NATIVE TITLE NEWSLETTER

AUGUST 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* is produced three times a year (April, August and December). The Newsletter includes feature articles, traditional owner comments, articles explaining native title reforms and significant developments, book reviews and NTRU project reports. The 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.

The Native Title Research Unit (NTRU) also produces monthly electronic publications to keep you informed of the latest developments in native title throughout Australia.

You can subscribe to NTRU publications online, follow @NTRU_AIATSIS on Twitter or 'Like' NTRU on Facebook.

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Cover image: Daynie Seriat, AIATSIS Community Visit to the Torres Strait, 2013.
Credit: Daniel Walding, courtesy of Audiovisual Collection, AIATSIS.

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.

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20 YEARS OF THE NATIVE TITLE RESEARCH UNIT

By Pamela McGrath, NTRU

The Native Title Research Unit (NTRU) in the Indigenous Country and Governance Research program of AIATSIS was established in 1993 in response to the Mabo High Court decision. Originally a collaboration between AIATSIS and the Aboriginal and Torres Strait Islander Commission (ATSIC), the NTRU's activities are currently supported through a funding agreement with the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA).

For the past two decades the NTRU has provided high quality independent research and policy advice to promote the recognition and protection of the native title of Aboriginal and Torres Strait Islander peoples. The NTRU was established through the efforts and advocacy of a number of people, most significantly the then Chair of AIATSIS Board, Professor Marcia Langton and AIATSIS' current Chair Professor Mick Dodson, who at the time was a member of the Council.

Shortly after it was established, the NTRU published the first of our research series, *Land, Rights, Laws: Issues of Native Title*. This peer-reviewed title, now in its fifth volume, has published over 90 articles by leading academics, Indigenous leaders and public intellectuals. They have made a major contribution to public debate and have significantly influenced broad understandings of the real world impacts of native title and its potential to act as a vehicle for social change. In addition, the NTRU has published more than 15 monographs and edited books, 25 research discussion papers, and a regular newsletter.

The NTRU facilitates access to the Institute's collections for native title claimants and holders. In the first half of 2013 the NTRU responded to more than 100 inquiries from native title claimants, Aboriginal organisations, government departments and native title researchers.

Over the past 20 years the NTRU has developed important research partnerships with native title claimants and holders around the country. These collaborations create valuable opportunities for all involved for information sharing, learning and influencing of policy development.

The NTRU has adapted its research focus to ensure it remains relevant to the particular concerns of Indigenous groups and responds to what is a rapidly changing socio-political and legal landscape. Current areas of research include investigating native title in relation to water rights, cultural heritage management, housing, co-management of protected areas, corporate governance, climate change, mediation and facilitation, tax and housing.

The NTRU anticipates that the major movements within the sector in the coming years will be prioritising support for Registered Native Title Bodies Corporate as these organisations emerge and develop. It has extended its capabilities in agreement-making to focus on corporate design and the management of decision-making, and we have consolidated our expertise in knowledge and information management. The following photo spread revisits a few significant moments from our history. We look forward to creating many more.

Young dancer performs with the Warumungu Men's Pujjalie Dancers from Tennant Creek at the Native Title Conference, Alice Springs, 2013. Credit: Matthew O'Rourke

L-R, top-bottom: Eddie Mabo, Jeremy Beckett & Esau Ghesa at his house in Townsville, 1983. Credit: Jeremy Beckett. Protest over the 1993 Native Title Bill, Canberra 1993; Mick Dodson at the protest over the 1993 Native Title Bill, Canberra, 1993; Crowd scene at the protest over the 1993 Native Title Bill, Canberra, 1993. Credit: George Villaflor. The book launch of *A Guide to Overseas Precedents of Relevance to Native Title*, Canberra, 1999; Russel Taylor signing the NTRU funding agreement with ATSIC, Canberra, 1999. Credit: AIATSIS. Photos courtesy of Audiovisual Collection, AIATSIS.

L-R, top-bottom: Bonita Mabo at the Native Title Conference in Adelaide, 2004; Crowd scene at the Native Title Conference in Geraldton, 2002; The AIATSIS conference team at the Native Title Conference in Coffs Harbour, 2005; Marcia Langton at the Native Title Conference in Darwin, 2006; Welcome to country at the Native Title Conference in Perth, 2008; NTRU staff at the Native Title Conference dinner in Townsville, 2012. Credit: NTRU, AIATSIS.

BUBU, JALUN, BAMA (LAND, WATER, PEOPLE): AN INTERVIEW WITH ROBYN BELLAFQUIH, CHAIRPERSON OF JABALBINA YALANJI ABORIGINAL CORPORATION RNTBC

Robyn Bellafquih, Chairperson, Jabalbina Yalanji Aboriginal Corporation RNTBC

When Mabo happened I was living in Sydney. I've always tried to keep up with Indigenous issues. In 1972 I went to Canberra and spent some time at the tent embassy, so I've always had an interest in what the older freedom fighters were saying. I followed the Mabo High Court case and it was great that the High Court recognised first nations peoples.

We really didn't know what the consequences of the Mabo decision would be. There was a bit of confusion at first and a bit of disbelief considering the history of this country since occupation. To have the court rule in favour of the black man was unreal. For so long it didn't appear likely, but the tide had finally turned. I think most bama (Aboriginal people) were waiting to get recognition of belonging to the land and get the rights to live on traditional estates. How we were going to do that hadn't quite come together then though. But the decision itself was a victory and we all celebrated.

In 1994 my sister rang and asked if I would come home and help with our family's land claim. She told me that we could claim any vacant Crown land that was in our traditional area. All we needed to do was make a connection through our apical ancestor. We knew our history back to our great grandmother who was the last one of her family in the Daintree coastal area.

So I went home and started helping, looking at plots of land. My sister was the one who was mostly putting the family claims together, with the help of our mum and uncles.

