shown we can deliver both short- and long-term benefits to the native title system from this strong but sensible approach.

The Attorney-General's Department will invite submissions on an exposure draft of the legislation. Details about the timing of this process will be made available on the department's website at:

http://www.ag.gov.au/IndigenouslawandnativetitleNativeTitle/Pages/Nativetitlereform.aspx.

The department welcomes any comments or input on the reform proposals through this process.

AMENDMENTS TO THE *NATIVE TITLE ACT 1993* (CTH)

The proposed reforms will:

- Clarify the meaning of 'good faith' under the 'right to negotiate' provisions and make associated amendments to 'right to negotiate' provisions.
- Enable parties to agree to disregard historical extinguishment of native title in areas such as parks and reserves.
- Streamline Indigenous land use agreement (ILUA) processes by simplifying the process for minor amendments to ILUAs, improving objection processes for area ILUAs, and clarifying the coverage of ILUAs.

AMENDMENTS TO TAX LAW

The proposed reforms will amend tax legislation to make it clear that native title payments and other benefits are not subject to income tax (which includes capital gains tax).

ants

australian • native • title • studies

By Deane Fergie

In 2011 the School of Social Sciences at the University of Adelaide established a lively focus for Australian Native Title Studies, known colloquially as 'ANTS'.

ANTS is committed to the development of vibrant communities of professional practice in native title. It seeks to collaborate with others to develop the most up-to-date academic knowledge on native title and its contemporary practice so that this knowledge can shape rigorous research and training to support the native title system and enhance the circumstances of Indigenous Australians.

In 2011–14 ANTS will focus on native title anthropology because 'under-supply' in this area of professional practice is causing a critical 'blockage' in the native title system. Supported by grants from the Attorney-General's Native Title Anthropologist Grants Program, ANTS is:

- coordinating an initiative to establish a national curriculum in native title anthropology
- developing the 'ANTS NEST', a virtual community for native title anthropologists;
- hosting study leave fellowships and
- researching society and governance questions.

Our top priority this year is the development of **a national curriculum in native title anthropology** to provide an articulated sequence of post-graduate awards (from Grad. Cert. to Masters level). This endeavour will be built on partnerships among Australian universities, NTRBs, the Federal Court, academics, senior practitioners and other stakeholders. Units in the program will be provided by a number of cooperating universities and delivered online and in short on-campus intensive programs. Financial support will be sought from government and non-government sources.

In 2012–13 we aim to scope this initiative, undertake a needs analysis, establish and coordinate a national curriculum development committee, develop a curriculum framework, negotiate the institutional architecture for its realisation, prepare a business plan to sustain the program, and plan the first two units for delivery in 2014. And that's not all!

The ANTS Nest, is another exciting initiative enabled by an Attorney-General's grant. This dynamic, interactive, members-only site for native title anthropologists provides:

Professor Peter Sutton takes participants through some innovative findings at the 2011 'Society and Governance' workshop. Engaged with his analysis are Prof. Nic Peterson (ANU), Dr David Martin (Anthropos), Dr Sally Babidge (UQ), Ray Wood (NSW), Dr John Morton (Qld) and Dr Rod Lucas (AU). Credit: Deane Fergie.

- a clearing house for a broad range of resources, with live media feeds and links to specialist bodies such as AIATSIS, ANU's Centre for Native Title Anthropology, rep. bodies, the Aurora project and more.
- facilities for members to upload material such as work-in-progress papers, publications, training and professional development material, videos and contributions to our 'soap-box'.
- a context for direct interaction among members through live chat, blog and email facilities.

ANTS also hosts **a study leave scheme**, which brings native title anthropologists to Adelaide. ANTS Fellows praise the program for providing access to first-class research facilities, including a research library, enabling synergies among colleagues and time out from their day-to-day work to think, write and learn with others. This year we hosted David Martin (Canberra), who worked on a plain English guide to the design of PBCs; Petronella Vaarzen-Morel (Alice Springs), who examined social organisation, transformation and change among Lower Southern Arrernte people; David Raftery (Perth), who looked at social organisation and governance models for the Noongar; Sidrah McCarthy (Alice Springs), who explored the role of youth in native title claims; and Caro MacDonald (Melbourne), who explored the potential of ethnographic film in native title processes.

Finally, ANTS hosted the **'Society and Governance in Native Title' project**. This brought experienced practitioners to Adelaide in December 2011 and June 2012 for two-day workshops which discussed approaches to 'the society question' in native title claim research and sought ways in which such work might better inform post-determination challenges such as governance.

