AIATSIS

Native Title NEWSLETTER

Issue 2 | 2023

WELCOME
to the Native Title Newsletter Issue 2, 2023

For the past 30 years, the AIATSIS Native Title Research Unit (NTRU) has focused on maximising the recognition of native title through improving information and coordination, actively engaging in law and policy reform and strengthening the voice of native title holders.

The Native Title Research Unit has been renamed the Indigenous Country and Governance Unit (ICGU) in recognition of the support that we can provide native title organisations in the post-determination environment.

Stay in the loop by subscribing to the online Newsletter. If you would like to make a contribution, please contact us at nativetitleresearchunit@aiatsis.gov.au

Above: Elizabeth Springs, Maiawali Country

Cover: K'Gari, Butchulla Country

AIATSIS acknowledges the funding support of the National Indigenous Australians Agency.

ISSN: 1447-722X

Editors: Indigenous Country and Governance Unit (ICG), AIATSIS.

Design and typesetting: Nani Creative

Printed by: University Printing Service, ANU.

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.

AIATSIS

@AIATSIS

AIATSIS_

/AIATSIS

nativetitleresearchunit@aiatsis.gov.au

CONTENTS

1

Meet the team

2

Native Title Snapshot

3

Youth Forum 2023

4

Native Title Representative Body Legal Workshop 2023

5

The Centre for Native Title Anthropology

6

Section 60AAA: a tool for internal consensus building and dispute resolution on the journey to self-determination

7

UNHRC decision holds Australia breached rights of Wunna Nyiyaparli people

8

Case note:

Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia [2023] FCAFC 73

9

Case note:

Nona on behalf of the Badulgal, Mualgal and Kaurareg Peoples (Warral & Ului) v State of Queensland (No 5) [2023] FCA 135

10

Case note:

Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

11

Case note:

Blucher on behalf of the Gaangalu Nation People v State of Queensland (No 3) [2023] FCA 600

Meet the team

Felicity Thiessen (Director)

Felicity was appointed the Director of the Indigenous Country and Governance Unit in 2022. She holds degrees in law and anthropology. Felicity has spent 12 years working in the native title sector including as a lawyer in a native title representative body and with a number of Commonwealth entities including the National Native Title Tribunal.

Tony Eales (Assistant Director)

Tony Eales is the Assistant Director of the Indigenous Country and Governance Unit. He grew up in Queensland and spent ten years doing cultural heritage management in the Bowen Basin west of Rockhampton and in the Hunter Valley, NSW. He then spent 14 years as an in-house anthropological expert at Queensland South Native Title Services working on many successful claims. Tony is now based in Canberra, ACT.

Clare Sayers (Research Fellow)

Clare is a Research Fellow from Toowoomba, Queensland. She has a Bachelor of Laws and a Bachelor of Government and International Relations and is currently studying a Master of International Law. Prior to joining AIATSIS, Clare worked as a lawyer and paralegal for approximately six years, with the majority of her career spent in the native title and resources team at King & Wood Mallesons.

Lilly-Rae Jones (Research Officer)

Lilly-Rae is a proud Wiradjuri woman who has lived on Ngunnawal Country for most of her life. She has been a Research Officer in the ICGU since April 2023 and joined the Australian Public Service in 2020. Prior to working in the ICGU Lilly-Rae has studied a Diploma in Governance, as well as Youth Work, Alcohol and Other Drugs, Mental Health and Community Services. Lilly-Rae provides valuable support across all ICGU projects and oversees the development and facilitation of the Youth Forum with Toya.

Latoya-Sharnae (Toya) Jones (Legal Intern)

Toya is a Balardong, Whadjuk Nyungar and Yamatji woman from Whadjuk Nyungar boodja in Perth (WA). At AIATSIS, Toya works on various projects including the PBC Survey and Youth Forum. She is also a current student at the Australian National University studying a double bachelor's degree in Psychological Sciences and Law (Honours).

Charlie Nott (Administration Officer)

Charlie is a proud Wiradjuri man; he has lived in and around central and southwest NSW. Charlie is an administration officer based in Canberra, working on projects like the PBC Survey, Youth Forum, Native Title Newsletter and general administration work.

Tegan Barrett-McGuin (Senior Research Officer)

Tegan is a Senior Research Officer born on Larrakia Country in Darwin, Northern Territory. She studied law, politics and philosophy at the University of Queensland. Tegan worked for six years as a lawyer and paralegal at a native title service provider in South-East Queensland before joining the ICGU. In her role at AIATSIS Tegan has been focusing on the PBC Survey and refreshing online resources.

Tayla-Jade Graham (Research Assistant)

Tayla-Jayde Graham is a Research Assistant for the 2023 PBC Survey. Her mob is Dharug and she is from the Western Sydney area but spent most of her life growing up on Jinibara County, both Freshwater River Country. Tayla-Jayde has just completed her Bachelor of Humanitarian Aid and Development at CDU specialising in Indigenous Engagement, Community Development and Disaster Management.

Alfred Hearn (Research Assistant)

Alfie is a Research Assistant and in his final year of law at Australian National University. Born and raised in Canberra, Alfie splits his time between AIATSIS, study and working as a guide at the National Museum of Australia. As a Research Assistant, Alfie dedicates most of his time to producing case summaries for the Native Title Law Database.

Zane Lindblom (Research Assistant)

Zane is a proud Ngiyampaa man, who grew up in Adelaide on Kaurna land. He recently completed his second year of a double degree in Law (Honours) and Economics at the Australian National University. He works as a Research Assistant on various projects, and the majority of his time is spent updating the Native Title Law Database.

Ya Maulidin (Research Assistant)

Ya was born in Indonesia and moved to Australia in 2017. He is a Research Officer and manages Native Title Access Requests in the ICGU. He is an Applied Anthropology and Participatory Development graduate from the Australian National University. Prior to working at AIATSIS, Ya was a research assistant for the Development Policy Centre at ANU.

Native Title Snapshot

By 2023 native title claims had been resolved over half of the land in Australia.

Hakea laurina, Noongar Country

Native title at a glance

The Indigenous Country and Governance Unit (ICG) compiles information from a range of publicly available resources, including from the National Native Title Tribunal and the Office of the Registrar of Indigenous Corporations to provide a broad overview of the status of native title throughout Australia.

Issue 1 of the 2023 Native Title Newsletter provided an overview as at January 2023. A short updates is provided here as at October 2023.

Percentage of land and waters covered by a native title determinations

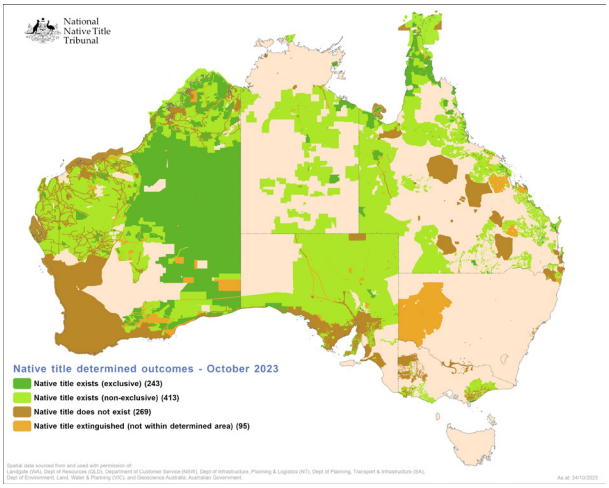
Year	Native title determinations
2005	7.9%
2010	12.6%
2018	35%
2019	37%
2020	39.2%
2022	50.2%
2023	54%

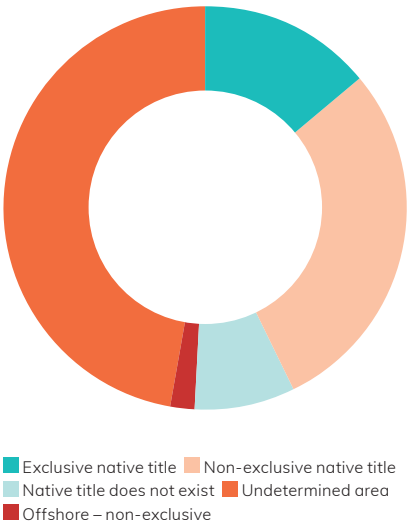
In 2023, determinations have been made over 54% of Australia (to the effect that that native title does not exist; exists either exclusively and non-exclusively; or that native title has been extinguished).