Our determination

In 1996, the Cape York Land Council (CYLC) advised us to claim as a nation rather than as individual family clans, as it had a better prospect of getting a positive outcome. That was when all the clans and all the different language groups came together to make what came to be the Eastern Kuku Yalanji native title claim.

The good thing about claiming as a nation was that we had a stronger voice. The different family groups were reconfirming those connections through networks of families and country, so that was a good thing. One of the difficulties though was that there were a lot of people living off country. Bringing them all together was very hard for CYLC. To have that input from bama that weren't living on country was very important but very difficult. But we persevered and in 1996, all of the Eastern Kuku Yalanji lodged claims and the negotiations began on which land tenures we would be able to get. On 9 December 2007 we got our native title determination.

Our governance

After our determination, we set up Jabalbina Yalanji Aboriginal Corporation as the Registered Native Title Body Corporate and Land Trust, and later the registered Cultural Heritage Body. We were initially under the administration of CYLC but after three years we cut loose from them, except in relation to legal advice. So we became an independent organisation. We still have a good relationship with CYLC, but we are taking over our own governance now. Like any new organisation we grow and learn from our mistakes, but if we don't make those mistakes we don't learn.

I am the second female Chair of our corporation since it began five years ago and we have had one female coordinator. I don't know if it is just this area or more widely spread but women mostly attend the meetings, not just for the corporation but in clan meetings as well. I personally would like to see more men have an input into the organisation and at the clan group level for program development.

We have always had an equal number of men and women representatives on our board. It was designed to deal with issues fairly and quickly. We have three language groups that deal with tribal gender issues such as sacred sites and story places. Males and females on the board represent these groups; this allows issues to be dealt with in one or two meetings. Business is a little more streamlined now to save us from getting bogged down and sometimes stalled. The board's composition also aids in the right people talking for country.

Our country

Our determination area has the oldest continuous living rainforest in the world, where the bubu (land) meets the jalun (water). I take pride in saying that my ancestors lived here. Eastern Kuku Yalanji country lies between Mowbray River in the south and Annan River in the north. Our country starts approximately 60 kilometres north of Cairns. It takes in the Port Douglas, Mossman, Daintree, Bloomfield and Rossville areas.

It has pristine waterways and unique flora and fauna. South of our estate a lot of the forest was cut down for farming cane, cattle and other produce, but most of our family estate is still as it was millennia ago.

It really is God's country! Although I didn't grow up on country, we came for school holidays every year and it was the happiest times I remember. There's

a feeling of connection to the land and sea. I will always feel that connection walking around here. There's a sense of belonging. I think any Aboriginal person would know walking on their country, there's a feeling you just can't really describe. You feel your ancestors and it's an inspiration to who you are.

Caring for our Country

We've got 16 Indigenous land use agreements (ILUAs) with a range of people and organisations such as DERM [Department of Environment, Resources and Mines], WTMA [Wet Tropics Management Authority], Douglas Shire Council (who amalgamated with Cairns Regional Council but will soon revert back), Cook Shire Council and Wujal Wujal Aboriginal Shire Council. We also have several ILUAs with pastoralists, Ergon Energy, Telstra, and a couple with other Aboriginal Corporations that have pastoral leases in the area. About 75% if not more of our country is World Heritage listed for its natural values. That creates another level of restriction we have to live with. We also have 275,000 hectares under Indigenous Protected Area (IPA), two thirds of which is sea country.

When we talk country there is no difference between land and sea, it is all ours to care for. I don't believe at all that we are the owners of the land; we are the custodians. We belong to the land not the other way around. It is our responsibility to look after land, all the sites and everything surrounding. That is our responsibility. This responsibility is passed down to us through our blood lines. If we don't talk up for country, no one else will.

"IF WE DON'T TALK UP FOR COUNTRY, NO ONE ELSE WILL."

Noah Head, Queensland
Credit: Robyn Bellafquih

Executive members of Jabalbina Yalanji Aboriginal Corporation RNTBC. Credit: Jabalbina

I don't really feel like our knowledge of land and sea is acknowledged by either government or non-government organisations. But through our own organisations such as RAPA [Rainforest Aboriginal Peoples' Alliance] we have a stronger voice to say that we have been here forever and know the best ways to manage our country. The Federal Minster Tony Burke last year announced that the World Heritage Area would also be recognised for its cultural values. This was a twenty year battle that members of RAPA have fought and won as a collective. Over the last few years we have tried to get our methods and practices of land management incorporated into the mainstream land and sea management programs. With the IPA, we've got more say in how it's managed. We didn't put our Aboriginal freehold land under IPA though, due to the fact that it would limit commercial ventures like orchards or commercial buildings. We are already so limited now in what we can and cannot do on our country, we don't want to shoot ourselves in the foot again.

We fought to get our own rangers up and running for a number of years. Last year, Jabalbina secured five Indigenous land and sea rangers from the State's previous Wild Rivers Project. We have also recently been informed that Jabalbina will be allocated Working On Country (WoC) rangers that were up for renewal in our northern area. So when they get up and running, we will have rangers that will cover all the land under our claim area. We don't have any exclusive sea rangers yet but we have applied. With the large area of sea country that we have there is a need there for us to have exclusive sea rangers.

The limits of native title and our ongoing determination

Native title has, I feel, limited us. Things like the amount of time that you can go and camp, take dogs when you camp, whether you can make fires on country, building houses, where you can build, develop enterprises, it feels like we aren't being given the right to practice our cultural rights or make a living from what we have. I thought that was what native title was about. We certainly didn't anticipate native title to restrict us as much as it has. Everybody's aspirations at the start were to be able to go out and live on country, but we can't live on country with no house and no means of income.

There's no turning back time, but I guess having the right to build homes and develop a sustainable way of life on our country is what we are still hoping to achieve. We haven't given up.