In opening the June meeting, Professor Greg McCarthy, Chair of the ANTS Board and Head of the School of Social Sciences, said that ANTS reflects the University of Adelaide's commitment to social justice for Indigenous Australians and in particular the recognition of Indigenous rights.

Native title anthropologists are encouraged to apply for membership of the ANTS NEST at www.austnativetitlestudies.org

Enquiries:
Dr Deane Fergie
ANTS, School of Social Sciences
University of Adelaide SA 5005
deane.fergie@adelaide.edu.au
+61 (08) 8303 7197

EYES AND EARS OF THE NORTH: AN INTERVIEW WITH DOUGLAS PASSI, CHAIR OF MER GEDKEM LE

Douglas Passi, Chair of Mer Gedkem Le
Credit: Kerstin Styche

My people

The population of Murray Island is around 450 and there are more families living in Townsville, Cairns, Mackay and other parts of the Australian mainland. Our people are pretty straightforward. There are people I would describe more as *kober* and *te kober* means 'eyes and ears of the north'. They will approach you immediately and say 'what are you doing in my country?' Then there are those in the eastern and southern part of the island that are *sor kober*, people that don't talk much. They will not approach you straight away. They normally sit back and observe you, to try to understand who you are. The people in the northern part of Murray Island always introduce themselves first to visitors and send a message to the *sor kober* people to say, 'this is what that group are doing in our country.'

Malo's Lore

When you first arrive on the island, I believe, and it's been handed down from generation to generation, you should approach the Traditional Owners. As is written in *Mabo*, Malo's lore says *malo tag mauki mauki, teter mauki mauki,* which means to say: you can't touch what is not yours. You can't enter into private land. You have to get permission to enter any property. The lore, as decided by the elders and high priests, is about 25 to 26 clauses. I believe clauses 1 to 8 lay the foundations of the lore itself, and from 9 to 12 is directed at the person, and that person is *muiar*. *Muiar ad le ged mimika*. This means that he can't enter another man's property. He must walk on his path, to the front door, and get permission to enter.

We have a system in place. All Indigenous people have a system in place. This is something for western society to learn to understand and believe: we were in this country a long time. When you look at the system of government in Australia, it has three levels, federal, state and local government... We have a similar thing, but like I said, on a smaller scale. We have clan groups, which is family. Like the Passi Clan. We have 8 tribes on Mer. One tribal leader from each tribe sits on the *ait ira per*. The *ait ira per* is like the parliament, where people sit and listen before arriving at a decision. Imagine

that our system is like the octopus. The 8 tentacles are the 8 tribes, the suckers on the tips of the tentacles are the clan groups, and the head is the *ait ira per*. Mer Gedkem Le [the RNTBC] has this same structure.

I've seen university students and anthropologists come to Mer to learn our culture, custom and tradition. Then they go and write their report, essay, or whatever. But when they give it back to us, and we read that report, it's really complicated to us. It's no longer ours.

Our native title experience

Native title for me is from generation to generation. We always think and *believe* that we own the land, the water and the resources around us, under and above. This is native title for us. And when I mention resources, this includes sea rights. Native title is recognition of this to make the western society understand that we have a system in place and we have lores in place.

For me, native title doesn't mean the *Native Title Act*. You can amend the *Native Title Act*. Our law, Malo's lore, stays the same forever. I don't know when they actually amend that lore, I couldn't say that. It's the same from generation to generation, from time immemorial, that's what Eddie and the others would say.

Dancer from Komet Kus, a collective of Mer Islanders from the Eastern Torres Straits. Native Title Conference 2012

Credit: Kerstin Styche

The sea and trade

The water is common, but we believe that we own the resources in the water: the trochus shell, the cray, the prawn. Our forefathers sank Spanish ships and attacked any boat that came into our water. We travelled to PNG, right up the Lockhart River, and to Raine Island, not far from Lockhart, to do trade. We have a name for Raine Island which is *Bub Warwar Kaur*. *Bub* mean chest, *Warwar* means stripes and *Kaur* means the island itself. And when you are at Raine Island you see crocodiles, you see fish and you see birds. That's what I interpret as the 'land of many species'.

We have trades to PNG. We have trades to our Southern brother in the mainland. Like I said, we trade. If we want red ochre we go to Lockhart and we trade in skulls or fish. It's a commercial thing, but on a smaller scale. Before the Coming of the Light, back in the 1800s, they traded the tomahawk for land. Trade is our way of life.

