NATIVE TITLE NEWSLETTER

AUGUST 2014

50 1964-2014 AIATSIS

CONTENTS

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: alexandra.muir@aiatsis.gov.au or amity.raymont@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.

National Native Title Conference 2014 **3**

Developing a toolkit for PBCs **5**

Anthony 'Tony' Perkins - Member of the Garby edlers of Corindi Beach NSW **7**

ALRC Native Title Act Review **10**

Cover image: Darryl Lockwood, of Wajar Naru (earth and water dancers) during the Smoking Ceremony at the opening of the National Native Title Conference 2014

Credit: John Paul Janke, Communication and Engagement, 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.

Editors: NTRU Information Services Team, AIATSIS

Design and typesetting: Brigitte Russell, Communication and Engagement, AIATSIS

Printed by: Vividprint, Australia

NATIONAL NATIVE TITLE CONFERENCE

2-4 June | Novotel Coffs Harbour Pacific Bay Resort

living with native title from the bush to the sea 2014

By Shiane Lovell, Project Officer, Communication and Engagement, AIATSIS

The 15th National Native Title Conference 'Living with Native Title from the Bush to the Sea' was held in Coffs Harbour NSW on the traditional lands of the Gumbaynggirr people. The conference went from Monday 2 – Wednesday 4 June and was co-convened by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and NTSCORP Limited. Over 600 delegates attended this year's conference, half of whom identified as Aboriginal and Torres Strait Islander people. The conference promotes native title as an agenda for justice for people and country, including the broader relationships between traditional owners and country. This year's sessions included presentations on local councils and PBCs, joint management, native title and cultural heritage management, corporate design, agreement making and authorisation, legal developments in native title, working on native title lands, leaderships, and the outcomes of the review into native title organisations' funding.

Like in previous years, the conference started with a closed program for NTRBs and PBCs on 2 June, followed by two days of public program on 3 and 4 June. Prior to the conference, a day was set aside for a national meeting of PBCs.

AIATSIS is proud of the strong Indigenous participation and ownership of the conference, including the Official Welcome to Country Ceremony, Indigenous Talking Circles, the Mabo Lecture, various cultural performances, the conference artwork and the 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.

Thank you to everyone who was involved in this year's conference, we look forward to seeing you next year.

National Prescribed Bodies Corporate (PBC) Meeting, Sunday 1 June 2014

AIATSIS hosted a National PBC Meeting the day before the main conference program began. This is the second time that PBCs have met before the conference, with a National PBC Meeting also being held the day before the 2013 National Native Title Conference in Alice Springs. Based on recommendations from PBCs at previous conferences, and the national PBC meetings held in 2007 and 2009, the meeting aims to offer PBCs a space to network and discuss shared concerns in a closed session.

The 2014 meeting was attended by over 50 participants, representing PBCs from WA, QLD, NSW, VIC and SA. The meeting was facilitated by Gordon Cole, a Director on the Board of the South West Aboriginal Land and Sea Council, and presentations were made by Tony Lee (Yawuru PBC), Murandoo Yanner and Terrence Taylor (Gangalidda and Garawa PBC), Ned David (Torres Strait Sea and Land Council), Janine Coombs (Federation of Victorian Traditional Owners) and Aboriginal barrister Tony McAvoy. Discussions focused upon sharing experiences and success stories, as well as ways that PBCs might be able to work together and collaborate in their respective regions, as well as nationally.

Each year the conference program includes a number of keynote speeches, inviting high profile national and international guests to share their views on native title related issues. This year's keynote speakers were Minister the Hon. Nigel Scullion, Minister for Indigenous Affairs and Leader of the Nationals in the Senate; Dr Wen-Chi Kung, a member of the Tayal Tribe of Taiwan and an elected Member of the Legislative Yuan (National Parliament of Taiwan); and Brian Wyatt, Churchill Fellow and CEO of the National Native Title Council (NNTC). Some of the main issues raised in their speeches are summarised below.

NTRB and PBC (Closed Program), Monday 2 June 2014

Nigel Scullion - Native Title Organisations: Current Challenges and Future Directions

The Minister for Indigenous Affairs and Leader of the Nationals in Senate, Senator the Hon Nigel Scullion gave the NTRB and PBC (Closed) Program Keynote Address on 'Native Title Organisations: Current Challenges and Future Directions', followed by opening the floor for question and answers from delegates.