CONFIDENCE IN COUNTRY: A CASE STUDY OF MUNGARLU NGURRARANKATJA RIRRAUNKAJA (ABORIGINAL CORPORATION) RNTBC

By Tessa Herrmann & Lindsey Langford, Central Desert Native Title Services

The Birriliburu native title holders were recognised in July 2008 as holding rights of exclusive possession, use, occupation and enjoyment across an area totalling over 6.6 million hectares. This Federal Court determination was the culmination of ten years of mediation and negotiation between the native title holders and, principally, the Government of Western Australia.

The Birriliburu native title holders, who self-identify as Martu people, were recognised as being people of the larger 'Western Desert Cultural Bloc', a society which spans vast tracts of the Australian interior and includes many dialects, but which nonetheless shares a system of traditional law and custom. The area covered by the Birriliburu determination is often described as being of high natural and cultural value, and is a largely intact landscape unaffected by the pastoral or mining industries thanks to its remote and rugged nature.

Following the Birriliburu determination, work began with the Birriliburu native title holders to set up a Prescribed Body Corporate (PBC). In early 2010, Mungarlu Ngurrarankatja Rirraunkaja (Aboriginal Corporation) RNTBC (MNR) was recognised by the Federal Court as holding native title rights and interests on trust for the Birriliburu native title holders.

When explaining the concept of a PBC to native title holders, lawyers will frequently describe it as the way native title holders connect their two worlds: that of traditional law and culture from which native title rights flow, and that of government rules and regulations. Native title holders are often told that the PBC is the body that external parties will come to when they need an exploration tenement, piece of land, or permission to access country. This explanation, while true, is fairly limited and gives native title holders the impression that the work of the PBC simply involves doing other people's business.

A determination of native title is, typically, a joyful event. For many native title holders it represents a recognition of their identity as traditional owners and an opportunity to 'get country back'. The 'business' of getting native title is effectively completed once you have a determination recognising your native title rights, and a PBC to hold and manage those rights. The question which then emerges is: 'What's next?'. The reality of managing native title after a determination can prove to be more complex and frustrating than native title holders may have anticipated.

Much of the effort involved in running a PBC focuses on meeting government rules and regulations. Native title recognition means learning about quorums, reading minutes, understanding financial reports, talking to mining companies, and so on. It is not difficult for a PBC to lose focus on what native title holders want their PBC to achieve, beyond this core business. Our experience has been that a PBC which simply exists to manage

native title rights as they are viewed by the Australian legal system, or by third parties, will struggle to function in a sustainable way. Native title holders will not be interested in engaging long-term with an entity which merely focuses on meeting legislative requirements. Further, constantly being advised of the limitations of your native title rights, and not the possibilities beyond them, leads to insecurity and a lack of confidence in the PBC.

Birriliburu native title holders identified early on that they wanted MNR to not only facilitate the exercise of native title rights, but also to promote the interests of the native title holders as traditional owners in accordance with their own worldview, in which 'country' is central.

In the past few years, MNR has successfully attracted a substantial amount of funding for land management programs on the Birriliburu determined lands. In particular, in early 2010, MNR received funding to begin consultations on the possibility of declaring an Indigenous Protected Area (IPA). The IPA program was established in the mid 1990s by the Commonwealth Government to provide funding and advice for Indigenous land owners, with the aim of managing country for conservation values while also supporting customary use and sustainable resource management. MNR's experience has been that having the IPA consultation process occur in parallel with the establishment of the PBC resulted in strong support for MNR's decision-making structure. While MNR has spent much of its first few years dealing with compliance-based and administrative functions, the IPA consultation project has meant that these functions have not been MNR's primary focus.

The funding received through the IPA program enabled traditional owners to access their determined lands more regularly soon after the determination of native title, and enabled MNR to move quickly into thinking about how native title rights could not only be protected, but also promoted and supported. The IPA consultation process meant that Birriliburu native title holders were able to spend time at MNR meetings talking about the management and use of their traditional lands. This process of capturing and reiterating decisions, with a focus on managing and protecting country through the Birriliburu IPA Management Plan, has provided members with confidence in the ability of a PBC to deliver more than mere compliance. Meetings of MNR have therefore been able to focus on both compliance and on what Birriliburu native title holders want to achieve in the future.

Ultimately, the IPA consultation project and the associated Birriliburu IPA Management Plan, have resulted in the declaration of the entire area of Birriliburu lands as the second largest IPA in Australia – a strong declaration about the importance of looking after country, underpinned by a confidence in native title.

This confidence has had broader positive effects for MNR. A hazard for PBCs is that they become reliant on income generated from other parties, such as mining proponents, for operating costs and continuing functionality. The IPA project has given MNR a funding source which is directly generated from a plan for country that native title holders have developed themselves. The funding is employed according to their own priorities for country, and this increased level of independence has emboldened MNR in the way it makes decisions. The hope is that more of these country-focused income streams can be developed through projects focused on tourism opportunities and permit systems that integrate native title holders' view of country – and how it should be cared for – with the right to control and regulate access.

This focus has also resulted in a shift in the way MNR communicates with companies and government representatives. The IPA process has galvanised MNR members around a collective understanding of the benefit of having native title rights to 'look after country', and a collective identity as land managers. MNR members are stronger in asserting themselves as the owners of country, not simply the holders of more limited legal rights. MNR approaches the external world with strong confidence and determination in its position as the 'boss for country'.

The vision for the future is that MNR will remain a progressive and powerful manager and owner of country, aligned with the native title holders' own worldview, rather than a corporate entity designed merely to serve the interests of others. The confidence gained from the IPA project is central to achieving that vision.

Above: Birriliburu ladies painting the Birriliburu IPA canvas at the declaration ceremony. Credit: Mladen Mrveic.
Previous page: Birriliburu rangers with Department of Parks and Wildlife WA staff conducting helicopter burning. Credit Gareth Catt.

