NATIVE TITLE NEWSLETTER

APRIL 2013

AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

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WELCOME TO THE *NATIVE TITLE NEWSLETTER*

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

The Newsletter includes feature articles, 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 www.aiatsis.gov.au/ntru/newsletter.html

We welcome your feedback and contributions. For more information, please contact: gabrielle.lauder@aiatsis.gov.au or bhiamie.williamson@aiatsis.gov.au

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Cover image: Pampila Hanson Boxer fishing for bait in the Fitzroy River.
Credit: Patrick Sullivan

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.

Editors: Gabrielle Lauder and Bhiamie Williamson, NTRU, AIATSIS
Design and typesetting: Amity Raymont, NTRU, AIATSIS
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Shaping the future

NATIONAL NATIVE TITLE CONFERENCE • 2013

ALICE SPRINGS CONVENTION CENTRE, 3–5 JUNE

By Jennifer Jones

We are pleased to announce that Professor Robert A. Williams Jnr from the University of Arizona will be the International Keynote Speaker at the 2013 conference. Professor Williams Jnr is an American lawyer who is a notable author and legal scholar in the field of the Federal Indian Law, International Law and Indigenous Peoples Rights, and Critical Race and Post-Colonial Theory. Professor Williams teaches at the University of Arizona's James E. Rogers College of Law, serving as the E. Thomas Sullivan Professor of Law and American Indian Studies and Director of the Indigenous Peoples Law and Policy Program. He is also the project leader of Arizona Native Net, a virtual university devoted to the higher educational needs of Native Nations.

We are also proud to announce that Miles Franklin Award winner Alexis Wright is the Keynote Speaker on Mabo Day. Alexis is a member of the Waanyi Nation of the southern highlands of the Gulf of Carpentaria. Her writings include the novels *Plains of Promise*, *Carpentaria*, *The Swan Book*, non-fiction book *Grog War*, and she is the compiler and editor of *Take Power*. Her latest novel, *The Swan Book*, will be published in August 2013. Alexis is a Distinguished Research Fellow in the Writing and Society Research Group, University of Western Sydney.

Alexis' Mabo lecture will be accompanied by members of the Black Arm Band on stage to perform excerpts from *Dirtsong*, music inspired by Alexis' words. The performance features songs performed in 11 different Aboriginal languages by some of the most extraordinary musicians in the land.

Since its beginnings in 2006, over 50 different artists have performed with the The Black Arm Band. They have performed to audiences of over 100,000 people, in remote communities and in every state and territory in Australia as well as on the world's foremost stages across the globe. The Black Arm Band have recently returned from New York where they made their USA debut.

Partnered with The Fred Hollows Foundation, The Black Arm Band Company undertakes tours to and works in remote and regional Indigenous communities. Using the power of music, full-scale performances and workshop programs they aim to promote and enhance holistic community health and wellbeing.

More keynote speakers will be announced over the coming month, so keep up to date via our conference website, Facebook and newsletters leading up to the conference. Our Facebook page is updated with photos and current information as it comes to hand, so make sure you visit this page. We look forward to feedback from you.

Preparations for the conference are now underway at full pace. The conference team visited Alice Springs from Tuesday 12 March to Thursday 14 March to meet with our co-conveners, Central Land Council and our hosts for the conference, Lhere Artepe Aboriginal Corporation.

While there Lisa Strelein, Jennifer Jones and Shiane Lovell visited the Alice Springs Convention Centre to finalise logistics for the conference. We were also invited to visit the Batchelor Institute of Indigenous Tertiary Education at the Desert Knowledge Precinct. It was great to meet with staff and students to learn more about their work.

The Program Committee is busy with over 100 call for papers submissions received. We have closed the call for papers, but if you are interested in submitting a paper, please contact the conference team as soon as possible as we are currently making decisions about submissions received.

The three days will be a great opportunity to catch up with friends, network and participate in sessions of interest. We look forward to seeing you there.

For more information and to register, visit our conference website at:
http://wired.ivvy.com/event/ntc13/

STRONGER CONNECTIONS MAKE STRONGER PEOPLE: AN INTERVIEW WITH PATRICK WHEELER, ON BEHALF OF THE TAGALAKA PEOPLE

Patrick Wheeler. Credit: North Queensland Land Council (NQLC).

On 10 December 2012, the Federal Court recognised the Tagalaka people as native title holders, granting rights and interests over lands and waters in the south-east Gulf of Carpentaria, including the township or Croydon.

The Tagalaka region

The determination area is about 30,000 square kilometres and is about 700 to 800 kilometres directly west of Cairns. It incorporates three local government areas and parts of the Carpentaria Shire as well as Etheridge Shire.

Croydon itself was a major gold mining town back in the late 1800s. It was actually the third largest town in Queensland if that gives you any indication of the population of Croydon back then. The population of Croydon today is only about 300 people if that, so obviously times have changed. As far as country is concerned, it can be very harsh country but then it's what you make of the country.

The area changes, from hilly country to hard, rough, harsh terrain. If we are lucky we have a three monthly wet season. You need to know the country, where the water is and the river systems. If you have respect for the country, the country will look after you. There are areas heading towards the west of the claim area, over towards Normanton, where it is very harsh as well. There is a lot of timber growth, but not timber as in rainforest; stunted timber due to the limited wet seasons. You have to also think about the remnants of the mining days: there are that many mine shafts, particularly around the town itself, that you can't just go wandering around.