The birth of Mer Gedkem Le

It was in 1997 that I first heard of a PBC. I was the Deputy-Chair of the Mer Community Council. The council called on TSRA [the Torres Strait Regional Authority], engineers, builders, an accountant, and we drew up a plan for the development of infrastructure on Mer. I remember sitting in a room in Cairns waiting for legal advice. The lawyer walked in and said, 'Sorry, I have bad news for you, before you can commence any construction or develop any infrastructure on the island, you have to form a body called a native title corporation'. We said, 'Why? We won native title in 1992.' He told us, that it is what the *Native Title Act* says. We put in our time and effort to fly down there from Murray Island just to get this answer and go back. What a waste!

At our next council meeting we decided to call a meeting for all people from the Meriam nations living in the mainland. This meeting, in Townsville, was paid for out of the council budget. For the second meeting, held on Murray Island, the council paid for 10 to 15 elders to fly from the mainland to Mer, just to set up this corporation and to write the rule book. It took us 18 months to set up the corporation. In August 1998, Mer Gedkem Le was born.

Mer Gedkem Le today

Fourteen years later we are still under-resourced. We receive no funds from FaHCSIA [the Department Families, Housing, Community Services and Indigenous Affairs] and only recently, in 2011, we received a peanut from TSRA. Most of us are doing volunteer work, and I am personally frustrated. I have been frustrated for years now. The cost of living is high for us. I suffer. We need paid work to support our families.

In 2009, at our AGM, I was appointed Chair of Mer Gedkem Le and at this same meeting we endorsed fees for service. It's really sad to say this, but only if they can give us resources, pay for 2 to 3 people full-time, can our PBC survive. I've got two others working, like myself, and we are just doing our best to get our PBC up and running. We have ORIC sitting there, like big brother, saying 'you have to do this, you have to do that'… but they don't recognise who we are and what we are. A PBC for me is something set up by the government, not under our lore or structure.

The 20th anniversary: whose day is this? Is it supposed to be for the Meriam People? For us it's a day to recognise, not 20 years, but a much longer struggle. I remember sitting as a kid listening to my parents, aunties, uncles and grandfather talking about the DNA [Department of Native Affairs] police, saying 'look at this bureaucrat telling us what to do'. Today, the bureaucrats sitting on Thursday Island are meant to be there to help us. But they do nothing for us. We have to do everything ourselves. This is the system. Fight the system back.

For more information you can contact Mer Gedkem Le and elders within the Mer community on: mer_gedkem_le@y7mail.com

NATIVE TITLE INSTITUTIONAL REFORMS

By Louise Anderson, Federal Court of Australia

The Australian Government recently announced a number of key native title institutional reforms focused on improving the efficiency of the native title system and assisting the Federal Court to strengthen its ability to achieve native title outcomes.

Under the reforms, native title claims mediation and Indigenous land use agreement (ILUA) negotiations related to native title claims mediation will, over time, cease to be undertaken in the National Native Title Tribunal (NNTT) and be taken up by the Federal Court:

The government has stated its expectation that most native title matters will cease to be mediated in the NNTT as of 1 July 2012 but some matters — for example, those that are close to resolution — are likely to remain with the NNTT for mediation, including any assistance with ILUA negotiations until finalised.

All of the NNTT's other statutory functions will remain with the NNTT after 1 July 2012, including:

- ILUA negotiations not related to native title claims mediation
- future acts functions
- maintenance of various registers
- application of the registration test.

Since 1 July the court's key priority in respect of the mediation workload has been to maintain the impetus and progress of existing mediation of cases in the priority list.

To achieve this the court has sought the views of the applicant and respondents in the majority of cases in mediation and put in place a mediation or case management strategy. This process of review considers what case will continue to be the subject of mediation, when mediation (or other form of ADR) should occur, and whether the mediation should continue with the NNTT or be referred to a registrar or external mediator, or cease.

Such an assessment takes place through callovers and review hearings, as well as before Registrars in case management conferences in order for the court to be fully apprised of the nature of the extant issues and to propose an approach to resolve these, including a timetable.

The initial focus of judges and registrars has been on the requirements over the six months from July to December 2012. However, the court's Native Title Committee has noted that there is a need to develop a plan for the future. It is important for the court to continue to identify priority cases and publish these with the indicative resolution dates but it is equally important for it to develop a longer term plan to allow for a balanced approach to allocation of resources.