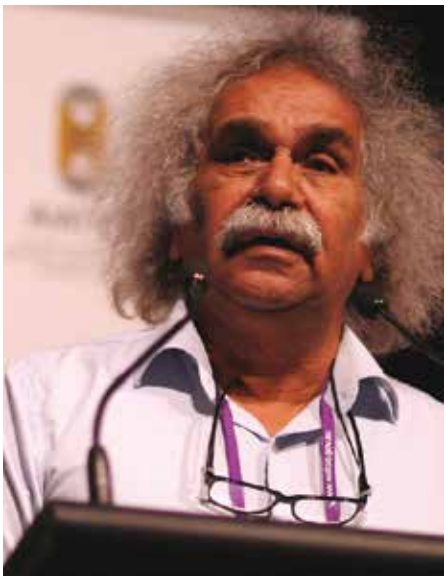
Shaping the future
NATIONAL NATIVE TITLE CONFERENCE • 2013

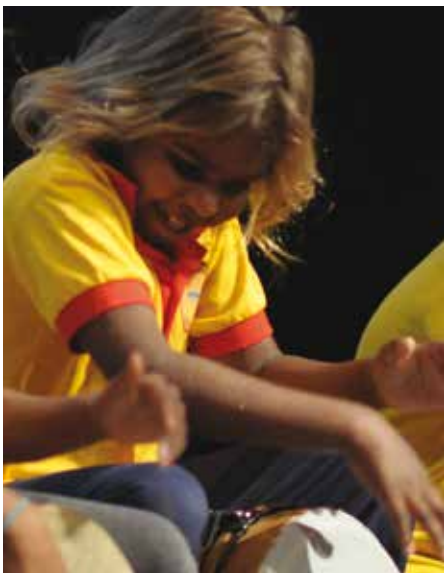
The 14th National Native Title Conference was co-convened by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and the Central Land Council in Alice Springs from 3–5 June 2013. It was held on the lands of the Central Arrernte people, the traditional owners of the Alice Springs region. This year was the 20th anniversary of the *Native Title Act 1993* which was reflected in our title – 'Shaping the Future'. The Native Title Conference has built a reputation for attracting powerful and passionate speakers. This year was no different.

Some 700 delegates attended this year's conference, half of whom identified as Aboriginal and Torres Strait Islander peoples. The conference promotes native title as an agenda for justice for people and country, including the broader relationships between traditional owners and country.

AIATSIS is proud of the strong Indigenous traditions of the conference, including the Welcome to Country ceremony, Indigenous Talking Circles, the Mabo Lecture, and preconference workshops for Native Title Representative Bodies and Prescribed Bodies Corporate. The conference embraces cultural diversity within Indigenous societies and values dynamic intercultural conversations between Indigenous and non-Indigenous delegates.

L-R, top-bottom: Performance by Alice Springs school children; Introductory remarks by Gail Mabo; Welcome to Country by Lhere Artepe Aboriginal Corporation; Michael Bennie from Parna Ngururrpa RNTBC. Credit: Matthew O'Rourke.





Crowd watching the cultural program; Mick Dodson, Chair of AIATSIS; Maurie Japarta Ryan, Chair of the Central Land Council; Keynote address by Professor Robert A. Williams Jr; Plenary session by Indigenous Social Justice Commissioners Mick Dodson, Tom Calma and Mick Gooda; Drum Atweme, a drumming group made up of young people from town camps in Alice Springs. Credit: Matthew O'Rourke.

L-R, top-bottom: Keynote address by Brian Wyatt, CEO, National Native Title Council; Dr Lisa Strelein, Director of Research - Indigenous Country and Governance, AIATSIS; The Black Arm Band performing *dirtsong*; Jimmy Brown from Tjamu Tjamu RNTBC; Performance by Alice Springs school children; Marlkirdi Rose, Warlpiri Education and Training Trust. Credit Matthew O'Rourke.

GETTING PBC VOICES HEARD

RECOMMENDATIONS FROM A NATIONAL MEETING OF PBCs

By Claire Stacey & Geoff Buchanan, NTRU

A national meeting of Registered Native Title Bodies Corporate (RNTBCs), who are also more commonly known as Prescribed Bodies Corporate (PBCs), was held on 2 June 2013, prior to the National Native Title Conference in Alice Springs. This meeting was a half-day session that was open to all PBCs to attend. The aim of the meeting was to give PBCs an opportunity to meet and discuss collective issues before the Native Title Conference. The key concerns expressed at the meeting were the chronic lack of funding for PBCs and the need for a national peak body to represent their interests, particularly in light of the current FaHCSIA Review of Native Title Organisations.

The meeting was a closed session and attended by PBC directors and staff members. Fifty representatives from 29 PBCs, 2 traditional owner corporations and 2 native title claim groups attended, coming from New South Wales, the Northern Territory, Queensland, South Australia, Victoria and Western Australia. There were approximately 55 PBCs represented during the main Native Title Conference program on the following three days. The meeting was facilitated by Dr Valerie Cooms (Quandamooka Yoolooburrabee RNTBC) and Mr Ned David (Magani Lagaugal RNTBC) and coordination support was provided by the Native Title Research Unit (NTRU) at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS).

Those present at this meeting talked about the issues facing PBCs across Australia and many representatives expressed concern that little had changed since the first meeting of PBCs in 2007. In light of long-standing concerns, PBC members noted the ongoing challenge of getting their voices heard at the national level. PBC members voiced their disappointment and frustration at having raised the same concerns at previous national meetings without seeing any action to address these issues. Most of the 10 recommendations made by PBCs at the First National Prescribed Bodies Corporate Meeting held in Canberra in 2007 still require significant action by government to address PBCs concerns.