The native title process

The claim process took more than 10 years. It started back in 1998, when the original claim was lodged, and then the second claim came in 2001. In between those two claims, while establishing native title, many Indigenous land use agreements (ILUAs) were negotiated and put in place. It was a long period of time to wait for a native title determination, but the benefit of that long process was the awareness and education for both Indigenous and non-Indigenous peoples that came out of it.

Like most communities, we all know the past isn't something we can really boast about. Through the process of dispossession a lot of people were forcibly removed from the area: as far up north as Weipa, down to the likes of Cherbourg and east to Palm Island. The 10 years plus leading to the determination brought people back together. People were connected to this region through that process. You had people at the planning meetings saying, 'Oh look, this is my Grandmother and that's my Grandfather' and so on. Some of these people have known and worked with each other for years and didn't even know they had connections to each other and back to this country.

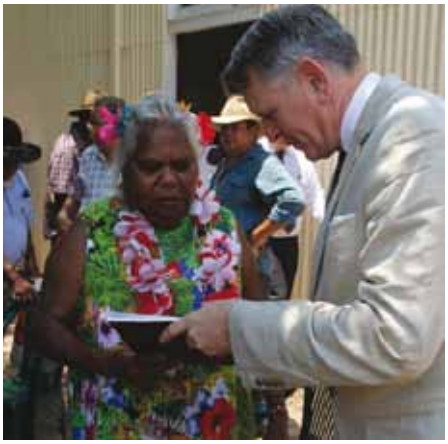
We have a lot of unwritten knowledge, but it's all verbal stuff. It's disapppointing that the native title system places so much emphasis on written knowledge. Anthropologists came through here in the 1900s and it's their snapshots in time that have now become gospel. When we do native title connection back to country through modern processes with computers and so forth, a lot of our oral history no longer exists. Once we established all that connection again it really made everyone feel as though they had returned back home.

That re-connection to country will now will be around forever. Before that it was like trying to put the pieces of a jigsaw back in to place. So now there are people who can come forward and claim their native title rights. It's going to be something that our education curriculum doesn't provide, this kind of education or service. Now that we have access to information that came out of the determination you can see who you belong to or where you come from or who you are related to throughout the whole Croydon region. Stronger connections make stronger people and obviously a brighter future can be established out of that. A lot of that old history will provide a sense of community and a sense of belonging.

Challenges

Native title is a challenge within itself, even today. For a lot of Tagalaka people, being geographically isolated certainly disadvantages us. Having limited funds or no funds to try an educate ourselves in this whole process was the main challenge. If things had been different, if we were in a better financial situation, and if navigating the native title system was more widely communicated, many of our challenges would have been easier to understand and overcome.

The Tagalaka people overcame these challenges through their ambition, passion and endurance. It's the same story around Australia, where you got all these Indigenous people who are passionate and keen about making things happen. Although sometimes this comes at a cost: being away from families, being able to do this on limited funds, and sometimes no funds at all. If it meant that we had to go to Cairns that often meant that the directors [of the Tagalaka Aboriginal Corporation] had to put up the money themselves out of their own pockets. So that's one significant way in which we overcame these challenges; pure passion and and a commitment to making this native title determination happen.



Aunty Janet Busch with Justice Logan at the Tagalaka determination.

Credit: NQLC.

Going forward

The Tagalaka Aboriginal Corporation has a long established history pre-native title and this corporation is now undergoing a transition period as it becomes the PBC [Prescribed Body Corporate]. For Tagalaka to go forward it's really important that we have good knowledge of the native title system and processes, for example, the *Native Title Act* and the PBC constitutions. Once that becomes apparent, people will say 'hold on, these people do know about native title'. Your vision is then formulated based on knowledge. After building that knowledge base, then opportunities will present themselves. We can't get up and say 'We're going to do this and we're going to do that' without first knowing the system.

Obviously there is still a long way to go, especially in terms of understanding native title. But at least now with the determination in place there are pathways to go forward collaboratively. If there are more seats around the native title table, it will be for the benefit of all.

"NATIVE TITLE IS A CHALLENGE WITHIN ITSELF, EVEN TODAY... THE TAGALAKA PEOPLE OVERCAME THESE CHALLENGES THROUGH THEIR AMBITION, PASSION AND ENDURANCE."

ACCESS TO AIATSIS PRINT & AUDIOVISUAL COLLECTIONS

By Grace Koch

Grace Koch, Native Title Research and Access Officer (NTRAO), has returned from five months long service leave and is ready to help you with requests for native title-related material from the AIATSIS Library and Audiovisual Archives. While she was away, Rita Metzenrath from the Library acted in the position and brought much professionalism in information management to clients. Rita has returned to her substantive position in the Library, so please contact Grace Koch for native title requests from now on.

Some of the services provided include:

- Catalogue searches and listings of AIATSIS Library and Archives holdings
- Arranging for individual and group research visits
- Copying relevant material from the Library or the Audiovisual Archives
- Providing contacts for further research and relevant Indigenous organisations

Searches can be done for you if you provide the NTRAO with names, geographical areas, or language groups that you are researching. These can be sent either by email or provided in hard copy. All information provided will be treated as confidential.

There are benefits in visiting AIATSIS to do your research as you can work directly with the NTRAO and, where you require copies of items, you may make photocopies free of charge. If you can't arrange to visit, photocopying services are 50c per page and quotes for copies of audiovisual materials can be provided on request.