The transfer of the responsibility for the mediation of claims from the NNTT to the Federal court complements various legislative changes that have occurred to the court's responsibilities over recent years. These changes include the 2009 amendments to the *Native Title Act 1993* (Cth), which empowered the Federal Court to, amongst other things, refer a claim to 'an appropriate person or body for mediation', including a Registrar of the Court, the tribunal or another individual or body.

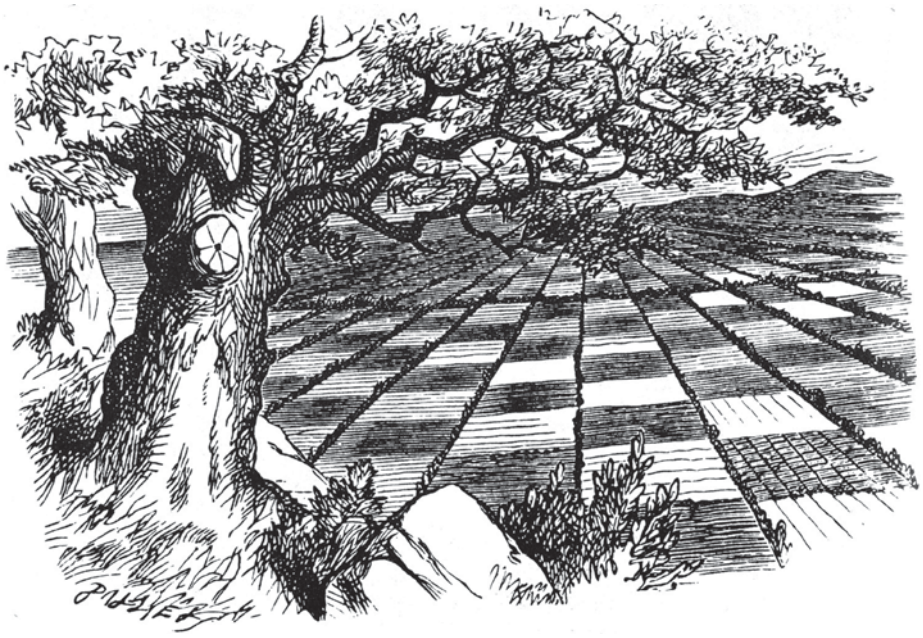
Also in 2009, amendments were made to the *Federal Court of Australia Act 1976* (Cth) to make clear that the court has both responsibility and authority to actively manage cases. The changes also placed similar responsibilities on parties and their legal representatives, including all parties involved in native title claims. Of significance are ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth), which makes 'the overarching purpose of the civil practice and procedure' of the court the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible and requires parties to act consistently with this purpose.

The mediation reforms, along with the other changes to native title in recent years, offer an opportunity for all parties to resolve native title claims, and the court looks forward to working with all parties involved in native title to achieve long-awaited results.

'[N]ative title claims mediation will, over time, cease to be undertaken in the National Native Title Tribunal (NNTT) and be taken up by the Federal Court'

THROUGH THE LOOKING GLASS: THE FEDERAL COURT'S ACQUISITION OF RESPONSIBILITY FOR MEDIATING NATIVE TITLE PROCEEDINGS

By Susan Phillips



In May 2012 the Attorney-General announced that, from 1 July 2012, all mediation of native title proceedings (both claims and claim related ILUAs) will be dealt with by the Federal Court. Funding for the National Native Title Tribunal (NNTT) from 1 July 2012 becomes a subprogram within the Federal Court's appropriation and a number of the NNTT registries have been relocated, where possible, to spaces adjoining or within the court's premises. A number of the NNTT staff have been absorbed by the court, and the Federal Court District Registrars are now convening conferences in each state and region to work out the management of all the matters in mediation. The NNTT retains its ILUA and claims registration functions, and notification, future act mediation and arbitral functions.

The architecture of the *Native Title Act* is premised upon mediation as the means by which native title will be recognised. In passing the *Native Title Act* the Commonwealth Parliament promised parties would be brought together in what the Act's Preamble describes as 'a special procedure to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character'. The Act promised 'Governments should facilitate negotiation on a regional basis between the parties in relation to claims to land or the aspirations of ATSI peoples and proposals for the use of land for economic purposes'.

The statutory design for progression of native title claims still requires parties to be brought together and assisted to work out by agreement how their interests coexist and express the practical way in which that coexistence should be enjoyed in the future. However, the court will now have complete control over that process and it will be interesting to see whether the oft expressed judicial frustration with the pace of native title proceedings abates as the court brings its powers to bear on the issues which have, in the past, taken a long time to resolve.