Determinations

In Australia, there have been 656 positive determinations as at October 2023:

	Number of determinations	Land and waters (sq km)	Land and waters (%)
Total land and waters	**1,020**	**8,099,264[1]**	**100%**
Exclusive native title	243	1,138,348	14%
Non-exclusive native title incl offshore	413	2,335,988	29%
Native title does not exist incl offshore	269	633,822	8%
Native title Extinguished incl offshore	95	190,833	2%
Undetermined area		4,158,793	47%



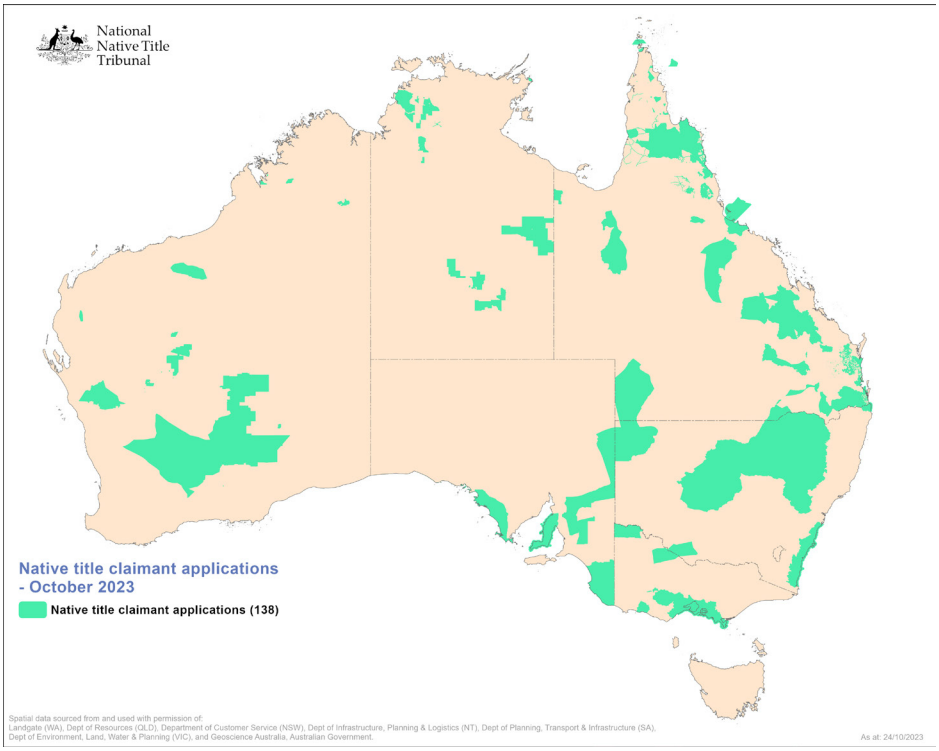


Source: http://www.nntt.gov.au/Maps/National_Presentation_Maps.ppt

[1] -https://www.ga.gov.au/scientific-topics/national-location-information/dimensions/area-of-australia-states-and-territories

Native Title Applications

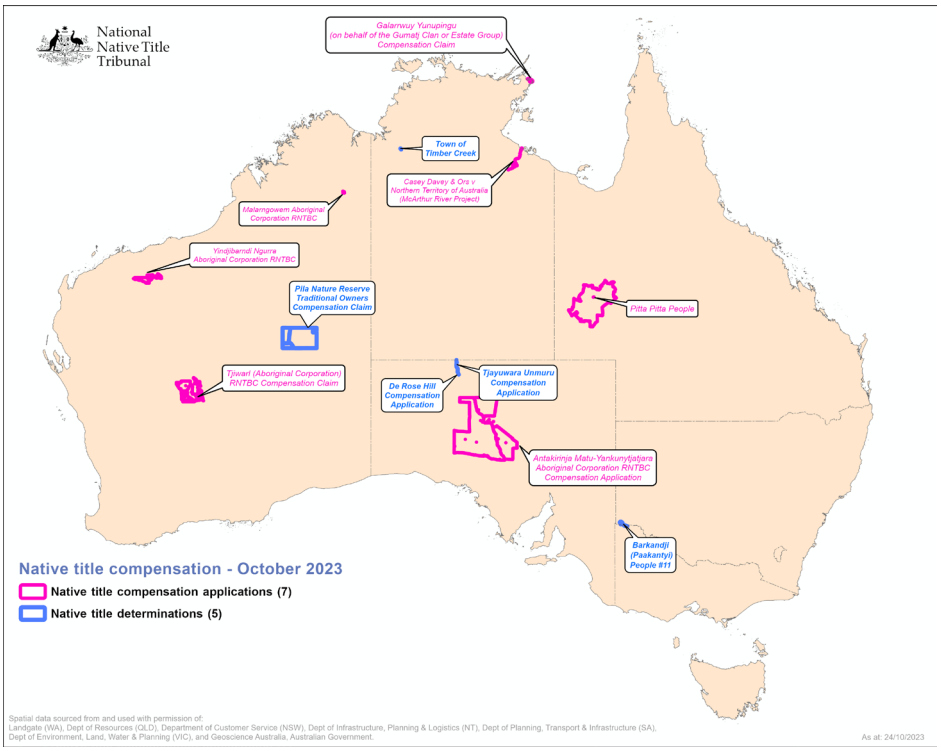
There are currently 138 registered claims on foot which represents 12% of the country as at October 2023.



Source: http://www.nntt.gov.au/Maps/National_Presentation_Maps.ppt

Compensation

As of October 2023 there have been five determinations four of which found compensation was payable. There are currently six active compensation applications yet-to-be-determined.



Source: http://www.nntt.gov.au/Maps/National_Presentation_Maps.ppt

State by State Outcomes

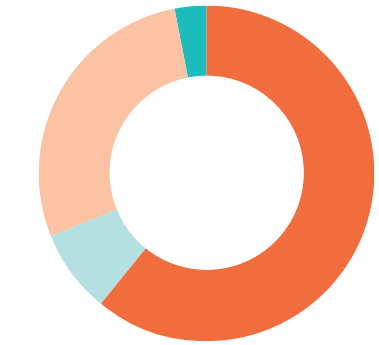
To date there has not been any determinations of native title in the ACT or Tasmania.

QUEENSLAND

In Queensland (Qld) there have been 259 positive determinations as at October 2023.

	Land and waters (sq km)	Land and waters (%)*
Total land and waters	**1,851,736**	**100%**
Exclusive native title	61,664	3%
Non-exclusive native title	523,766	28%
Native title does not exist	149,022	8%
Undetermined area	1,117,284	61%

*Percentages have been rounded to the nearest whole number



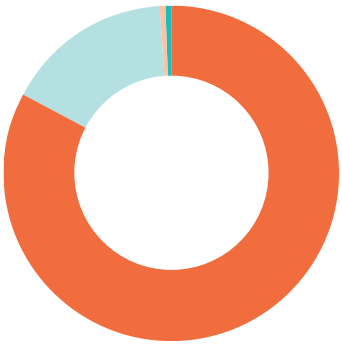
Exclusive native title Non-exclusive native title
Native title does not exist Undetermined area

NEW SOUTH WALES

In New South Wales (NSW) there have been 20 positive determinations as at October 2023.

	Land and waters (sq km)	Land and waters (%)*
Total land and waters	**809,952**	**100%**
Exclusive native title	685	Less than 1%
Non-exclusive native title	4,265	Less than 1%
Native title does not exist	132,537	16%
Undetermined area	672,465	83%

*Percentages have been rounded to the nearest whole number



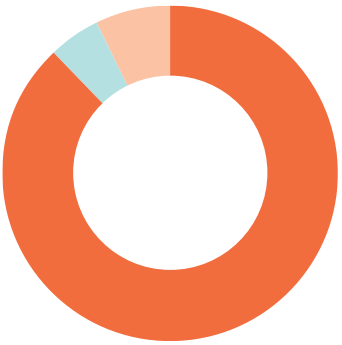
Exclusive native title Non-exclusive native title
Native title does not exist Undetermined area

VICTORIA

In Victoria (Vic) there have been 5 positive determinations as at October 2023.

	Land and waters (sq km)	Land and waters (%)*
Total land and waters	**237,657**	**100%**
Exclusive native title	0	0%
Non-exclusive native title	16,051	7%
Native title does not exist	11,018	5%
Undetermined area	210,588	88%

*Percentages have been rounded to the nearest whole number



Exclusive native title Non-exclusive native title
Native title does not exist Undetermined area

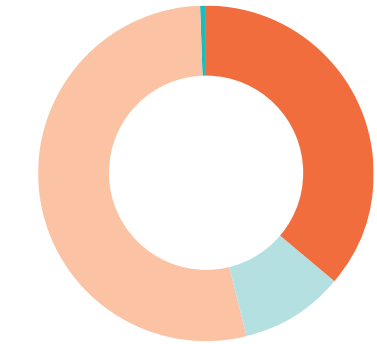
Moon over Bladensburg, Guwa Koa Country

SOUTH AUSTRALIA

In South Australia (SA) there have been 45 positive determinations as at October 2023.