Discussion included the options of developing a compensation test case, of raising PBC's concerns with the United Nations, and of PBCs contributing to a fund in support of PBC advocacy. Much of the discussion from PBC members related to the establishment of a national PBC peak body to lobby on behalf of all PBCs and to convene a national meeting of all PBCs. At the conclusion of the meeting nominations were received for members of a national PBC Working Group, representing each state and territory where PBCs currently exist, including specific representation from the Torres Strait. Another key recommendation from the PBCs present at this meeting was the urgent need for a national conference of PBCs to enable in depth discussion about a national peak body, giving any future body a clear mandate for operation.

A presentation was made by Dr Ric Simes from Deloitte Access Economics about the FaHCSIA Review of Native Title Organisations. PBC members expressed concern that the consultation schedule for the review did not provide adequate opportunity for all PBCs to be heard. PBC members expressed their concern that while PBCs have many things in common, each PBC faces unique challenges and a broader consultation program is necessary to ensure that any outcomes from the review responded adequately to the needs of PBCs and the native title holders they represent. PBC members voiced their concern that due to a lack of funding and resources, many PBCs would find it challenging to make a written submission to the review.

Members of the PBC Working Group went on to meet during the 2013 National Native Title Conference to discuss the way forward and have since met twice via teleconference. AIATSIS has agreed to act as informal secretariat for the PBC Working Group and will continue to facilitate PBC networking and coordinate the flow of information to PBCs through their PBC support project.

PBC members at the Alice Springs Convention Centre, 2 June 2013. Credit: Matthew O'Rourke

THE SEA IS OUR GARDEN

AKIBA ON BEHALF OF THE TORRES STRAIT REGIONAL SEAS CLAIM GROUP V COMMONWEALTH OF AUSTRALIA AND ORS [2013] HCA 33

By Gabrielle Lauder, NTRU

The sea is described variously by Torres Strait Islanders as their 'bank', 'garden' and 'supermarket'. The primary judge in *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia and Ors* ('Torres Strait Sea Claim') recognised that Torres Strait Islanders have traditionally exploited marine resources for commercial purposes. In February 2013 the High Court of Australia heard arguments regarding to what extent those native title rights had been extinguished by Queensland and Commonwealth fisheries legislation. This was the first native title case to come before the High Court for some years.

Federal Court decision

The Torres Strait Sea Claim at first instance was handed down in the Federal Court of Australia on 2 July 2010. Justice Finn, the primary judge, found that the Torres Strait Regional Seas Claim Group ('the Sea Claim Group') had established their claim to approximately 37,800 square kilometres of sea between the Cape York Peninsula and Papua New Guinea. The Sea Claim Group included the descendants of the native title holders of 13 island communities within the determination area. The primary judge recognised the non-exclusive right to access and take for any purpose resources from the determination area, which by natural extension includes commercial purposes. His Honour said that the taking of marine resources for a commercial purpose was no more than a particular mode of enjoying this right.

Full Court of the Federal Court decision

On appeal, the Full Court of the Federal Court varied the native title determination to exclude the right to take fish and other aquatic life for sale or trade on the basis that these rights had been extinguished by applicable Queensland and Commonwealth fisheries legislation. The Full Court in the Torres Strait Sea Claim held that although the statutory fishing regimes do not explicitly extinguish native title, the relevant statutes manifest a clear intention to extinguish *all* common law rights and an explicit reference to native title is not necessary to include native title holders within a general prohibition.

High Court decision

On 7 August 2013 the High Court delivered its judgment on the appeal from the Full Court's decision. The High Court was asked to consider whether the statutory fishing regimes in Queensland extinguish commercial fishing rights or merely regulate the exercise of these rights. The High Court unanimously held that the right to take fish and other aquatic life for trade or sale, supported by the native title right to take for any purpose, had not been extinguished by fisheries legislation.

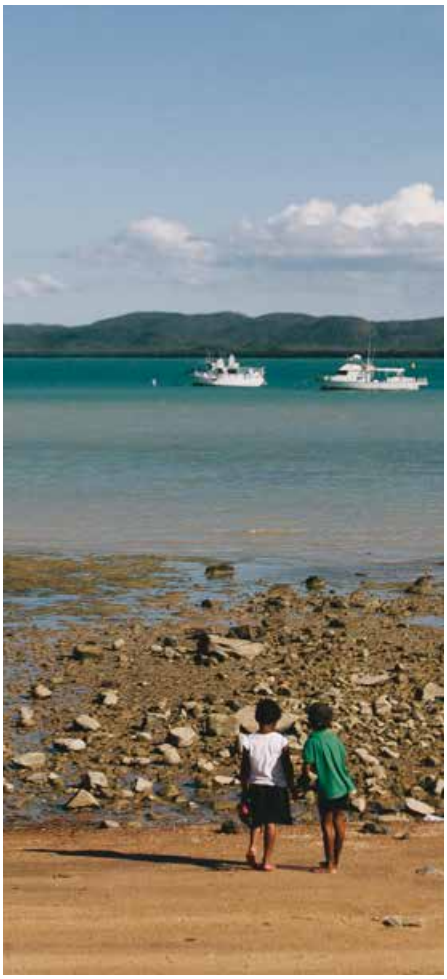
Ultimately the High Court accepted the primary judge's articulation of the right, such that the regulation of commercial fisheries is logically acceptable as mere regulation of the right to take for any purpose. Chief Justice French and Justice Crennan held that neither logic nor construction required a conclusion that a conditional prohibition on taking fish for commercial purposes was directed to the existence of native title rights.

Their Honours cited various provisions of the *Native Title Act 1993*, including s 227, s 238 and s 211, which necessarily assume that native title rights can be affected, restricted or prohibited by legislation without that right itself being extinguished. Section 211 of the Act acknowledges that regulating particular aspects of the usufructuary relationship with traditional waters does not sever the connection of the Torres Strait Islanders with those waters, nor is it inconsistent with the continued existence of that right. The joint judgment of Justices Hayne, Kiefel and Bell also emphasised that the *Native Title Act 1993* lies at the core of this litigation.