There is a long history in Australia of reliance upon dispute resolution through procedures other than resorting to litigation in a court. The conciliation and arbitration systems for workplace disputes pre-dated Federation and were incorporated into our Constitution. Section 51(xxxv) provides conciliation and arbitration should be provided by the Commonwealth for the prevention and settlement of industrial disputes.

The immediate model for the NNTT was the Human Rights and Equal Opportunity Commission (HREOC), where parties complaining of breaches of their human rights could be brought together and a binding solution found.

However, a feature of our constitutional arrangements has been the courts' vigilance regarding their domain under Chapter III of the Constitution. Delegations of power to tribunals which the courts have found encroached upon judicial functions have been found unconstitutional. Shortly after the establishment of the NNTT in *Brandy v HREOC* (1995) 183 CLR 245, the capacity of HREOC to provide binding solutions for parties in dispute was set aside. The consequences of *Brandy* meant the NNTT's capacity to determine, where the parties had reached agreement, that native title exists was no longer possible. The determination of facts and declaration of native title as an in rem interest binding upon the world at large could only be done by the court.

The 1998 amendments to the *Native Title Act* caused significant discomfort to the court. The Federal Court was very proud of its disposition rate — the average time it took for a matter to be disposed of from commencement to final orders was 18 months. In Senate estimates this could be contrasted usefully with Supreme Court proceedings with an average disposition rate of three years. The transfer to the Federal Court overnight in September 1998 of almost 900 matters — irrespective of their status before the NNTT — meant proceedings commenced in 1994 and

1995, — of which there were (and still are) many, confounded these statistics.

To accommodate the change the court set a provisional disposition target for native title matters of three years, having regard to their unique nature. It is doubtful that this goal has ever been achieved in a claimant application. Eventually in its annual reports the court started to quarantine the native title matters to their own category so that the 'balance' of the court's statistics could be restored. Wilcox J complained in a national Native Title Users' Group forum in 2003 that to hear and determine all the active native title claims would take the court 75 years. This showed a fundamental misunderstanding of the nature of native title proceedings and the role of the court in relation to them. The docket system in the Federal Court means matters are managed by the same judge from the beginning to the end. Where claims are in mediation and eventually resolved by consent the judge acts largely administratively until the very end, when they make orders that the parties have worked out — if the court regards them as appropriate.

Many legal representatives of parties to native title proceedings have had the experience of finding that their primary objective after the transfer in 1998 of native title proceedings to the Federal Court was to keep the court at bay so that the work of progressing the claim could continue or, in the alternative trying to use the court as a way of urging other respondents and the NNTT on through some of the blockages that occur. The court has frequently noted that parties are not getting on with progressing the claim and matters have been brought into closer and more intensive judicial management now with full control over mediation of the claims. It will be interesting to monitor the effect.

Out of all the matters that have been filed under the *Native Title Act*, only 25 are litigated determinations. There have been 1985 claims (claimant, compensation and non-claimant) made. Only 474 are active proceedings, meaning 1511 have been resolved by one means or another — the bulk of them, 1486, by means other than judicial determination following a hearing. There have been 187 determinations, out of which 143 have recognised the existence of native title. Determination of contested proceedings regarding the existence of native title by the court has therefore only happened in 25 out of the 1985 proceedings filed.

Julius Stone commented in relation to mediation :

> By the nature of mediation, directed as it is to secure agreement, the merits of the dispute on the facts or law are almost necessarily subordinated. "To achieve success, the mediator is inclined, therefore, to encourage compromise rather than advise adherence to legal principle." The mediator tends, in short, to follow the line of least resistance, and does not—or at least does not have to—bring an objective judgment to bear on the issues before him. On the other hand, mediation has a value corresponding to this shortcoming, namely, that a settlement thereby produced may be better designed to settle not merely the merits of the dispute, but the mutual relations of the disputants.

The extent to which the court falls within or without of this paradigm will now be susceptible to the same assessment as formerly applied to the NNTT. The extent to which this is an appropriate fit with the judicial purpose and functions of a court will be demonstrated in the months and years to come. The loss of corporate experience and memory the NNTT possessed may itself be a setback for many of the claims where mediation was fairly advanced. The accumulation of experience in native title matters for all of the clients, institutions and practitioners since 1998 has made disposition of matters far quicker than was possible in the past. As has already occurred, full credit for the increasing number of consent determinations has already been claimed for the court before Senate estimates. More thorough analysis of the processes by which the determinations made since the 2009 amendments were achieved may show that the credit for the increasing rate of resolution of native title claims by consent should at least be shared.