	Land and waters (sq km)	Land and waters (%)*
Total land and waters	**1,044,353**	**100%**
Exclusive native title	6,093	Less thann 1%
Non-exclusive native title	551,097	53%
Native title does not exist	106,835	10%
Undetermined area	380,328	36%

*Percentages have been rounded to the nearest whole number



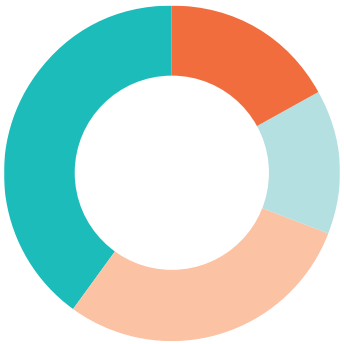
Exclusive native title Non-exclusive native title
Native title does not exist Undetermined area

WESTERN AUSTRALIA

In Western Australia (WA) there have been 197 positive determinations as at October 2023.

	Land and waters (sq km)	Land and waters (%)*
Total land and waters	**2,642,753**	**100%**
Exclusive native title	1,055,851	40%
Non-exclusive native title	772,155	29%
Native title does not exist	361,680	14%
Undetermined area	453,067	17%

*Percentages have been rounded to the nearest whole number



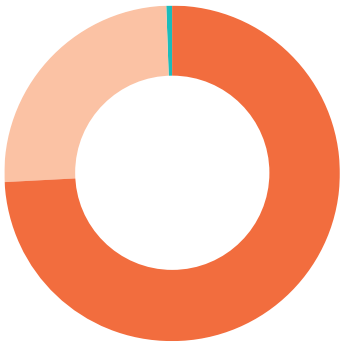
Exclusive native title Non-exclusive native title
Native title does not exist Undetermined area

NORTHERN TERRITORY

In Northern Territory (NT) there have been 135 positive determinations as at October 2023.

	Land and waters (sq km)	Land and waters (%)
Total land and waters	**1,406,243**	**100%**
Exclusive native title	14,055	Less than 1%
Non-exclusive native title	355,185	25%
Native title does not exist	941	Less than 0%
Undetermined area	1,406,243	74%

*Percentages have been rounded to the nearest whole number



Exclusive native title Non-exclusive native title
Native title does not exist Undetermined area

Dragonfly, Kabi Kabi Country

Prescribed Bodies Corporate

In 1997, five years after the Mabo decision the first registered native title body corporate, also known as a PBC, was registered. Ten years later in 2007, and almost 15 years after the Mabo decision, the number of registered PBCs increased to 52. The number has climbed to 268 PBCs registered as at October 2023.

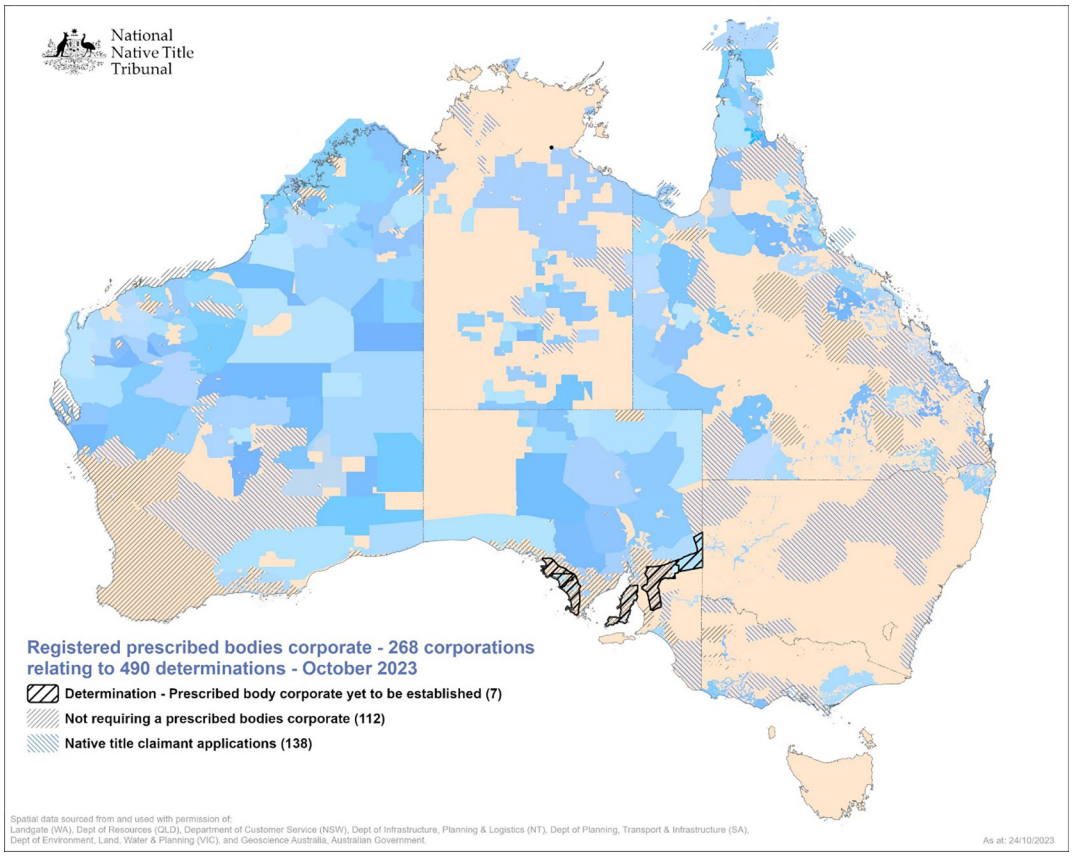
PBCs by State and Territory

State/Territory	Number of PBCs per State/Territory
Queensland	111
New South Wales	10
Australian Capital Territory	0
Victoria	4
Tasmania	0
South Australia	25
Western Australia	83
Northern Territory	35

PBCs by representative body region

NTRB Region	Number of PBCs per region
Gur A Baradharaw Kod (Qld)	21
Cape York Land Council (Qld)	25
North Queensland Land Council (Qld)	32
Carpentaria Land Council Aboriginal Corporation (Qld)	5
Queensland South Native Title Services	28
Central Land Council (NT)	34
Northern Land Council (NT)	1*
Kimberley Land Council (WA)	29
Central Desert Native Title Services (WA)	19
Native Title Services Goldfields (WA)	5
Yamatji Marlpa Aboriginal Corporation	30
South Australia Native Title Services	19
First Nations Legal and Research Services (Vic)	4
NTSCORP (NSW)	9

* *The Top End (Default PBC/CLA) Aboriginal Corporation RNTBC* (administered by the legal branch of the Northern Land Council) acts as PBC for all positive native title determinations in the Northern Land Council's region.



Source: http://www.nntt.gov.au/Maps/National_Presentation_Maps.ppt

2023 Youth Forum on Noongar Boodja

By Lilly-Rae Jones and Latoya-Sharnae Jones

The Indigenous Country and Governance Unit (ICGU) convened a Youth Forum at AIATSIS 2023 Summit, on 9 June 2023. The Forum drew together over 40 Indigenous youth to discuss their experiences of native title and current and future opportunities to engage with their rights and interests, governance and nation-building.

ICGU team members Lilly-Rae Jones and Latoya-Sharnae Jones joined with representatives from the Noongar community, Jack Collard and Rickeeta Walley, in facilitating the Forum. Jack and Rickeeta opened discussions talking about their views and experiences on Noongar youth engagement in nation-building

Rickeeta began with discussions about the culture and traditions that were lost, as well as other impacts of colonisation. This led to discussions about the importance of youth engagement and the opportunities that youth are being presented to keep culture alive to ensure that this is something that is easily accessible for future generations.

The group moved into small yarning circles and Rickeeta asked that each group discuss and write down the restrictions and opportunities that Indigenous youth face today due to colonisation.

The group went outside for a smoking ceremony. Jack spoke about the important reasons why we do this ceremony and Rickeeta sang a song in Noongar language called 'Djinnanginy Bo' which means 'looking into the distance', which is a song about looking across Noongar Country from the hills.

When the group returned, we formed a large yarning circle where Lilly-Rae Jones and Latoya-Sharnae Jones, spoke about how youth perspectives play an important role in nation-building and supporting cultural growth and sustainability for future generations.

We discussed that there are a range of barriers that restrict youth from participating in discussions around First Nations' issues, including the complexities of navigating native title. We also discussed how the ICGU want to develop resources on the PBC Website about native title and governance and how Indigenous youth can become more active in nation-building.