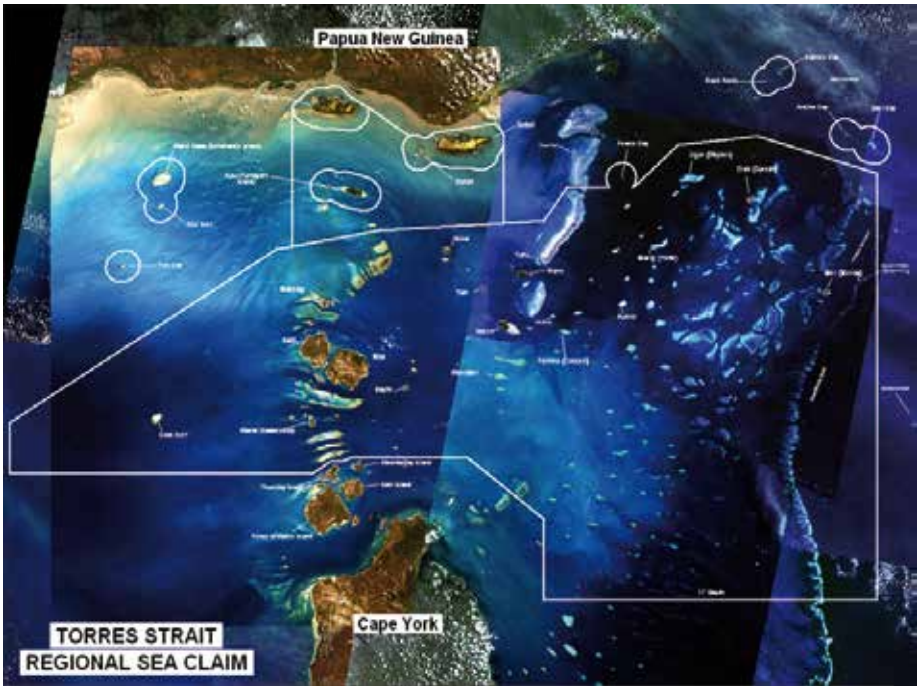
The joint judgment of Chief Justice French and Justice Crennan considered the difficulty in ascertaining a clear and plain legislative intention to extinguish native title, when the applicable statutes were enacted prior to the common law recognition of native title in Mabo. Both judgments therefore turned to inconsistency of rights as the preeminent

criterion for extinguishment. Put simply, native title is extinguished by the creation of rights that are inconsistent with the native title holders continuing to hold their rights and interests.

The respondents relied on *Harper v Minister for Sea Fisheries* in which the effect of the licensing regime was held to convert a public right to take abalone into the exclusive preserve of those who hold licences. The High Court clarified that Harper is not authority for the proposition that native title rights are as freely amenable to extinguishment as public rights derived from common law. The judgment of Justices Hayne, Kiefel and Bell distinguished Harper from the Torres Strait Sea Claim, saying: 'This case concerns the relationship between legislation prohibiting commercial fishing without a licence and rights and interests which are rooted, not in the common law, but in the traditional laws and customs observed by Torres Strait Islanders.'



Opposite page & above: AIATSIS Community Visit to the Torres Strait, 2013. Credit: Daniel Walding, courtesy of Audiovisual Collection, AIATSIS.



Map of Torres Strait Sea Claim determination area. Credit: David Saylor and Rob Blowes, Native Title Conference presentation, Townsville, 2012.

The decision of Justices Hayne, Kiefel and Bell indicated that the Full Court erroneously disregarded the precedent in *Yanner v Eaton* on the basis that it depends upon the availability of s 211 (which only applies to exercising native title rights for non-commercial purposes). However, Yanner established that statutory regulation on the exercise of native title rights and interests, specifically the taking of resources from land and waters, does not conclusively establish extinguishment of native title rights and interests. The relevant question is whether the statutory injunction, 'no commercial fishing without a licence', is inconsistent with the native title right to take resources for any purpose.

No distinct native title right to take fish for sale or trade was found; rather, the relevant right was a right to take resources for any purpose. Chief Justice French and Justice Crennan rejected the submission that the exercise of a general native title right for a particular purpose is a differentiated right that can be characterised as a lesser right by reference to that purpose. Likewise, Justices Hayne, Kiefel and Bell stated: 'It was wrong to single out taking those resources for sale or trade as an "incident" of the right that has been identified.' Focusing on the activity rather than focusing upon the relevant native title right was apt to lead to error.

The effect of this decision is that native title rights, although not extinguished, are still regulated by the statutory fishing regimes in place in Queensland. So what do the Sea Claim Group stand to gain from this decision? This decision provides for recognition that Torres Strait Islanders are a maritime people who have exploited the region's marine resources for millennia. Also, as Counsel for the Sea Claim Group stated, if native title had been partially extinguished 'then nothing by way of future change, radical or otherwise, repeal or otherwise of statutory fishing regimes can lead to its revival.' This decision means the native title rights survive and may be reinvigorated, to be enjoyed to the fullest extent possible under the prevailing regime.

For more information about this decision, please refer to forthcoming article by Gabrielle Lauder and Dr Lisa Strelein on this decision in the September/October 2013 edition of the Australian Lawyers Alliance journal ***Precedent***. This article provides a more expansive analysis of the High Court decision and considers the broader social, economic and cultural issues in the context of native title and commercial fishing rights.

DJA DJA WURRUNG SETTLEMENT OF NATIVE TITLE CLAIMS

By Graham Atknison, Chair of the Dja Dja Warrung Clans Aboriginal Corporation

On 28 March 2013, the Victorian Government and the Dja Dja Wurrung people reached a landmark native title settlement that formally recognises the Dja Dja Wurrung people as the traditional owners of lands in central Victoria. The settlement under the *Traditional Owner Settlement Act 2010* (Vic) was formally signed by the State Government and representatives of the Dja Dja Wurrung people at a ceremony in Bendigo. The settlement achieves full and final resolution of the four Dja Dja Wurrung native title claims to approximately 266,532 hectares of Crown land - about three per cent of all Crown land in Victoria.