Opposite page: illustration by Sir John Tenniel from *Through the Looking-Glass, and What Alice Found There* by Lewis Carroll, 1871: This page: The Nyangumarta Karajarri determination in May 2012: Judge and Nyangumarta dancers. Credit: Susan Phillips.

RNTBCs AND CLIMATE CHANGE ADAPTATION WORKSHOP 'CHANGES TO COUNTRY AND CULTURE, CHANGES TO CLIMATE: REFLECTIONS ON INDIGENOUS RESILIENCE AND ADAPTATION'

National Native Title Conference, Townsville, 4-6 June 2012

By Christine Regan

The Centre for Land and Water Research at AIATSIS is undertaking case study research into what helps and what hinders climate change adaptation for registered native title bodies corporate (RNTBCs) and the native title holding groups they represent. This is part of a research grant from the National Climate Change Adaptation Research Facility (NCCARF). The research project focuses on the social and institutional barriers to and enablers of RNTBCs in facilitating community driven climate change adaptation.

RNTBCs, sometimes also referred to as PBCs, are the corporate entities that are established after a successful determination of native title has been made. Their key role is to protect and manage native title lands and waters on behalf of the broader native title holding group. There are currently 93 RNTBCs across Australia, with formal land management and community development responsibilities on native title land, which now comprises around 17 percent of the Australian continent.

RNTBCs have a key role to play in climate change adaptation practices because of their legislative, cultural and social responsibilities and because they are a contemporary structure through which traditional Indigenous authority can be exercised. However, research by AIATSIS has found that these governing Indigenous bodies are marginalised in the governance, institutional and decision-making structures and practices designed to facilitate climate change adaptation.

As part of the project a workshop was held at the Native Title Conference in June 2012. The aim of the workshop, entitled 'Changes to country and culture, changes to climate: Reflections on Indigenous resilience and adaptation', was to engage in a dialogue between RNTBCs and Indigenous and non-Indigenous researchers and stakeholders about:

- the social, economic and institutional factors that drive or undermine RNTBC facilitation of climate change adaptation in remote Indigenous communities
- the gaps in Indigenous involvement in climate change policy and decision making
- the use of traditional Indigenous knowledge to adapt to and mitigate the impacts of climate change.

The workshop was co-convened by Dr Jessica Weir, a Research Fellow at the University of Canberra, and Tran Tran, Research Fellow at the Centre for Land and Water Research at AIATSIS, and chaired by Professor Marcia Langton. There were presentations by Traditional Owners from the Karajarri Traditional Lands Association (KTLA), Abm Elgoring Ambung RNTBC and Yanunijarra Aboriginal Corporation RNTBC (with Sonia Leonard from the University of Melbourne). The critical issues that emerged from the workshop were:

- how the governance, land holding and management, and community development responsibilities of RNTBCs places them in a strong position to contribute to climate change adaptation
- how RNTBCs, local councils and governments can more successfully and inclusively collaborate on the building of infrastructure, town planning, economic development, land and water management and other adaptation work
- the need for the knowledge, experiences and unique situation of RNTBCs to be taken into account in recommendations for institutional design for climate change adaptation
- the gaps in Indigenous involvement in climate change adaptation decision-making processes, and the need to identify what constitutes best practice for that decision-making.

The workshop began with the presentation by Ngurrara Traditional Owners, from the Yanunijarra Aboriginal Corporation, who, in partnership with Sonia Leonard from the University of Melbourne, discussed the Ngurrara Climate Change Initiative project. The

project establishes a methodology for using traditional knowledge to provide a better understanding of climate patterns and ways to adapt to environmental changes on native title lands.

Traditional Owners from the KTLA discussed how PBCs can play an important role in coordinating the use of traditional knowledge to care for country.

The Karajarri also focused on ways of maintaining cultural identity in the context of climate change and its impacts on Indigenous cultural practices relating to country.

Representatives from the Abm Elgoring Ambung spoke about how RNTBCs are the governing Indigenous institutions through which Traditional Owners can potentially exercise control over the decisions that are made about country, but that lack of investment in RNTBCs is preventing them from having a voice in climate change decision making.