We invited the group to share what sort of information and activities they would like ICGU to undertake to support youth participation in these important discussions. The feedback we received will be integral to setting up the ICGU youth governance webpage on the PBC Website.

Jack then talked about how this is an important time for youth involvement in nation-building, especially due to the South West Native Title Settlement, and how there will be many opportunities for youth to enhance not only their own quality of life and the quality of life for their community, but also how this can break harmful stereotypes and stigma that sometimes surrounds Indigenous people, especially Indigenous youth.

Jack discussed how these opportunities can lead to Indigenous communities being self-sufficient and no longer relying on government support and/or funding and how this can also break those stereotypes. Jack expressed that it is important that young people put in the work to ensure that this can be a reality in the future.

By bringing young Aboriginal and Torres Strait Islander people together who have a shared interest in native title, governance and nation-building, delegates had the opportunity to form valuable relationships and networks to support one another along their journeys.

Youth Forum, AIATSIS Summit 2023

Native Title Representative Body Legal Workshop 2023

By Tegan Barrett-McGuin

AIATSIS's Indigenous Country and Governance Unit convenes (ICGU) an annual workshop for lawyers from native title representative bodies (NTRBs), native title service providers (NTSPs) and in-house prescribed body corporate (PBC) lawyers. The workshop serves as a community of practice, facilitating the sharing of knowledge and skills over the course of three days.

This year's NTRB Legal Workshop was held from 29-31 August 2023 in Tarntanya (Adelaide) where attendees were welcomed to Country by Kaurna Elder, Aunty Rosalind Coleman. It was the most well-attended workshop since it was first held in 2017, with over 100 lawyers participating.

The majority of the thirteen presentations were delivered over the first two days by native title practitioners from representative bodies sharing insights into contemporary challenges and successes in native title practice. Day 3 was allocated to a Trauma Informed Practice workshop.

This article provides a brief overview of the workshop program.

Day One

Claim updates

Day One focused primarily on native title compensation opening with a presentation from Graham O'Dell[1] on the Tjiwarl Palyakuwa (Agreement) Indigenous Land Use Agreement between the State of Western Australia and the Tjiwarl Aboriginal Corporation. The Agreement resolved the State's compensation liability in relation to three compensation claims filed by Tjiwarl.

Northern Land Council (**NLC**) provided an update on the McArthur River Project compensation claim filed on behalf of the Gudanji, Yanyuwa and Yanyuwa Marra Aboriginal Peoples and which comprises areas of parent-company Glencore's zinc and lead mining operation. NLC also presented on the Full Court of the Federal Court's decision in *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 73 (see case summary on page 20).

The non-extinguishment principle

Central Land Council delivered a technical and thought-provoking exploration of instances where native title can continue to exist alongside interests held in perpetuity through the application of the 'non-extinguishment principle' (per s 238(3) of the *Native Title Act 1993* (**NTA**) and the benefits this might provide to native title holders or claimants.

Preservation of evidence in compensation claims

Kimberley Land Council (**KLC**) lawyers presented on options for preserving the evidence of elderly knowledge holders in lieu of the lengthy process of preparing and prosecuting compensation claims. In addition to taking the evidence of elderly knowledge holders, the challenge is ensuring that the evidence of witnesses who have passed away will be afforded the full weight that it would were the witnesses able to give live evidence within a proceeding. The presentation considered options for enlivening provisions of the *Federal Court Rules 2011*, the NTA and *Federal Court Act 1976* (Cth) and case authority to that end.

Strategies to prevent late joinder applications

Queensland South Native Title Services (**QSNTS**) presented on options for early resolution of native title disputes. Section 84(5) of the NTA allows any person who has an interest that may be affected by a native title determination to be joined as a party to a native title claim and if it is in the interests of justice to do so (joinders). Not infrequently do individual Indigenous people file a joinder, asserting native title rights and interests in existing native title claim areas. The interests asserted vary but often relate to contested claim boundary areas, highlighting a tension between the requirements of the NTA and traditional boundaries.

The presentation considered the pain and hurt that claim-related

disputes cause Indigenous people who must give up life-long connections to Country to which they have always felt they belonged. In a bid to lessen those impacts, the presentation highlighted the importance of dealing with disputes as they arise, and recommended disputes be resolved through:

- Culturally responsive engagement using traditional decision-making processes;
- Building trusting and establishing relationships;
- Employing neutral third-party (First Nations where possible) facilitators/ mediators;
- Capacity building and empowerment;
- Co-management and shared decision-making; and
- Legal and policy reform.

The presentation spoke directly to the successful resolution of a boundary dispute where the Indigenous parties to the dispute controlled the process and outcome for resolving the dispute, illustrative of the need for self-determination in native title negotiations.

Day Two

Future acts

Day Two commenced with a workshop led by Tessa Hermann, barrister, considering the application of Division 3 of the NTA, a complex regime for dealing with future acts. A number of hypotheticals were undertaken by the participants testing their understandings of the application of the future act regime.

Case updates

Tina Jowett, barrister, presented case summaries on the following matters:

- *Nona (obh of the Badulgal, Mualgal and Kaurareg Peoples (Warral & Ului)) v State of Queensland (No 5)* [2023] FCA 135
- *Santos NA Barossa Pty Ltd v Tipakalippa* (2022) 296 FCR 124; [2022] FCAFC 193
- *Ross (obh of the Cape York United #1 Claim Group) v State of Queensland (No 10)* [2022] FCA 1129
- *Pitta Pitta Aboriginal Corporation RNTBC v Melville (obh of the Pitta Pitta People)* [2022] FCAFC 154
- *Blucher (obh of the Gaangalu Nation People) v Queensland (No 3)* [2023] FCA 600
- *The Nyamal Palyku Proceeding (No 7)* [2023] FCA 528
- *Davey (obh of the Gudanji, Yanyuwa and Yanyuwa-Marra Peoples) v Northern Territory of Australia (No 2)* [2023] FCA 455
- *Davey (obh of the Gudanji, Yanyuwa and Yanyuwa-Marra Peoples) v Northern Territory of Australia) (No 3)* [2023] FCA 521
- *Rainbow (obh of the Kurtjar People) v Queensland (No 2)* [2021] FCA 1251

Panel: Legal practice obligations under Part 11 of the NTA

The panel (comprised of Ms Jowett, Tim Wishart (QSNTS) and Brooke Creamers (Native Title Services Goldfields)) considered some of the common practical and ethical dilemmas faced by NTRB/NTSP lawyers against a consideration of the functions of representative bodies under Part 11 of the NTA.

Good faith negotiations

NTSCORP presented on the principles of good faith in relation to the grant of exploration licences in New South Wales, against a consideration of the Right to Negotiate and Future Act Determination Applications provisions in the NTA.

Pastoral Land Clearing

NLC spoke about the sharp increase in applications on pastoral leases; the introduction of an expedited procedure for such applications; the lack of consultation with native title holders; and the risk for sites of significance.

Panel: Renewal Energy Projects and Native Title

The second panel for the day was comprised of Sophie McLeod (NLC) Graham O'Dell (Wajarri Yamaji Aboriginal Corporation), Colin McKellar (Yamatji Marlpa Aboriginal Corporation) and Justine Toohey (KLC). Each panellist provided an overview of renewable energy projects planned for or occurring within their regions including the development of large-scale green hydrogen and ammonia production facilities and pipelines, solar farms and carbon farming initiatives. In some instances, native title groups were key partners in the projects, rather than an interest group to be consulted. For an example of a renewable energy project, see: https://aboriginalcleanenergy.com/.

Panellists reflected on the opportunities for native title holders and claimants in this emerging sector, and highlighted that renewable energy projects:

- are more flexible than other projects such as traditional mining in terms of location, so they are likely to be available to a broader geographic spread of native title groups.
- tend to be long term and can be source of indefinite

income for native title groups.

- in some instances may require native title holders' consent, so effectively provide a veto power to native title groups which creates greater bargaining power.

The panellists also identified challenges, including that the nascent character of the sector means the impact on land and communities is not easily assessable nor is the success, long term viability and economic outcomes of projects. This in turn makes it difficult to assess appropriate financial compensation. Panellists also observed that project proponents may be new to native title space and require education on processes, values and expectations of native title groups.

Day Three

Day three delivered a full day 'trauma-informed practice' workshop, delivered by Badimaya and Ukranian woman Bianca Stawiarski[2] and Toni Bauman[3]. The workshop highlighted the impact and indicators of intergenerational trauma that have been recognised broadly in colonised peoples across the world. Participants then explored how trauma can both arise and be managed in the workplace.