Negotiations and authorisation

On Saturday 16 March 2013 a majority of the Dja Dja Wurrung full group voted to accept the terms of the settlement package as recommended by the native title negotiation team. The negotiation team was made up of family group representatives of the native title group who were delegated in 2010 to negotiate on the behalf of the full group. The negotiation team was involved in over 50 meetings to negotiate the best deal possible for all Dja Dja Wurrung people. The agreements that make up the settlement package were negotiated by the negotiation team on behalf of the Dja Dja Wurrung people with the State of Victoria. Now the Dja Dja Wurrung Clans Aboriginal Corporation ('Corporation') must hold and manage the benefits of the settlement on behalf of all Dja Dja Wurrung people, including future generations.

Land and joint management

The settlement includes the transfer of two national parks, one regional park, two State parks and one reserve to 'Aboriginal title' held by the Dja Dja Wurrung, to be jointly managed with the State. These are the Kooyoora and Paddy's Ranges State Parks; Wehla Nature Conservation Reserve; part of the Kara Kara/St Arnaud Range National Park; Greater Bendigo National Park; and the Hepburn Regional Park. The six areas cover 47,523 hectares of public land.

The Dja Dja Wurrung will jointly manage with the State a number of national parks and reserves in the agreement area. At the signing ceremony, Minister for Environment and Climate Change in Victoria, Ryan Smith, said the State will partner with the Dja Dja Wurrung people to improve land and natural resource management within the agreement area, providing benefit to the whole central Victorian community. There will be four Dja Dja Wurrung people (and three non- Dja Dja Wurrung people) who will sit on the traditional owner land management board (to be called Dhelkunya Dja Land Management Board), which will be responsible for drafting a joint management plan for management of the parks and reserves. There will also be a number of paid full-time positions available for Dja Dja Wurrung people to put the joint management plan into practice.

The settlement also includes the transfer of two freehold properties (approximately 56.2 hectares) of cultural significance at Carisbrook and Franklinford. Mt Barker is a property that will be purchased for the Corporation by the Indigenous Land Corporation as part of the settlement. Mt Barker will be transferred to the Corporation once the Indigenous land use agreement (ILUA) is registered. An ILUA is an agreement made between people who hold or may hold native title in an area and another person who wishes to do something that affects the native title rights and interests. It is necessary for the Corporation to enter into the ILUA to ensure that the settlement agreements are valid under the *Native Title Act 1993* (Cth).

"THIS SETTLEMENT GIVES US CERTAINTY AND THE OPPORTUNITY TO BUILD A BETTER LIFE FOR US, OUR CHILDREN AND GRANDCHILDREN AND ALL FUTURE GENERATIONS."

Financial benefit

The financial value of the settlement package is $9.65 million, plus a contribution to be made by the Indigenous Land Corporation, with funding to enable the Corporation to meet its settlement obligations and to advance the cultural and economic aspirations of Dja Dja Wurrung people. Minister for Aboriginal Affairs in Victoria, Jeanette Powell, said the settlement will increase economic opportunities for the Dja Dja Wurrung people. 'The settlement includes seed capital payments, investment planning, and business development components, assisting the Dja Dja Wurrung to achieve economic and employment outcomes in the Agreement Area,' Ms Powell said.

Most of the money that will come with the settlement is 'tied' funding. This means that the money can only be used for certain things. For example, some of the settlement funds will need to be used for the Corporation's operating costs, including employee salaries, rent for an office, and office supplies. Other funds will be invested to bring in an income for the Corporation and the Dja Dja Wurrung people to make sure the Corporation eventually becomes financially independent into the future.

Some money held by Native Title Services Victoria for future acts in the native title claims area will be made available to individual Dja Dja Wurrung members in accordance with the Corporation's policies for these funds. People will be able to apply to the Corporation for money from these funds for things like funerals, education, and micro-financing (small business loans).

Previous page: Group photo at the signing ceremony in Bendigo on 28 March 2013. Above: Graham Atkinson and Ron Kerr Junior signing the Agreements on behalf of the Corporation. Credit: Dja Dja Wurrung Clans Aboriginal Corporation

Victoria's alternative settlement framework

The *Traditional Owner Settlement Act 2010* (Vic) provides for an alternative to a native title determination in the Federal Court. It allows the Victorian Government to make agreements to recognise trad-itional owners and their rights in Crown land. A native title determination would only give recognition that Dja Dja Wurrung hold native title rights and interests in some areas of Crown land where native title hasn't been extinguished. A determination wouldn't include funding, joint management of national parks, strategies for participating in the management of natural resources, among other benefits. There is little Crown land left in the Dja Dja Wurrung claim area (about 15% of the total area), and native title is extinguished in most of that Crown land. The settlement that has been negotiated will cover all Crown land in the area, not just those areas where native title might still exist. This was one of the reasons the group decided to enter into a settlement under the *Traditional Owner Settlement Act 2010* (Vic) and not pursue a native title determination.

Into the future

Dja Dja Wurrung's place in this land-scape and its history has now been legally recognised. This settlement will become a new benchmark for other traditional owner groups and the broader society. No amount of money could compensate the suffering of our ancestors. This settlement is not about that. It is about creating a foundation for the Dja Dja Wurrung people to build on: to practice culture, strengthen our community and grow economically so we can create opportunity for our people. We want jobs, businesses and the freedom to practice our culture on our land. This settlement gives us certainty and the opportunity to build a better life for us, our children and grandchildren and all future generations. We will now be able to take control of and determine our own futures.