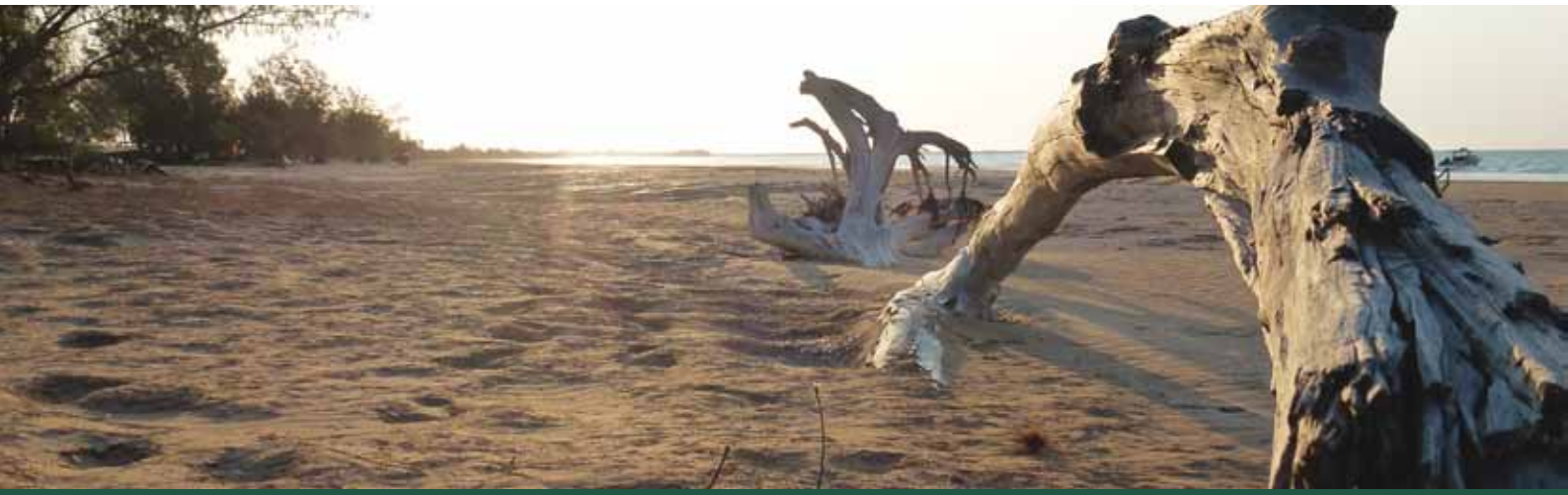
The NTRAO can provide help from 9am–5pm Mondays through Fridays. Although the Library operates on more limited hours, native title clients can have full service the entire working day.

Please contact the NTRAO directly at:

grace.koch@aiatsis.gov.au

Or the general service email address at:

ntss@aiatsis.gov.au



A JOINT MANAGEMENT COMMUNITY OF PRACTICE

By Toni Bauman

Cultures usually transform slowly and organically. One of the ways to open up opportunities for the development of a changed strong and thriving joint management culture is through building a 'community of practice'.

There is a body of literature underlying the idea of a community of practice. The idea is based upon the fact that knowledge is situated and reproduced in evolving social relations and activities called 'communities of practice' (Wenger 2006). Such a community involves a group of people with a common interest and/or passion coming together to share information, resources, contacts, knowledge and experience to influence change and arrive at creative approaches to issues and problems. Often a community of practice is founded in ideals of social justice, wellbeing, equity, human rights and participation. Reed describes this as a process for '… developing leadership and capacity among individuals, groups, communities and institutions' (2005: 86).

As the participants at the AIATSIS workshop for government staff involved in joint management noted, a joint management community of practice should involve the facilitation of free and open discussion on how to be mutually supportive, reduce duplication and maximise efficiencies. A joint management community of practice should be a source of information and advice for the benefit of parks services, policy makers and planners, and traditional owners (Bauman, Stacey and Lauder 2012). An effective community of practice would be informed by existing research and initiatives, such as the Indigenous Protected Areas (IPA) network led by SEWPAC, activities relating to the management of sea country, and AIATSIS sponsored workshops. With this in mind, the AIATSIS workshop in 2012 sought to implement a recommendation of the Indigenous forum at APAC08 that DEHWA (now SEWPAC) meet with state and territory governments responsible for protected areas to 'explore ways of enabling national networking among co-managed parks, similar to the IPA managers' network, and linkages with the IPA Managers' network (Grant et al 2008: 8).

As joint management arrangements are determined at the state/territory level, this gives rise to uncertainties and inequities within and between jurisdictions. However, such inequities should not pose a barrier to more uniform bipartisan policy approaches. There are principles, processes, and practical measures which can provide guidance for those entering into joint management arrangements regardless of the respective jurisdiction and institutional arrangements. This is not to suggest the strict prescription of practice, but rather that a national community of practice can support learning and exchange platforms through tiered systems of communication and co-operation.