Facilitated discussions and group work encouraged participants to identify the many trauma trigger points involved in native title, and brainstorm or share existing approaches to avoid triggering trauma. It was recognised, for example, that rushed meetings which use complex legal language and which focus on achieving an outcome can be triggering and disempowering. There may be a need for lawyers to shift their approach to what constitutes a 'good' meeting. Other solutions identified included:

- Greater use of dispute resolution functions.
- Investing in building relationships and trust.
- Respecting and understanding cultural protocols.
- Ongoing support for witnesses.
- Encouraging clients to choose how and where meetings or interviews take place.

Participants were asked to encourage the development and implementation of trauma-informed practice frameworks in their workplaces.

For more information on intergenerational trauma, see:

- The Healing Foundation's video 'Understanding Intergenerational Trauma': https://www.youtube.com/watch?v=vlqx8EYvRbQ
- The Healing Foundation: https://healingfoundation.org.au/intergenerational-trauma/
- Australian Indigenous Health Info Net: https://healthinfonet.ecu.edu.au/learn/health-topics/healing/trauma/
- Atkinson, J. (2003) Trauma Trails: Recreating Song Lines, the Transgenerational Effects of Trauma on Indigenous Australia. Visit Warida Store to purchase.
- Menakem, R (2017) My Grandmother's Hands: Racialised Trauma and the Pathways to Mending our Hearts and Bodies. Visit Booktopia to purchase.

For more information on developing a trauma-informed practice framework see:

- Warida Wholistic Wellness: https://www.warida.com.au/we-al-li-programs-workshops/
- We Al-li: https://www.wealli.com.au/
- Weave Youth and Community Services' Aboriginal Healing Framework: http://www.weave.org.au/wp-content/uploads/2020/11/Weave-Aboriginal-Healing-Framework-_-Summary-Document.pdf
- The Healing Foundation: https://healingfoundation.org.au/resources/healing-the-stolen-generations-the-theory-of-change/

---

1 CEO of Wajarri Aboriginal Corporation

2 Managing Director of international certified Indigenous social enterprise Warida Wholistic Wellness

3 Anthropologist, facilitator and mediator

Beach grass, Kabi Kabi Country

Centre for Native Title Anthropology

by Dr Julie Finlayson

Readers may not be aware that the Centre for Native Title Anthropology (**CNTA**) has been based at the Australian National University (**ANU**) for over a decade. We are grant-funded under a three-year contract, competitively awarded by the Australian Attorney General's Department. The grant purpose is to "support the resolution of native title claims, [contribute] to effective management of native title, and post-determination and compensation efforts."

The current Research Fellow is Dr Julie Finlayson (Julie.Finlayson@anu.edu.au) and CNTA Directors are Emeritus Professor David Trigger (david.trigger@uq.edu.au) and Ms Petronella Vaarzon-Morel (pvmorel@bigpond.com). The Centre offers several professional development activities each year directed to supporting anthropologists and native title practitioners in this field. These activities comprise an annual conference generally held in early February each year, at least two workshops often on request and focused on specific practice issues. In previous years CNTA has also contributed to Federal Court professional development days with an anthropological perspective on applied matters.

The program for the forthcoming CNTA annual conference – Let's Talk! Unexpected Challenges in the Native Title Environment – on 8-9 February 2024 at Lincoln College, University of Adelaide is available on the CNTA website. Keynote Speaker is the NNTT President Mr Kevin Smith.

You can register by simply contacting the CNTA Research Fellow. Registration is free.

CNTA's website (www.cnta.org.au) has a range of support materials for practitioners; especially tailored in some instances to those beginning a career in native title research claim and post-determination work.

Podcast interviews and perspectives on theoretical questions and applied native title matters are discussed, offering informed views and addressing challenging questions. Conference papers and articles relevant to field researchers are also posted. CNTA recently refreshed the homepage layout to increase consumer access including uploading new material – one of which is the result of the sector-wide survey on working conditions and workforce trends for anthropologists and associated native title workers conducted early in the year.

CNTA advocates the importance of supporting related organisations operating in the

native title system and by way of demonstrating this commitment, CNTA collaborated this year (2023) with the Anthropological Society of Western Australia (**ASWA**) whose members are heavily involved in assisting First Nations parties to preserve and protect cultural heritage in an enthusiastic state-government mining environment.

In September 2023, CNTA joined with the Anthroprospective for an extended discussion of the relationship between Ethics, Advocacy and Expertise in anthropological practice. Photographs of the event are available on the CNTA website and on the Anthroprospective Instagram and Facebook pages. Guest speakers were Erica Taylor from ExpertDirect, scholars Jon Altman, Melinda Hinkson (Institute of Post Colonial Studies), Bain Attwood, Nicolas Peterson and CNTA Director (David Trigger). Ms Courtney Boag, Dr James Rose, and Dr Debora Lanzeni took up themes aired initially in their presentations at the Anthroprospective event. Other speakers contributing to the event's theme are detailed in the full program and alongside available pictures on the CNTA website.

In an operating environment now requiring attention on future professional workforce development and retention in claim resolution, compensation, and cultural heritage, CNTA is looking to foster further synergies with other native title players. A first step in this direction was the inaugural workshop held in Brisbane for First Nations staff working in native title organisations (native title representative bodies, native title service providers and land councils) as field staff, cultural advisers, and liaison officers.

Participants at the Ethics, Advocacy and Expertise event, Queens College

National Native Title Tribunal President Mr Kevin Smith, Associate Professor Suzi Hutchings (RMIT) and event participants, Queens College

We were pleased to have the President of the National Native Title Tribunal Mr Kevin Smith join us, along with some of his staff. Associate Professor Suzi Hutchings (RMIT) was a guest speaker describing her experiences as a First Nations anthropologist in native title.

The workshop was jointly facilitated by Dr Tahnee Innes from Cape York Land Council and CNTA Director Ms Petronella Vaarzon-Morel.

CNTA also sponsored a two-day workshop for Native Title Research Managers in Brisbane on the same dates. It is important for this group to have dedicated opportunities to meet and discuss common problems, as well as staffing challenges in a supportive collegial environment.

If you are keen to find out more about CNTA activities or just keep in touch with CNTA events, and current job vacancies you can join the CNTA Email distribution list by contacting the Research Fellow Dr Julie Finlayson.

Julie Finlayson (Dr.)
CNTA Research Fellow
M 0419 994 708

Bladensburg, Guwa Koa Country

Section 60AAA – a tool for internal consensus building and dispute resolution on the journey to self-determination

By Kevin Smith, President of the National Native Title Tribunal

As early as the High Court's Mabo #2 judgment in 1992, it was clear that native title was the recognition of traditional rights and interests over land and waters rather than the recognition of the actual traditional laws and customs from where those rights and interests originate. It was also made clear in that first native title case and many court cases since that ongoing acknowledgement and observance of traditional laws and customs, with some adaption by native title holders, is critical to prove native title as well as maintain it for generations to come. This means that traditional laws and customs are never 'frozen in time'. Instead, they remain as vital and vibrant as the day they came into being many a millennia ago, by the deliberate acts and intentions of the same body of people generation after generation, who stood united despite the external challenges in abiding by them.

There are two fundamental rules for cultural longevity. First is the ability of a People to be able to define itself, and second, their commitment to maintain unity. In other words, sustainability depends upon a nation's ability to decide its own identity in accordance with traditional laws and customs, but just as importantly, how to maintain that identity by constructively resolving internal difference that might threaten cohesion.

The oldest continuing cultures on the planet know these things. Yet living in a coexisting reality in the nation state of Australia – in a bi-cultural world – presents challenges that must be actively managed to assure longevity.

This two-world reality is brought into clear focus in the post-determination space where registered native title bodies corporates (commonly known as prescribed bodies corporates, **PBCs**) must navigate complex legislative, regulatory and administrative regimes with limited resources, while always acting in the best interests of common law native title holders. Native title holders must also live in the same two-world reality. This is complex stuff – it is the nature of two-world governance. However, the ability to anticipate disputes and put in place processes to manage them may serve as a handy compass to navigate this complexity.

While these challenges might seem relatively new with a growing critical mass of PBCs,[1] the signs of things to come were present even in the Mabo #2 judgment. When the High Court held that the 'Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer…'[2] the court did not deal with how Meriam would apply those recognised rights as amongst themselves in relation to Mer, Dauar and Waier. That was a matter for Meriam to work out among themselves applying their law and customs. Every native title determination since Mabo #2 sets out the persons or group of persons who hold common or group native title rights and the relationship between those rights and other interests within a determination area[3], but invariably the determination is silent on how the native title group will decide internal matters relating to those rights. This is as it should be, but common law holders and their PBCs must take the time to work through many existing and prospective matters, preferably before they escalate into disputes. Plainly, it is always wise to work out a dispute resolution process before there is an actual dispute but often this does not happen due to competing priorities.