It is expected that implementation of the settlement will begin in approx-imately August 2013. We will not let this agreement languish as a symbolic moment in our history. Today is not the end of our aspirations. Today is the start of a new sustainable future, determined by Dja Dja Wurrung people for Dja Dja Wurrung people.

"TODAY IS THE START OF A NEW SUSTAINABLE FUTURE, DETERMINED BY DJA DJA WURRUNG PEOPLE FOR DJA DJA WURRUNG PEOPLE."

Yagan Reburial. Credit: Trevor Walley, courtesy of South West Aboriginal Land and Sea Council (SWALSC)

FROM THE BIKE TO THE BUS:
THE NOONGAR NATIVE TITLE SETTLEMENT

THE CONVERSATION

By Simon Young, University of Western Australia

The current negotiations over the Noongar native title claim in the south-west corner of Australia reflect an important maturing of the native title resolution process.

Beneath the photo opportunities and highly publicised dollar figure of around $1 billion, much is happening that deserves deeper reflection. The history here is one of complex yet inconclusive litigation, years of discussion, and some well-publicised division in the Indigenous community. Yet emerging now is a comprehensive settlement package that breaks new ground in Australia for both governments and native title claimants.

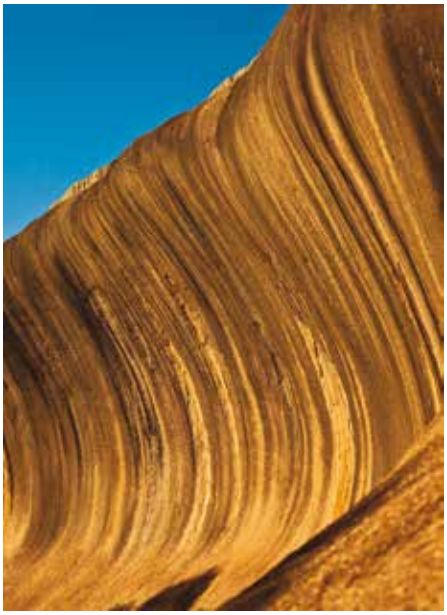
The Noongar litigation that concerned significant parts of this claim wound its way through the Federal Court for some years. The Noongar history put this case at the sharp end of the self-conscious legal confusion that had been gathering ever since the Mabo decision, which recognised native title in Australia for the first time.

The central difficult question here was whether the Noongar community had remained sufficiently "traditional" to be successful. The politics were serious, given the value of the land and the involvement of a capital city. However, despite the familiar distant drumbeat from some parts of the media, no-one's backyard was at stake. The vast amount of past legal "extinguishment" in this area – the past loss of native title essentially by reason of government grants over the land – was not in question.

In a 2006 Federal Court judgement, Justice Wilcox initially upheld the claim in a cavalier final judgment before retirement. He found that the legal threshold of cultural continuity had been met and that native title existed, subject to specific extinguishment, in Noongar hands. This was an incredible day for the local Indigenous community, and was met with considerable support in the broader community.

This initial opportunity to pull Australian native title into a positive and co-operative future was soon unstitched. The case was appealed, and the Full Federal Court considered there were errors in Justice Wilcox's approach – in his lack of rigour on questions of continuity – that meant his decision had to be overturned, and that the matter reconsidered.

This sobering chapter in the courts again illustrated the heavy costs of litigating native title matters. It also highlighted the artificiality of addressing such important post-colonial questions in isolation from their social, historical and political significance. And it clearly demonstrated the uncertainty and irony of central aspects of the Australian native title doctrine. Amongst the many raw legal points re-exposed in the Full Federal Court decision was the issue of whether the reasons for loss of 'tradition' (inevitably western interference) could excuse it. The court considered not.



Above left: Wave Rock. Credit: Matt Brand.
Above right: Albany WPM April 2009. Credit: Sean O'Hara, courtesy of South West Aboriginal Land and Sea Council (SWALSC)

Yet a new opportunity arose from the ashes of the appeal and these uncomfortable lessons. No-one had the appetite to start the litigation process again, and the lingering uncertainty posed difficulties for business, agriculture and local and state governments.

The WA state government signed a Heads of Agreement for comprehensive negotiation with representatives of the Noongar groups in December 2009. The ensuing discussions covered the interests of 30,000 Noongar people and produced the current comprehensive settlement plan. This essentially involves a proposed surrender of all native title in exchange for a long-term cultural, social and economic development package. The package includes appropriate recognition of traditional ownership, the provision of a significant land base, specific housing initiatives and indexed monetary compensation and support for regional management corporations.

Ten years ago, the idea of a "surrender" would have choked most keen observers, and it must still be carefully discussed amongst Noongar communities and reconciled with broader political aspirations. However, the complexity and delays of the native title system, the effects of past extinguishment and the entrenched legal confinement of surviving rights all point clearly to the reality that a successful determination of native title here might produce little more than an expensive administrative burden.

Native title, or potential native title, is often traded to some extent under the Australian system. The idea of doing so to avoid the limitations and delays of the system has progressed somewhat with recent developments in Victoria. However, the Noongar negotiations are remarkable owing to their scale and the proactive and comprehensive approach acceded to by the WA state government.

Perhaps most importantly, these negotiations clearly signal the emerging reality that native title recognition may no longer be an end in itself. It may, for many communities, be an impractical and faded promise that is best left behind in the pursuit of lasting community advancement. At a recent national workshop, a prominent Indigenous lawyer from the eastern states offered the analogy of riding a very limited legal "bicycle" so far and so fast as is necessary to jump onto the bus.

There is both triumph and tragedy here. The limitations of the metaphorical bicycle left behind are now more obvious than before, and for various reasons this remains the vehicle for many native title claims across the country. The hope is that success in the Noongar negotiations might encourage a more holistic and forward-looking approach in other places where native title is a poor fit.

Souce: http://theconversation.com/au

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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