Tran Tran and Jessica Weir presented on the social and institutional dimensions of climate change adaptation and the role of native title holders in this context, noting that there are many areas of law and legislation, policy making and institutional processes that are yet to adapt to the introduction of native title and to the even more recent establishment of the RNTBCs. Tran and Weir discussed how existing legal, political and academic institutions can compartmentalise and exclude native title holders.

THE OUTCOMES AND EMERGENT THEMES OF THE WORKSHOP ARE DISCUSSED IN MORE DEPTH IN THE RNTBCS AND CLIMATE CHANGE WORKSHOP REPORT, WHICH WILL BE MADE AVAILABLE IN OCTOBER TO VIEW ONLINE AT THE AIATSIS CENTRE FOR LAND AND WATER RESEARCH WEBSITE: HTTP://WWW.AIATSIS.GOV.AU/RESEARCH/LW/ADAPTATION.HTML

Images: Opposite page: Seasonal flooding in Kowanyama, QLD. Credit: Tran Tran.
Above: Tran Tran and Thomas 'Dooli' King, Bidyadanga, WA. Credit: Jessica Weir.

CHANGES TO THE NATIVE TITLE RESPONDENT FUNDING SCHEME

By Alice Nagel and Samuel Stapleton

On 1 January 2013, changes to the Native Title Respondent Funding Scheme will come into force, with consequences for the level of funding available and the circumstances in which financial assistance will be granted. These changes are part of a broader move by the Attorney-General's Department to consolidate the administration of 26 Commonwealth financial assistance schemes, which took effect on 1 July 2012. In the consolidated framework, financial assistance will generally be limited to disbursements and only available for the cost of legal representation in exceptional circumstances.

The Native Title Respondent Funding Scheme is designed to assist parties whose interests may be affected by the recognition of native title to participate in native title proceedings. Financial assistance under section 213A of the *Native Title Act 1993* (Cth) is available to respondents involved in native title proceedings or disputes, parties to Indigenous land use agreement negotiations and grantee parties in future act matters. Native title claimants are not included in this scheme.

Under s 213A(4), the Attorney-General has discretion to grant financial assistance if satisfied that an applicant is not eligible for assistance from any other source, that they fulfil the department's guidelines, and that the grant would be reasonable in the circumstances. As part of the 2011–12 budget process, the department announced that it would revise existing guidelines and develop a new interest test for respondents. The current funding guidelines will remain in place until 31 December 2012 and will be replaced by the new scheme on 1 January 2013.

The Attorney-General's Department has indicated that the new 'interest test' will introduce two tiers of eligibility. Generally, native title respondents will be eligible for disbursement funding only; however, legal representation costs will still be funded in exceptional circumstances. The Attorney-General's Department defines disbursements as the costs associated with legal action, such as the costs of obtaining court transcripts, but not the costs of legal representation fees.

Under the new revised interest test, applicants will have to satisfy the following requirements in order to qualify for disbursement funding:

- For native title inquiries, mediation or proceedings, the respondent must be joined as a party to the claim.
- In relation to the negotiation of Indigenous land use agreements (ILUAs), the applicant for funding must have identified a relevant party who is willing to negotiate an agreement. If they intend to seek assistance for dispute resolution, they must be joined as a party to an inquiry, mediation or proceeding.
- In the case of future acts, the grantee party must have identified a relevant party who is willing and able to negotiate an agreement.

Funding for legal representation will be restricted to exceptional circumstances, and in particular:

- Legal representation funding will no longer be available for future act grantee parties.
- For native title proceedings, mediations or inquiries, there must be a novel legal issue that is directly relevant to the respondent's interests or the court must require the respondent's participation beyond standard procedural processes.
- In relation to ILUA negotiations or disputes about access rights, the Attorney-General will consider a number of factors, including whether a template or a standard agreement exists, whether the native title party is willing and able to negotiate, whether there is a novel legal issue directly relevant to the respondent's interests, whether there is a need for the respondent to be involved in the specific stage of proceedings, and whether the court requires the respondent's participation in a substantial sense.

Under the new scheme, limits to financial assistance will be imposed. While there will be no overall cap placed upon disbursement grants, specific types of disbursements, such as photocopying costs, may be capped. Furthermore, financial assistance for legal representation will be capped at $50,000. For disbursement funding, group respondents are not subject to

FOR MORE INFORMATION:

HTTP://WWW.AG.GOV.AU

OR CONTACT THE FINANCIAL ASSISTANCE SECTION OF THE ATTORNEY-GENERAL'S DEPARTMENT ON 02 6141 4770

OR BY EMAIL ON FINASS@AG.GOV.AU

Opposite page: Road to Jarlmadangah, Karajarri country, Kimberley WA. Credit: Jessica Weir.