This is a long introduction to the point of this paper. On 25 March 2021, a new section in the *Native Title Act 1993* (Cth) (**NTA**) into force. Section 60AAA gave the power to PBCs and common law holders to request the National Native Title Tribunal (**NNTT**) to assist in promoting agreement about matters relating to native title or the operation of the NTA, as between different PBCs (presumably this will mainly be between neighbouring PBCs but not necessarily), as between the PBC and its common law holders as well as between common law holders themselves. The new section is intentionally broad to cover the many circumstances that currently exist or may arise. Importantly, s 60AAA contemplates that agreement making will be complex, sensitive work and hence requires that the NNTT not disclose information imparted during the provision of this assistance without the prior consent of the person who provided the NNTT the information.[4]

It is important to note that this amendment came into existence at the same time other changes were made to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)* (**CATSI Act**), the legislation under which PBCs are incorporated. The CATSI Act included three interrelated changes; the requirement for the PBC rule book to have a specific rule to deal with disputes involving common law holders or persons who claim to be common law holders;[5] that the PBC include eligibility requirements for membership for all common law holders to be represented, directly or indirectly[6]; and mandating that directors of PBCs accept to membership persons who meet eligibility requirements.[7] These changes may seem unusual for corporations, but they reflect the unique situation that common law holders[8] are either the principal (in the case of agent PBCs) or the beneficiary (in the case of trustee PBCs). Importantly, common law holders are also entitled to participate in decision-making and obtain information under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (**PBC regs**).

While all these new and existing rules are aimed at improving transparency and accountability, the complex interrelationship of those rules with traditional laws and customs and how they play out on the ground may well be the cause of new disputes. The NNTT's institutional experience acquired over almost thirty years[9] can assist PBCs and common law holders alike to navigate this complexity. Indeed, over thirty years of active interaction with the native title system, the NNTT has acquired a deep understanding of the types of disputes and a suite of options that might assist First Nations. The NNTT delivers these services with a firm commitment to professionalism, cultural sensitivity, and providing practical guidance that secure enduring outcomes for First Nations that advance their ultimate objective of Indigenous self-determination.

Finally, s 60AAA came into existence on the premise that there are five stakeholders or institutions that have an important role to play in the native title system: PBCs, native title representative bodies/service providers, Office of the Registrar of Indigenous Corporations (**ORIC**), NNTT and the Federal Court of Australia (**FCA**). The first four stakeholders have a crucial role in assisting First Nations to build consensus and resolve disputes along the way on their journey of self-determination. Realistically, not all disputes are capable of resolution by alternative approaches, and some will have to go to the FCA for resolution. However, the NTA, CATSI Act and PBC regs contain processes designed to avoid or reduce the impact of disputes. Section 60AAA is one of several processes that can be used to resolve or manage disputes at key points to avoid court litigation on matters that are essentially things which only the First Nation can resolve. This is why information, education and mediation are powerful tools in a First Nation's journey. The dedicated team at the NNTT is ready, willing, and able to provide its experience, expertise, and professionalism to walk with First Nations on that journey.[10]

---

1 There are currently 269 PBCs with rough predictions indicating that there could be around 320 PBCs in existence before the recognition phase of native title finalises in coming decade.

2 *Mabo v Queensland [No.2]* (1992) 175 CLR 76

3 NTA s 225.

4 Ibid s 60AAA(4).

5 CATSI Act s 66-1(3B).

6 Ibid s 141-25(2).

7 Ibid s 144-10(3A).

8 As defined by the native title determination (see s 225 and s 192 National Native Title Register)

9 2024 marks the thirtieth anniversary of the implementation of the NTA and establishment of the NNTT.

10 Post Determination Assistance (nntt.gov.au)

UNHRC decision holds Australia breached rights of Wunna Nyiyaparli people

By Clare Sayers

Dingo, Yandruwandha Yawarrawarrka country

On 10 July 2023, the United Nations Human Rights Committee (**UNHRC**) published an opinion determining that Australia had violated the rights of the Wunna Nyiyaparli people under the International Covenant on Civil and Political Rights (**ICCPR**) after the Wunna Nyiyaparli's native title claim was dismissed by the Federal Court of Australia (**Court**).

The Wunna Nyiyaparli claim was filed in January 2012 over an area of the eastern Pilbara, Western Australia. The Wunna Nyiyaparli claimed that they had the right to speak for this country. The Wunna Nyiyaparli claim was overlapped by a wider Nyiyaparli claim which was filed in 1998.

The Wunna Nyiyaparli claim was filed by people who had once been considered a part of the Nyiyaparli claim but were excluded in 2010 after anthropological research suggested their Nyiyaparli ancestor was not a Nyiyaparli person. This issue was debated by the parties and in 2016 the Court ordered a separate question proceeding be held to determine whether the Wunna Nyiyaparli people were part of the Nyiyaparli people.

While the Wunna Nyiyaparli initially had legal representation, by the time of the separate question proceeding, they were self-represented. The Wunna Nyiyaparli indicated to the UNHRC that this was due to a lack of funds. Additionally, the Wunna Nyiyaparli were unable to obtain legal aid, and could not keep up to date with the claim due to unreliable internet access. Without access to legal advice, the Wunna Nyiyaparli misunderstood the purpose of the proceedings, believing they were for the determination of their claim. That belief was based on the further belief that as their claim had passed the National Native Title Tribunal registration test the question of their Nyiyaparli heritage had been resolved in their favour.

On 11 July 2016, three Wunna Nyiyaparli people attended the hearing, but because they were prepared to argue their claim and not their status as Nyiyaparli persons, the Court did not allow them to give evidence. The Court considered the Wunna Nyiyaparli had not engaged in the proceedings satisfactorily by failing to meet programming deadlines leading up to the hearing, and felt that it would not be in the interests of justice to delay the hearing. On that basis, the hearing proceeded, and the Court held that the Wunna Nyiyaparli people are not Nyiyaparli people. As a result, the Wunna Nyiyaparli claim was dismissed. In 2018, the Nyiyaparli claim was determined, which eliminated the possibility of the Wunna Nyiyaparli ever being granted native title in their previously claimed area.

In 2019, Wunna Nyiyaparli elder Ailsa Roy applied to the UNHRC claiming that the Wunna Nyiyaparli's rights under the ICCPR had been violated. Upon review, the UNHRC found that

the Australia (via the Court) had violated the Wunna Nyiyaparli's cultural rights under article 27 of the ICCPR by effectively disallowing their participation in the proceedings which resulted in the dismissal of their claim.

Article 27 of the International Covenant on Civil and Political Rights

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The UNHRC affirmed that the exclusion of the Wunna Nyiyaparli from the proceedings contravened the principles of equality before the court and the right to a fair trial and called for Australia to expand the provision of legal aid to more than just criminal proceedings. The UNHRC provided Australia with 180 days to find an effective and enforceable remedy.

Australia is not bound to follow the directions of the UNHRC, and at the time of writing, Australia has not commented on the decision. Whether or not Australia responds to the UNHRC proposing a remedy, this case has drawn international attention to the native title process in Australia. It may also prompt other native title parties to seek redress via international institutions where they feel the Australian system has failed them.

i The opinion (UN Treaty Body Database reference number CCPR/C/137/3585/2019) can be accessed here: https://scottcalnanlawyer.com.au/wp-content/uploads/2023/07/Human-Rights-Committee-Decision_Unedited_110723_.pdf

ii The International Covenant on Civil and Political Rights can be accessed here: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

Grasstree, Wakka Wakka Country

Case notes

Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia [2023] FCAFC 73

By Clare Sayers

On 22 May 2023, the Full Court of the Federal Court of Australia (**Full Court**) handed down its judgment in *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia*.[1] The Full Court's judgment is an important one regarding the interaction between native title and constitutional law.

The decision concerned a separate question arising from the Gumatj People's native title compensation claim which was filed in 2019. As part of those proceedings, the Gumatj People are claiming compensation for the extinguishment of native title by various acts of the Commonwealth and Northern Territory governments prior to the commencement of the *Racial Discrimination Act 1975* (Cth), including:

a) the vesting of all minerals on the Gove Peninsula in the Commonwealth under Mining Ordinance 1939 (NT) and Minerals (Acquisition) Ordinance 1953 (NT);

b) the grant of at least five special mineral leases and one special purposes leases granted between 1958 and 1968; and

c) other past acts and intermediate period acts validated by the Northern Territory under the Validation (*Native Title Act) 1994* (NT).