Strategically directed and facilitated dialogues at regional, state and national levels between and among traditional owners and government staff in their full range of capacities, from rangers to bureaucratic decision-makers, would assist in promoting productive debate around key issues. Such issues may include:

- changed practices in which 'Top Down' and 'Bottom Up' meet in a more unified approach;
- the meaning of joint management, identifying and promoting its economic and other benefits to the wider community;
- joint management as a pathway, the many ways of 'doing' joint management flexibly;
- the relative benefits of different institutional arrangements, including legislation, ILUAs and MOUs and other informal arrangements;
- the location and nature of power in joint management arrangements;
- alternative discourses and approaches to the governance of joint management;
- the implications of viewing joint management arrangements as 'intercultural' including issues of cultural heritage, intellectual property rights and partners not being seen as apposite;
- rights-based approaches to protected area management and their limitations, including innovative ways of describing native title rights and interests;

- ways of understanding how joint management, biodiversity, political ecology, traditional ecological knowledge and intellectual property issues relate to Closing the Gap indicators;
- 'whole-of-country' multi-tenure approaches that transcend protected area boundaries and mainstream management planning;
- ways of integrating joint management with socioeconomic values and commercial benefits, such as employment and rental payments, commercial ventures, licensing, contracting with traditional owners, sitting fees and other forms of paid recognition of traditional owner involvement to reflect adequate compensation for loss of rights;
- frameworks for monitoring and evaluating joint management from the perspectives of a wide spectrum of joint management partners and stakeholders; and
- international case studies and comparisons.

There are also many practical measures to be taken and tools to be developed, not all of which are set out here (but see Bauman and Smyth, 2007: xiv-xv and Bauman, Stacey and Lauder 2012). Initially there is a need to identify, locate and share existing knowledge resources and to then building on these existing initiatives.

Tools might include:

- guidelines for negotiating joint management partnerships;
- a code of conduct for joint management addressing the responsibilities of all parties;
- national and international bibliographies that locate existing research;
- templates for joint management ILUAs;
- templates for community education and park visitor engagement programs;
- a common approach to the establishment of digital archives for protected area cultural materials and facilitating return of materials to traditional owners;
- collaborative development of toolkits providing key practical and operational advice addressing issues such as: staff and traditional owner burnout; mentoring processes; managing relationships between traditional owners, parks staff, and broader park management;
- developing conflict management protocols and processes; and
- cultural protocols, e.g. no person speaks for another person's country.

Communication strategies and networking in a community of practice can capitalise on existing networks and initiatives to leverage support and champion joint management. Communication strategies might involve email networks, online forums and webpages, exchange visits between traditional owner groups nationally and internationally, as well as networks of specialised accredited Indigenous and non-Indigenous facilitators.

Above all, there is a need for specialised joint management career pathways and a national curriculum for park staff, the staff of Indigenous representative bodies, boards of management and advisory committees, and traditional owners involved in joint management. This might include:

- the development of key eligibility and selection criteria for jobs in joint management;
- an alternative national curriculum for Indigenous Rangers;
- Junior Ranger programs with an 'on country emphasis';
- dedicated positions for developing joint management intercultural awareness, training and education;
- secondment arrangements to enable government conservation and natural resource management staff to develop working relationships with traditional owners, promoting skills transfer and cross-cultural understanding;
- flexible vocational pathways for Indigenous staff, including though contracted services reflecting Indigenous cultural priorities; and
- a national cultural awareness and engagement curriculum for protected areas, into which local components may be incorporated.

Bauman, T and D Smyth 2007, *Indigenous partnerships in protected area management in Australia: Three case studies*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Bauman, T, C Stacey and G Lauder 2012, 'Joint management of protected areas in Australia: Native title and other pathways towards a community of practice', Workshop report, AIATSIS Research Publications, Canberra, accessed 20 March 2013, <http://www.aiatsis.gov.au/ntru/documents/AliceSprings.pdf>.

Grant, C et al 2008, A combined report from the Indigenous forum (satellite event), Monday 24 November, workshop report on co-management and Indigenous Protected Areas: 30 years on.

Reed B 2005, 'Theorizing in community practice: Essential tools for building community, promoting social justice, and implementing social change', *Handbook of community practice*: 84-102.

Wenger E 2006, 'Communities of practice: A brief introduction', accessed 22 April 2013, <http://www.ewenger.com/theory/communities_of_practice_intro.htm>.

Above: Bitter Springs, Mataranka, NT. Previous page: North Beach, West Island, Sir Edward Pellew Islands, NT. Credit: Bhiamie Williamson

THE NATIVE TITLE RE

Dr Lisa Strelein
Director of Research,
Native Title Research Unit and
Indigenous Country and Governance

Dr Pamela McGrath
Senior Project Manager
(currently Acting Director of
Native Title Research Unit and
Indigenous Country and Governance)

Toni Bauman
Senior Research Fellow,
Native Title

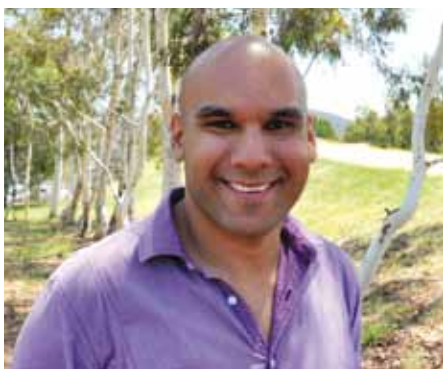
Shiane Lovell
Native Title Conference Officer