This page: heritage survey, central Pilbara 2008. Credit: Cath McLeish

means testing, whereas individuals must undergo an assessment of their financial situation. Means testing may apply to both individuals and groups seeking legal representation assistance. Organisations will not be able to seek funding for native title officers or administrative costs.

The major drivers behind the funding reforms, as explained by the Attorney-General's Department, are budgetary cuts and the changing nature of native title proceedings. In 2011–12, financial assistance funding will be reduced by $0.71 million through a stricter application of funding guidelines, and after 2012–13, when the consolidated scheme takes effect, by $2.5 million. The Attorney-General's Department has stated that it considers it an opportune time to reassess the funding of native title respondents, given that many legal issues are now settled, the effect on existing rights is more certain and the resolution of claims has shifted away from adversarial litigation towards negotiation and mediation.

The new scheme will take account of findings by an independent review, conducted by Mr AC Neal SC in 2011. Mr Neal's report examined all aspects of the existing funding arrangements, including the scheme's effectiveness and the circumstances in which funding should be granted to native title officers and legal representatives. It involved public consultation with 32 stakeholders across Australia and written submissions from 23 stakeholders. The government has stated its commitment to access to justice principles, greater support for pro bono work and an effective distribution of limited funds.

Several issues raised in Mr Neal's report are likely to attract continuing debate. The most contentious aspect of the government's proposal is the impact it could have on respondent organisations and whether current outcomes can be maintained in such a reduced funding environment. Submissions by respondent peak body organisations made the claim that if funding is reduced then the benefits that arise from respondent organisations linking with qualified native title lawyers will wane. Furthermore, if native title respondents began participating in claim proceedings without legal representation this would certainly lead to heightened stress being placed on the Federal Court and the National Native Title Tribunal's management processes.

However, Mr Neal considered that it was difficult to evaluate such negative implications when dealing with hypothetical situations and little empirical information. He noted that he was not persuaded by the argument that reducing Commonwealth funding will lead to the disappearance of native title lawyers acting on behalf of respondent organisations. He argued that there will always be incentives present for respondent organisations to allocate available funds to a representative agent to act in their interests when necessary.

In summary, the main change will be the introduction of a two-tiered system of native title respondent funding, with different eligibility requirements for disbursement funding and legal representation. Funding for legal representation costs will be limited to exceptional circumstances and will be part of a broader move by the Attorney-General's Department to consolidate legal assistance schemes. Overall, it is difficult to ascertain the implications of the new scheme, as it is yet to be implemented and the revised native title respondent funding guidelines are still to be finalised.

ABOUT US

The Native Title Research Unit (NTRU) was established through collaboration between the Aboriginal and Torres Strait Islander Commission and AIATSIS in 1993 in response to the High Court decision in *Mabo v Queensland [No 2]*, which recognises Indigenous peoples' rights to land under the legal concept of native title. The NTRU's activities are currently supported through a funding agreement with the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA).

The NTRU provides high quality independent research and policy advice in order to promote the recognition and protection of the native title of Aboriginal and Torres Strait Islander peoples. We facilitate access to the Institute's records, materials and collections and publish the results of our research both as a source of public information and in academic publications.

Located within the wider AIATSIS research program, the NTRU aims to provide ongoing monitoring of outcomes and developments in native title; independent assessment of the impact of policy and legal developments; longitudinal and case study research designed to feed into policy development; ethical, community based and responsible research practice; theoretical background for policy development; recommendations for policy development; and policy advocacy designed to influence thinking and practice.

SUBSCRIBE TO NTRU PUBLICATIONS AND RESOURCES

All NTRU publications are available in electronic format. This will provide a faster service for you, is better for the environment and allows you to use hyperlinks. If you would like to SUBSCRIBE to the *Native Title Newsletter* electronically, please send an email to ntru@aiatsis.gov.au. You will be helping us provide a better service.

For previous editions of the Newsletter, go to http://www.aiatsis.gov.au/ntru/newsletter.html

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Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies
GPO Box 553
Canberra ACT 2601

Telephone: 02 6246 1161
Facsimile: 02 6249 7714
Email: ntru@aiatsis.gov.au

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AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES
NATIVE TITLE RESEARCH UNIT