The Commonwealth of Australia (**Commonwealth**), as the first respondent in the matter, sought clarification from the Full Court on a number of questions which essentially boiled down to the following:

a) Does the just terms requirement contained in section 51(xxxi) of the Constitution apply to laws enacted pursuant to the 'territories power' of section 122 of the Constitution, including the *Northern Territory (Administration) Act 1910* (Cth) and the Ordinances made thereunder?

b) If section 51(xxxi) does apply, can the extinguishment or impairment of native title rights and interests by exercise of the Crown's radical title give rise to an acquisition of property for the purposes of section 51(xxxi) of the Constitution?

The Full Court answered both questions in the affirmative. In relation to the first question, the Full Court's decision was essentially guided by High Court precedent. The Commonwealth had argued that a previous High Court decision, *Teori Tau v Commonwealth*[2] (***Teori Tau***), compelled the High Court to find that section 51(xxxi) did not apply to laws enacted under section 122 of the Constitution, and that a subsequent decision on a similar matter, *Wurridjal v Commonwealth*[3] (***Wurridjal***), did not affect that outcome. The Full Court, however, found that *Wurridjal* did in fact overrule *Teori Tau*, and therefore, the Full Court was bound to find that section 51(xxxi) does apply to laws enacted under section 122 of the Constitution.

With respect to the second question, the Commonwealth's main argument was that native title rights and interests are not property, and therefore the extinguishment or impairment of native title rights and interests cannot be considered an acquisition of property for the purposes of s 51(xxxi) of the Constitution. The Commonwealth submitted that native title is inherently defeasible and argued that the High Court has consistently describe native title as 'inherently fragile'.

The Full Court rejected this. It stated that the High Court's references to the fragility of native title rights and interests applies only in the sense of the Crown's prevailing rights to the land where there is an inconsistency between the Crown's rights and interests and native title rights and interests.

The Full Court went on to explain that native title rights and interests are indeed property that can be acquired for the purpose of section 51(xxxi)

of the Constitution. It is the proprietary nature ascribed to rights and interests arising under traditional law and custom by the *Native Title Act 1993* (Cth) (**Native Title Act**) that is extinguished in instances of extinguishment. Put another way, it is not the normative systems of Indigenous people that are extinguished (because traditional law and custom exist whether or not they are recognised by Australian law). Rather, it is the categorisation of rights and interests arising from traditional law and custom as 'native title' (i.e. a type of property right under Australian law) that is extinguished. It is this feature of native title rights and interests that gives them a proprietary nature, and allows them to be acquired within the meaning of section 51(xxxi) of the Constitution.

The Full Court's decision in this matter means that the claimed acts are potentially compensable acts under the Native Title Act, for which the Commonwealth may be liable. Some estimates have put the potential value of compensation payable by the Commonwealth at $700 million.[4] However, the matter is far from settled; the Commonwealth has filed an application for special leave with the High Court. As at the date of this article, it is not yet known when the leave application will be heard.

For a more in-depth case note on this case, please refer to the Native Title Law Database.

1 [2023] FCAFC 75.

2 (1969) 119 CLR 564.

3 (2009) 237 CLR 309.

4 https://www.afr.com/politics/federal/late-yunupingu-wins-final-court-battle-in-landmark-native-title-case-20230522-p5dabd#:~:text=The%20late%20Yunupingu%20has%20won,as%20much%20as%20-%24700%20million.

Magnetic termite mounds, Larrakia Country

Case notes

Nona on behalf of the Badulgal, Mualgal and Kaurareg Peoples (Warral & Ului) v State of Queensland (No 5) [2023] FCA 135

By Clare Sayers

Rock background, Guwa Koa Country

On 27 February, 2023, the Federal Court of Australia (the Court) handed down its decision in *Nona on behalf of the Badulgal, Mualgal and Kaurareg Peoples (Warral & Ului) v State of Queensland (No 5)* [2023] FCA 135 (***Nona***). The decision concerned the issue of ownership of the islands of Warral and Ului in the Torres Strait. Three native title groups claimed native title rights and interests in the islands, being the Badulgal People, the Mualgal People and the Kaurareg People. Ultimately, the Court found that the Badulgal People and Mualgal People hold shared native title rights and interests in the islands, and that the Kaurareg People do not hold native title in the islands.

Warral and Ului are not permanently inhabited islands but are known as a stop for people travelling between the Kaurareg home islands and Badu, Mua and Mabuaig. Warral and Ului were first subject to a native title claim in 2002 by the Badulgal People. The Kaurareg People subsequently filed a claim over the islands, and the Mualgal People joined to claim rights. In 2015, the parties came to an agreement that the three groups shared ownership of the two islands, and in 2020, a formal 'shared ownership' claim was filed with the Court.

Objections were made to the shared ownership claim by a group of Badulgal men who argued that Warral and Ului belonged only to the Badulgal People in accordance with traditional law and custom. The State of Queensland agreed their objection should be heard by the Court, and in July 2020, the Court agreed to hold a trial to answer the question of who holds native title in Warral and Ului.

During the trial, the Court heard evidence from the Applicant (being the three groups) on a variety of matters including: family histories; visits to Warral and Ului and what people did there; how people gathered resources from the islands and the surrounding sea; who built structures on the islands; traditional lore; burial sites; historical accounts of clashes and warfare, and so on. The State of Queensland provided evidence showing the islands traditionally belong to the Badulgal People and Mualgal People. Based on the evidence provided by the parties, the Court decided that the Applicant had not proven that all three groups shared native title rights and interests in the islands.

The Court found that the Badulgal People's evidence for native title in the islands was very strong, and that the evidence supporting the Mualgal People's native title in the islands was strong. However, the Court did not find that the Kaurareg People's evidence supported their claimed native title rights. Rather, the Court found that the Kaurareg People's use of the islands stemmed from their forced removal to Mua in the 1920s, but also because of gud pasin (or 'good fashion', meaning the proper way to behave) and their close relationship with the Mualgal People.

In regard to the native title rights and interests held by the Badulgal People and Mualgal People, the Court found that these rights were exclusive, meaning that the groups have the right to the possession, occupation, use and enjoyment of the islands to the exclusion of all others.

Case notes

Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

By Clare Sayers

Background and first instance

This case concerned an appeal by Santos, an international energy company, to the Full Court of the Federal Court of Australia (**Full Court**) of an earlier decision in which the Federal Court of Australia (**Federal Court**) found that Santos did not properly consult with traditional owners of the Tiwi Islands in relation to its proposed drilling activities in the Barossa gas fields, approximately 128km north of the Tiwi Islands (*Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 (***Tipakalippa (No 2)***).

In the first instance, the Federal Court found that Mr Dennis Tipakalippa (the named applicant) and other traditional owners of the Tiwi Islands had interests in the area that could be potentially affected by a petroleum spill, if one were to occur once Santos began its drilling activities. Theinterests arose from the Munupi clan's traditional rights to sea country in the Timor Sea (where the Barossa gas field is located). Interests included longstanding spiritual connections to the area as well as traditional hunting and gathering activities. Mr Tipakalippa argued that, while Santos' Environment Plan (EP) included reference to these interests and activities, it did not demonstrate that Mr Tipakalippa or any other traditional owners of the Tiwi Islands were consulted.

For the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) to be able to accept Santos' EP for its drilling activities, the Federal Court stated NOPSEMA had to be reasonably satisfied that Santos had met its consultation obligations set

Spiderweb, Turrbul Country

out under regulation 11A of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) (**Offshore Petroleum Regulations**). These obligations included consulting with relevant persons, including those whose 'functions, interests or activities may be affected by the proposed activities to be carried out' under an EP.

As the EP did not demonstrate that Mr Tipakalippa or any other traditional owners had been consulted by Santos, the Federal Court was of the view that NOPSEMA could not have been reasonably satisfied that Santos had met its consultation obligations. On that basis, the Federal Court set aside NOPSEMA's decision to accept the EP.

The appeal

Santos appealed to the Full Court which upheld the Federal Court's decision. In its decision it provided further clarity on the requirements for consultation under the Offshore Petroleum Regulations.

First, Santos had argued that a broad interpretation of 'functions, interests or activities' (which includes rights to sea country as an interest) would be unworkable in terms of trying to contact all persons who may hold such an interest. The Full Court disagreed and stated that there are ways to consult with large groups of individuals, such as holding a public meeting. By way of example, the Full Court referred to authorisation meetings that are held pursuant to the *Native Title Act 1993* (Cth), which provide native title claimants with an opportunity to meet, be informed of and comment on various matters relevant to them.