Jenny Jones
Native Title Conference Manager

Amity Raymont
Project Officer

Geoffrey Buchanan
Project Officer

Jaylee Martin
Executive Officer



Bhiamie Williamson
Project Officer

ESEARCH UNIT TEAM

Nick Duff
Senior Project Manager,
NTRB Knowledge Management Project

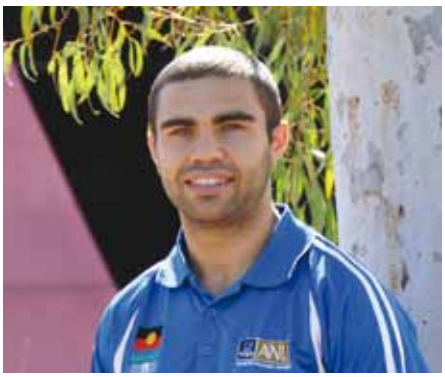
Tasha Lamb
Senior Project Manager

Grace Koch
Native Title Research and
Access Officer

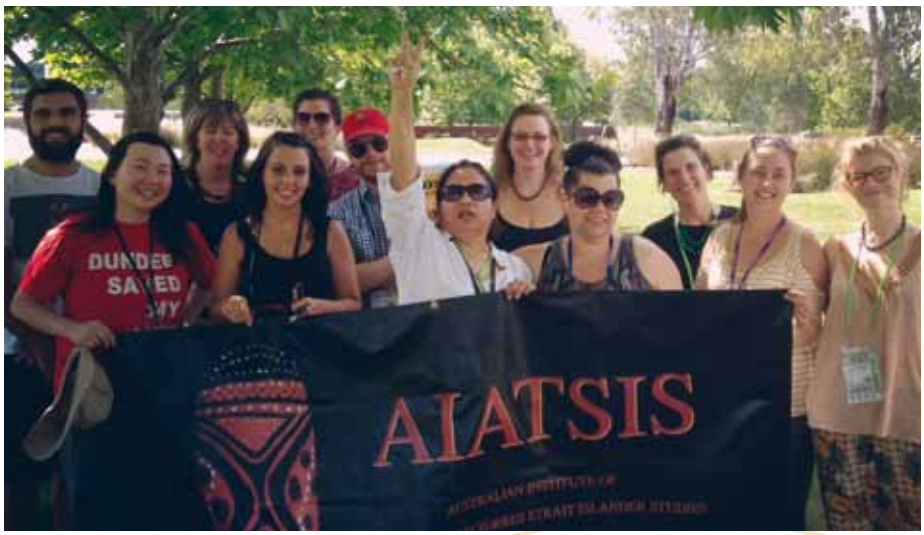
Gabrielle Lauder
Senior Research Officer

Claire Stacey
PBC Project Manager

Elizabeth Tsitsikronis
Senior Project Manager



Robert Williams
Cadet



NTRU staff Christmas party, 'The Amazing Race', 2012.
Credit: Shiane Lovell

Ngadju witnesses giving evidence at an 'on country' preservation evidence hearing in June 2009.

Credit: Rhianne Bruce, Goldfields Land and Sea Council

NGADJU WIN MARKS NEW ERA IN GOLDFIELDS

By Nick Duff

A recent Federal Court decision in favour of the Ngadju people marks a historical turning-point for native title in the Goldfields region in Western Australia.

In a judgment delivered in December 2012,[1] Justice Marshall held that the Ngadju claimants have rights and interests in the claim area under their traditional laws and customs. The claimants had successfully proven that they belong to the same society that existed when the British crown first asserted sovereignty, and that they have continuously observed and acknowledged their society's laws and customs since that time. This means that Ngadju people can be recognised as native title holders, once the Court has identified the areas in which native title has been extinguished (or the parties agree on extinguishment).

The claim area covers 102,600 sq km in the state's south-east, extending eastwards from north of Ravensthorpe to Caiguna on the Nullarbor and including the coastline from south of Balladonia to Caiguna. The particular rights to be recognised have not been finalised yet (this will depend on the kinds of extinguishment found to have occurred), but even so this decision is likely to give the Ngadju people important rights over their country. Claimant Johnny Graham said: 'The decision is a fantastic outcome for our people. We have known from day one that our links with this country have never been broken.'

The judgment, however, is not just significant for the Ngadju people. It also represents the first recognition of native title anywhere in the Goldfields-Esperance region. Goldfields was until this decision the only NTRB region where native title had not been recognised (ACT is part of the NSW region and Tasmania comes under the Victorian region). Although claims have been filed there since the 1990s, there have been no consent determinations to date. Prior to Ngadju, the largest litigated outcome in the region was the *Wongatha*[2] claim, which was dismissed by the Court.

The *Wongatha* case was one of the longest running trials and longest written judgments in native title history. It was rigorously contested by respondents (including Aboriginal respondents and the state and Commonwealth governments) so that virtually every aspect of the claimants' case had to be proven rather than being conceded by the respondents. Justice Lindgren's 2007 judgment held that the claimants had not successfully proven their case, though his Honour did not go so far as to find that native title did not exist. Instead, he decided that the claim was not properly formulated and was not supported by enough evidence. The primary obstacle for the claimants was the judge's finding that they did not constitute a 'group' under traditional law and custom, but instead were a collection of individuals whose rights under traditional law could only be held as *individuals*. This posed a number of problems for their case, although the judge left open the possibility that these problems might be addressed by filing smaller or individual claims. Another finding by the judge was that the geographic coverage of the 'Western Desert Cultural Bloc' did not extend as far west as claimed, which may prevent recognition of native title in those areas further west. Further, the respondents had contended that the claimants' ancestors had migrated into the claim area after the Crown's assertion of sovereignty (which was denied by the claimants), which would require special proof that they had acquired rights in the area under Western Desert law and custom. The judge found that such 'acquisition' had not been proven.