Additionally, a broad interpretation of the terms 'functions, interests or activities' serves the purpose of consultation under the Offshore Petroleum Regulations, which is to allow all people whose functions, interests or activities might be affected by the proposed activity the opportunity to consider the impacts of it and have input into the development of the EP. The Full Court found that a narrow interpretation of the terms (such as a legal interest only, as suggested by Santos) would undermine that purpose.

Second, the Full Court stated that contacting the relevant land council or representative body for the area is one step towards consultation, but it should not be the last step. The Full Court noted that all Aboriginal and Torres Strait Islander groups have some sort of intramural structure, such as elders and family groups, and many groups now have their own organisations or corporations. On that basis, the Full Court disagreed with Santos' argument that consultation based on a broad construction of 'functions, interests or activities' would be unworkable.

The Full Court provided guidance on what consultation under the Offshore Petroleum Regulations requires. A proponent or titleholder must:

a) provide sufficient information to each relevant person to allow them to make an informed assessment of the potential consequences of the proposed activity in relation to their functions, interests or activities;

b) consult in a genuine manner, which includes providing a reasonable timeframe for consultees to review the material provided, identify the potential effects of the proposed activities, and to response to the proponent if they choose to do so; and

c) adopt appropriate measures in response to the concerns conveyed to the proponent by a consultee during consultation.

d) As at the date of this article, Santos is preparing revising its EP for the proposed drilling activities which will supersede the earlier EP. According to Santos, the new EP will take into consideration the Federal Court's and Full Court's decisions and will include further information. Santos has not yet submitted the new EP to NOPSEMA for assessment.

Consequences of the decision

Following the Full Court's handing down of its decision, NOPSEMA released new guidelines on consultation under the Offshore Petroleum Regulations. The guidelines, titled 'Consultation in the course of preparing an environment plan' were released in May 2023 and are based on the principles enunciated in the Full Court's judgment.

Further, the Offshore Petroleum Regulations will be repealed from 10 January 2024 by the *Offshore Petroleum and Greenhouse Gas Storage Legislation (Repeal and Consequential Amendments) Regulations 2023.* The Offshore Petroleum Regulations are being repealed as they are due to sunset on 1 April 2024, and will be replaced by the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023* (**the 2023 Regulations**).

Eastern Maar Country

Case notes

Blucher on behalf of the Gaangalu Nation People v State of Queensland (No 3) [2023] FCA 600 ('Gaangalu')

by Tegan Barrett-McGuin

On 15 June 2023, Justice Rangiah handed down a decision in *Blucher on behalf of the Gaangalu Nation People v State of Queensland (No 3)* [2023] FCA 600 (***Gaangalu***); a native title claim over approximately 25,506 km2 of land and waters in Central Queensland (**the Claim Area**). His Honour found that native title does not exist in the Claim Area primarily due to a lack of evidence demonstrating continuity of traditional laws and customs.

The claim was filed in August 2012, describing the claim group as the biological descendants of 29 named ancestors (**the Gaangalu Ancestors**). The Gaangalu Applicant claimed that rights and interests were held in accordance with the traditional laws and customs of the regional society of which they are part (and which included Gaangalu Garingbal and Wadja peoples) (**the Regional Society**) and could be acquired through either parent and that each claim group member holds the rights equally.

On 5 November 2019 Rangiah J ordered a trial on a separate question in matter to determine whether – apart from any extinguishment - native title exists in the claim area, and if so, where? The trial took place over 12 days in April 2023, in Biloela, Blackwater and the Blackdown Tablelands, with evidence given by 20 Gaangalu people (with the Applicant also relying upon three affidavits of deceased claimants). Expert evidence was adduced from an historian and two anthropologists (**the Anthropologists**). The State of Queensland (**the State**) was the only active respondent in the proceeding.

The parties agreed on the traditional laws and customs of the Regional Society at a general level including land holding, inalienability of rights, landed spirituality and mythology, totems, moieties and systems, kinship and marriage rules, funerary practices, resource use, gendered sites and initiation ceremonies. Following the evidence, the key issues in dispute were whether the Gaangalu ancestors occupied the entire claim area at effective sovereignty (the occupation issue) and whether the laws and customs acknowledged and observed by the Gaangalu claim group had changed too much to be considered 'traditional' (**the continuity issue**).

The occupation issue

Regarding the occupation issue Rangiah J agreed with the State, finding that the evidence did not establish that the Gaangalu Ancestors occupied certain areas in the east of the claim area near Mount Morgan. To establish their occupation of the Mount Morgan area, the Gaangalu Applicant relied on Tindale records and evidence from a small number of claimants who were told by their old people that Mount Morgan was their Country. His Honour found this evidence was inconsistent with other historical evidence which recorded the relevant ancestors living in other places prior to Mount Morgan. There was also evidence which associated a number of other Aboriginal peoples with the area. For these reasons, Rangiah J did not find the Gaangalu Applicant's evidence for Mount Morgan satisfactory and found that Gaangalu Ancestors only occupied part of the claim area.

The continuity issue

Regarding continuity, Rangiah J considered that while some of the traditional laws and customs had been followed substantially uninterrupted since sovereignty, key laws and customs that gave rise to rights in Country had changed too much to be considered 'traditional'. In particular, his Honour considered there was insufficient evidence to explain how the laws regarding rights inheritance and rights holding were traditional. His Honour also found that the laws and customs regarding spiritual mythology, as well as some others peripherally connected to rights and interests in land and waters, did not continue.

Fallen tree, Butchulla Country

Regarding inheritance of rights, the parties agreed that traditionally people inherited 'primary' rights to their father's Country and some secondary rights to their mother's Country (**patrilineal descent rule**). Today, however, Gaangalu people can inherit all claimed native title rights in Country through either parent (**cognatic descent rule**).

Rangiah J considered the cognatic descent rule was too different from the patrilineal descent rule and there was no evidence explaining how it could be considered traditional. His Honour found the Anthropologists explanations unhelpful because they did not directly apply them to the Gaangalu claim area or identify any evidence from within the claim area to support their theories. The only other evidence his Honour considered relevant to the continuity question was historical records documenting colonial violence and displacement within the claim area and surrounds. His Honour found this evidence was "...consistent with consequential loss of traditional law and custom".[1] For these reasons, Rangiah J concluded that the cognatic descent rule had been adopted sometime after effective sovereignty and it was not an adaptation of traditional law and custom rather than a completely new rule.

His Honour applied a similar logic to the question of how rights in Country are held. The parties agreed that under traditional laws and customs, rights to small areas of Country within the claim area were held locally by patriclans. Today, however, all Gaangalu people hold the same rights and interests across the whole claim area. There was also an argument arising from the evidence that some families hold differentiated rights to the east or the west side, based on their ancestor's association with that area. Rangiah J considered both positions but again found insufficient evidence to demonstrate that either rule was an adaptation of traditional laws and customs. His Honour suggested that, to demonstrate how today's rule was traditional there would need to be evidence of traditional succession occurring within the claim area, which there was not.

Regarding spiritual mythology, Rangiah J considered some of the stories that claimants gave evidence of had their roots in traditional laws and customs. However, his Honour found that the evidence was inconsistent between claimants and lacking in detail, so could not demonstrate continuity since pre-sovereignty. Rangiah J also found that a number of traditional laws and customs which would have been somewhat connected with rights in Country had not continued. Specifically, male and female rituals, including initiation ceremonies and increase ceremonies, were no longer practised; the complex systems of sections, moieties and associated marriage rules had lost their nexus to rights in Country; and the relevance of totems to rights in Country had also been lost.

His Honour also highlighted that the Gaangalu Applicant had pleaded the laws and customs were those of the Regional Society but had not demonstrated the continued existence of that Regional Society.

Ultimately Rangiah J found native title no longer exists in the Gaangalu claim area. Rangiah J did however acknowledge the sense of loss the decision would cause the Gaangalu people and recommended law reform to give the Court the power to make a declaration recognising the past occupation of ancestors of a claim group in the event of a negative determination.

---

[1] [1060]

CONTRIBUTE TO THE NATIVE TITLE NEWSLETTER

If you would like to make a contribution to future newsletters please submit an abstract to nativetitleresearchunit@aiatsis.gov.au

Subscribe to ICGU publications and resources

If you would like to subscribe to the Native Title Newsletter electronically, please go to: aiatsis.gov.au/subscribe
All ICGU 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.

For previous editions of the Newsletter, go to:
aiatsis.gov.au/native-title-newsletter

Indigenous Country and Governance Unit

Australian Institute of Aboriginal and Torres Strait Islander Studies

GPO Box 553 CANBERRA ACT 2601
P 02 6246 1111
E nativetitleresearchunit@aiatsis.gov.au

AIATSIS