The *Wongatha* decision had a deeply felt impact across the region as a disheartening indication of the hurdles that traditional owners could face in fighting for recognition. It demonstrated the difficulties involved in translating Aboriginal (and particularly Western Desert) relationships to land into the legal categories of the *Native Title Act*. In the judgment's aftermath, GLSC set about organising a regional approach in order to ensure that new claims in the Wongatha trial area were cast at the right scale to meet the needs of the Court process. The Goldfields region covers a diverse range of cultures: some claimants belong to the 'Western Desert Cultural Bloc', sharing cultural similarities with others in the Northern Territory, South Australia and Western Australia; the south coast is home to Nyungar people; and others (including the Ngadju people) are distinct from either of those two large groupings. After *Wongatha*, land summits were

[1] *Graham on behalf of the Ngadju People v State of Western Australia* [2012] FCA 1455.

[2] *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31.

held and strategic research conducted to ensure that the strongest case could be put forward in each part of the region.

Ngadju is the first claim to be decided since that time, and its success is giving others a reason for optimism. GLSC research manager Craig Muller said that now 'other claim groups can see that it's possible to get native title in the region – the general mood has a bit of a feeling that there's some hope there'.

In the *Ngadju* decision, Justice Marshall found that there was and is a single 'Ngadju society' for the purpose of native title. Even though there was some evidence of a smaller group that held land in the area and that no longer exists, his Honour found that group was part of the same broad society as Ngadju and that those areas could be claimed by Ngadju. The state conceded that there was a contemporary Ngadju identity and that Ngadju people still engaged in some traditional practices, but argued that Ngadju people had not continuously observed and acknowledged traditional laws and customs, since they no longer recognised birth totems as part of their land-owning system, and no longer conducted initiation ceremonies as a basis for 'the Law'. The judge disagreed. He found that the state's submissions about totemism were based on very weak evidence, and that there had been a shift in emphasis on totems but no break with tradition. He found further that the role previously held by lawmen was now held by elders, who gained their authority from age and cultural knowledge rather than from ritual practice. This was a modification rather than an abandonment of traditional culture. Overall, the judgment found that Ngadju people had maintained their connection to their traditional lands and waters.

GLSC Principal Legal Officer Mark Rumler described the Ngadju judgement as a 'great win' and a 'good thing for the entire region'. 'The state government chose to vigorously contest this claim. However, the judgement shows that even in highly contested circumstances our claimants can win,' he said.

Despite the celebrations, there are no illusions about the difficulties yet to come. Dr Muller said 'We're very pleased with the outcome, but it's not as though we can now sit back and relax now – there still a lot of very hard work ahead of us.' Only one of the region's claims (Esperance Nyungar) is currently in consent determination mediation; the others are at earlier stages of mediation or else are being prepared for authorisation and lodging. The challenges of claiming native title in a resource rich and historically settled region remain formidable.

The state government has lodged an appeal against the *Ngadju* judgement, though this does not mean that work towards a determination is necessarily halted. In the meantime, Justice Marshall will go on to consider the 'tenure' evidence: the checking the native title findings against other forms of land title that exist within the claim area, such as freehold title and pastoral leases. This will decide those areas where native title might have already been extinguished, either wholly or in part. 'The judge's orders for the tenure proceedings remain in place, so stage two continues while the appeal is heard,' Mr Rumler said. 'Even if the state's appeal is successful, the Ngadju people will still have native title over the bulk of the claim area,' he said.

WATER RIGHTS, WATER DEALS & WATER REFORM

By Nick Duff

For years, many people in the native title sector have thought of 'water rights' as one of the next frontiers of native title, unexplored territory waiting for the right test case. A research project at AIATSIS is investigating the potential for native title to help traditional owners achieve their water-related objectives. Its preliminary conclusions are that purely rights-based approaches to water in the native title context are unlikely to produce significant results on the ground. Native title, however, can provide leverage that may be used to promote water-related priorities where these are important to traditional owners.

In Australia, a range of Aboriginal organisations and meetings have made public statements about the importance of water to Aboriginal people and Aboriginal peoples' adamant intention to protect their water resources and water-related interests. (Examples include the *Mary River Statement* (2009), the *North Australian Indigenous Water Policy Statement* (2009), the *Garma International Aboriginal Water Declaration* (2008), the *Murray and Lower Darling Rivers Indigenous Nations Echuca Declaration* (2008), and the First Peoples' Water Engagement Council's advice to the National Water Commission (2012) following a national summit held in Adelaide.) Important research and consultation work has also been done at regional and local levels around Australia, recording and articulating the meanings attached by Aboriginal people to water; the social, cultural, environmental, spiritual, economic values they hold in relation to water and the species and systems that depend on it; the ways in which they use or rely on water; their views of how well water issues have been managed by landowners and governments; and what priorities they would have for reform.

All of this work shows that there are a broad range of meanings, values,

priorities, aspirations, and grievances in relation to water held by Aboriginal people across the country. These present a challenge for analysis, both because there are multiple and potentially conflicting views, and because many Aboriginal people actively resist the attempt to categorise their unified and integrated understanding of country into the reductive language of modern water resource management. The approach taken in AIATSIS' *Water and Native Title* research project is to adopt the three-fold division employed by the First Peoples' Water Engagement Council, in which Aboriginal peoples' diverse interests and priorities in relation to water can be seen as relating to:

- The place of Aboriginal people in water planning, management, governance and decision-making structures and processes (and the extent to which these structures and processes reflect the knowledge, understandings and priorities of Aboriginal people);
- The protection of Aboriginal peoples' cultural, spiritual, social, and environmental interests; their physical and mental health; and those of their economic interests that depend on water being left in its natural state (things like fishing, collecting food-plants, hunting animals attracted to water; but also things like tourism ventures that depend on the intact state of the water environment) by limiting (or placing conditions on) the use of water by others; and
- The ability for Aboriginal people legally to take water out of water systems, for example for the purpose of irrigation or aquaculture projects (building weirs would also come within this category, since in legal terms it would have the effect of interrupting the flow of a river).

This division is the most useful basis for legal analysis of the interface between Aboriginal peoples' interests in water and the legal and bureaucratic systems of water planning and management used in Australia.

The legal analysis in the AIATSIS research project is not yet complete, but the preliminary conclusions are as follows:

- Difficulties of proof, common law limitations, and pre-1975 statutory extinguishment mean that many native title determinations only provide for very limited rights in respect of water.
- Section 211 of the *Native Title Act* may potentially allow native title holders to 'gather' water in small volumes for personal, domestic, or non-commercial communal needs without the need for a licence.
    - It is not clear whether 'gathering' would be broad enough to include, for example, irrigation for community gardens.
    - Current High Court litigation is addressing the question of whether regulatory legislation extinguishes native title (such that there would be no remaining native title rights for s 211 to preserve).
    - In any case, most of the state and territory water regimes already provide for personal and domestic water use without the need for a licence.
- The law does not offer any mechanism for compelling state and territory water planners to issue water licences or entitlements to native title holders, though theoretically there may be scope for challenging the validity of particular water plans that do not make provision for native title holders.
    - Again, the limited nature of the recognised native title rights, and the complexity of the decision-making process mean that such challenges would rarely succeed.
- The granting of water licences or entitlements to *other* people is not something that native title holders are able to legally challenge: s 24HA provides that legislation about water management and licences granted under such legislation, are valid (and while they do not extinguish native title, they prevail over any native title rights). Section 24HA gives native title holders a limited right to 'comment', but no way of challenging the validity of the legislation or other decisions.
- Native title holders with exclusive possession can prevent certain developments from occurring on their land (such as intensive agriculture) by withholding permission to enter. They can also use this power to impose conditions on how developments on exclusive possession land proceed.
- Exclusive possession rights, however, do not allow traditional owners to simply withhold permission to mining projects on their land – these must go through the future acts process, in which the chance of the project *not* going ahead is very slim. (Native title holders, even non-exclusive possession holders, may have stronger rights in relation to carbon-farming projects – some of which may have important effects on hydrology.)
- Where developments (whether on native title land or not) have the potential to negatively affect native title holders' enjoyment of their water-dependent rights, native title holders may potentially be able to sue other land users under the old common law actions of 'nuisance' or 'trespass'. For example, on this argument a native title right to fish in rivers would be harmed by activities that depleted or polluted those rivers. Or potentially, the rights to protect sites from harm and to conduct ceremony could be affected by developments that interfere with the water table. This legal avenue, however, is untested and is subject to considerable doubt (for example, if the land users have a statutory licence to extract water or statutory environmental clearance, then this may provide them with a defence to the action).
- Native title holders may have standing to object to projects under environmental legislation.

The effect of these initial findings is that native title does not provide clear rights-based pathways to achieving any of the three types of interest listed above. Even where native title determinations actually contain rights that directly or indirectly relate to water, native title's relatively weak position in the Australian legal system means that there are very limited options for translating those rights into reality. Native title does not guarantee traditional owners a seat at the table when water plans are being

Fivebough Wetland, Leeton NSW. Credit: Jessica Weir

developed and implemented; other than non-mining developments on exclusive possession land, it does not allow traditional owners to decide whether or not a development should be allowed to impact on the water resources of an area; and native title does not provide a right to extract water for commercial ventures (though it could potentially be used for irrigated community gardens).

This does not mean, though, that native title is of no help to traditional owners when it comes to water. Native title provides forms of leverage that can be employed to achieve some of what traditional owners would want, in terms of decision-making, protecting water resources, and even accessing consumptive water for enterprise developments. The ILUA negotiations that often lead up to consent determinations, and negotiations under the future acts process, are two important points at which native title can be deployed in indirect way. For example, in determination settlements parties may agree on co-management arrangements for important water systems (such as those created under the Miriuwung-Gajerrong Ord Final Agreement). If traditional owners valued the ability to engage in commercial water-dependent developments such as agriculture (or the ability to control an entitlement and earn ongoing income from it) they could seek to negotiate entitlements under an ILUA (this did not happen in the Miriuwung-Gajjerong agreement). In future act negotiations (or broader ILUA negotiations for large projects) native title holders may seek to impose conditions on mining developments to ensure that particular sites, or the water table in general, are not adversely affected.

There are creative ways of deploying the leverage ability of native title in relation to water. For example, in one recent case a native title party agreed to a mining development on the condition that the miners would pay a 'water royalty' – a per-volume payment that would both recognise the importance of water to the traditional owners and encourage the minimisation of waste. Another idea might be to seek the in-kind assistance of a development proponent in setting up a water-dependent enterprise – this could include the administrative and financial requirements for obtaining water licences, or engineering and infrastructure assistance. In 'comprehensive settlement' negotiations, states and territories could also provide for guaranteed traditional owner representation (or employment and training) in water planning and management bodies.

This model of 'leveraged water rights' is not unproblematic, however. In any situation where traditional owners are gaining something in an agreement, it must be assumed that they are giving something else up. It is important to consider carefully what is being traded to achieve the desired water outcomes. In the case of 'comprehensive settlements', claimants will often be required to disclaim any future right to compensation, or may be under pressure to settle for a weaker set of rights than they would otherwise claim. Claimants ought to consider whether (for example) gaining consumptive water entitlements through a settlement is a 'better deal' than simply purchasing them from the mainstream market (though there may be other symbolic considerations). Further, there are problems in the idea of giving up legal entitlements (such as compensation) to achieve moral entitlements that ought to be enjoyed in any case (such as access to water and decision-making). Not only can this be seen as unfair to those traditional owners who are striking the bargain, it can also be seen as undermining the ability for others to argue for legislative change. For Aboriginal people who are unable to prove native title, their political leverage may be reduced as a result.

To conclude: the *Native Title Act* places native title rights in a comparatively weak position within the Australian legal system. That position appears to be at its weakest in the context of water planning and management. Accordingly, there are only very limited ways in which native title holders can *directly* rely on their rights in order to prevent harmful developments, gain access consumptive water allocations, or demand a role in water decision-making. There are, however, creative ways of achieving these objectives using the general leverage afforded by native title, though these are subject to their own difficulties. Ultimately, the maximum achievement of the moral rights of Aboriginal people in relation to water are likely require a combination of legal action, negotiation and political advocacy.

NOW OPEN
AIATSIS 2013 PBC SURVEY

By Claire Stacey

In 2013, AIATSIS is inviting all Prescribed Bodies Corporate (PBCs) in Australia to participate in a national survey. The AIATSIS 2013 PBC Survey aims to compile comprehensive data about the capacities of PBCs throughout Australia to adequately communicate the challenges that PBCs face in holding and managing their traditional lands and waters.

In 2007 the first National PBC Meeting held in Canberra recommended that AIATSIS gather PBC data and develop PBC profiles. Since then, concerns have been raised by PBCs at a number of regional and national forums about the lack of detailed information available about how well-resourced PBCs are, and particularly how the federal government through the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) determines levels of funding for PBCs.

AIATSIS would like to collect information that will help to provide a comprehensive picture of the current capacity of PBCs to carry out their statutory obligations and respond to the needs of their members into the future. The results from the AIATSIS 2013 PBC Survey will provide important information about PBC capacity and aspirations that will inform an AIATSIS submission to the FaHCSIA *Review of Native Title Organisations*. For more information about the FaHCSIA Review and its terms of reference please see the article about the Review that appears on page 15 of this edition of the Newsletter.

The PBC Survey project is being conducted by a research team from the Native Title Research Unit. The team have designed a set of interview questions, which have been sent out in the mail, and via email, to every PBC in Australia. The questions are designed to gather information about a PBCs current operations, future aspirations, challenges and relationships with external organisations and stake-holders. PBCs can choose to complete the survey booklet or participate in a phone interview.

Once the survey is completed, AIATSIS will collate all the information it collects and write a report which sets out the findings of this research. This report can then be used by native title groups and research organisations such as AIATSIS, to argue for more support and better policies for PBCs into the future. This report will also make up part of a policy submission from AIATSIS to the FaHCSIA Review of Native Title Organisations.

If your PBC is interested in participating, or you have any further questions about the survey, please contact Claire Stacey or Tasha Lamb at the Native Title Research Unit. The survey is now open and will close on Friday 28 June 2013. For more information about how AIATSIS works with PBCs through research and support please see:

www.aiatsis.gov.au/ntru/pbc.html

Undertaking the pilot PBC Survey; L-R: Claire Stacey (NTRU, AIATSIS), Teddy Bernard (Chair of Abm Elgoring Ambung Aboriginal Corp), Tasha Lamb (NTRU, AIATSIS), Rodney Whitfield (General Manager of Abm Elgoring Ambung Aboriginal Corp), Joseph Edgar (Chair of Karajarri Traditional Lands Association) and Gabrielle Lauder (NTRU, AIATSIS). Credit: John Paul Janke

Sunset beyond the river gums on the Murray River, VIC. Credit: Jessica Weir

REVIEW OF THE ROLES & FUNCTIONS OF NATIVE TITLE ORGANISATIONS

By Ric Simes, Partner, Deloitte Access Economics

It is now 20 years since the *Native Title Act* was introduced and established the regulatory and legal context for the operation of native title organisations across Australia. Since this time, a number of significant changes have occurred, impacting the context in which these organisations operate. Perhaps most significantly, over 100 native title determinations have now been achieved, with a corresponding number of registered native title bodies corporate established.

The growth in the number of determinations and several other changes with associated implications for the evolving needs of native title holders has created a situation in which it is now timely to assess the roles and functions of native title organisations. Accordingly, the Minister for Families, Community Services and Indigenous Affairs (FaHCSIA) has initiated a Review to address these matters.

Specifically, the Review has been designed to ensure that native title representative bodies and native title service providers continue to meet the evolving needs of the system and are well positioned to respond to the needs of native title holders after claims have been resolved.

Deloitte Access Economics has been contracted to undertake the Review and is being assisted in this task by a Reference Group, selected by the Minister to provide guidance and sector specific insights. The Review Team is led by Dr Ric Simes and includes Bill Gray AM, Dr Jeff Harmer AO, Roland Breckwoldt and Deloitte staff. The Review will be conducted and concluded in the calendar year of 2013.

In order to inform the Review's finding, extensive public engagement will be undertaken. This public engagement will primarily be based on submissions made in response to a public discussion paper, scheduled for release in June, which will outline the issues being considered in the Review. The Review's success will depend in large part on the strength of the submissions, making it essential that interested parties engage in this process.

Further details of the Review, including the Review's Terms of Reference and information on the Reference Group, are available at:

www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/native-title-organisations-review-0

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 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