Minister Scullion talked about the future for native title and how this could be linked to economic opportunities. He also discussed issues ofland tenure and how to break free of dependency on the whims of government, followed by an update on the Federal budget, native title and land.

Public Program Day 1, Wednesday 3 June 2014

Dr Wen-Chi Kung - 2014 Mabo Lecture: 'Lacking the "Mabo Wonder" but still striving for it: The hard struggles for Indigenous Self Government and Land Rights in Taiwan.'

Each year, the National Native Title Conference hosts International Speakers one of which delivers a keynote address relating to international experiences of native title, land rights and Indigenous justice issues.

Dr Wen-Chi Kung was the International guest speaker at the first day of the Public Program at the conference. Dr Kung is a member of the Tayal Tribe of Taiwan and an elected Member of the Legislative Yuan (National Parliament of Taiwan), a position he has held for three consecutive terms. Dr Kung has for a long time been involved in advocating for recognition of the rights of Indigenous Taiwanese. He has been the President of the 'Taiwan Indigenous Survival and Development Association' since 2006, and has previously acted as Chairman of the Indigenous Peoples Commission for the Taipei City Government.

Dr Kung's paper '*Lacking the "Mabo Wonder" but still striving for it – the hard struggle for Indigenous Self-Government and Land Rights in Taiwan*', discussed his political journey, the Taiwan Indigenous Peoples, land and traditional territory, cultural colonisation and political liberalisation, the challenges of Indigenous land problems, Indigenous Self-Government and the struggles for Indigenous Rights in the United Nations. Dr Kung speech also drew parallels between the history of the Indigenous Peoples of Taiwan and Australia, stating that in both countries this history is deeply embedded in colonialism.

Dr Kung said that Taiwan's democracy, freedom, liberalisation, and tolerance, as well as its historical and particular situation have shaped its Indigenous history to what it is today. Today Taiwan's Indigenous Peoples are not yet close to achieving their own 'Mabo wonder ', but they continue to work towards it, keep it in high regard and continue to be deeply inspired by the spirit of it. Taiwan's Indigenous Peoples are determined to follow and pursue the spirit of Mabo, eager to learn from the hard struggles and brave endeavours of Australia's Aboriginal and Torres Strait Islander peoples.

Dr Kung raised that the experiences of the Mabo Case are illuminating to Taiwan's Indigenous Peoples in that the Mabo Case is still considered a landmark victory and a wonderful achievement for Aboriginal and Torres Strait Islander Peoples in Australia in their long and hard struggles for land rights. Dr Kung continued that Eddie Koiki Mabo has had a tremendous impact upon and provided inspiration and stimulation to all Indigenous Peoples elsewhere. He concluded that, considering the struggles and challenges in Taiwan there is indeed still a long way to go to for Taiwan's Indigenous Peoples towards their own 'Mabo Wonder'. However, the Indigenous Peoples of Taiwan still keep on striving for it.

Public Program Day 2, Wednesday 4 June 2014

Brian Wyatt

Native Title and Indigenous Affairs Policy

Brian Wyatt is a Churchill Fellow who has had nearly 40 years' experience

From left to right: AIATSIS Chairperson, Mick Dodson, The Hon. Senator Nigel Scullion MP, AIATSIS Principal, Russell Taylor. Photo credit: Bryce Gray

Dr Wen-Chi Kung (above), Ezra Mabo (below). Photo Credits: Brigitte Russell

in administration of Aboriginal Affairs, and is also the Chief Executive Officer of the National Native Title Council (NNTC). Mr Wyatt gave the keynote speech on the second day of the Public Program. In his speech he responded to Minister the Hon. Nigel Scullion's keynote address from the day before and discussed changes in policies affecting native title and Indigenous Affairs. Mr Wyatt discussed some issues he thinks should provide the focus for improving the current system, chiefly among them the fact that achieving outcomes for Traditional Owners should be the key driver of policy and policy changes.

Together with the Minerals Council of Australia, Marcia Langton of the University of Melbourne and others, the NNTC developed the Indigenous Communities Development Corporation (ICDC), which aims to create a new category of entity for tax purposes as an alternative for use when considering appropriate structures for management of payment and benefits negotiated by native title groups, where these benefits come from the public or private sector centred on the statutory entitlements of native title holders. Minister Scullion indicated his openness to exploring the benefits of the ICDC, and Mr Wyatt is looking forward to pursuing this with the Minister over the next few months.

Brian Wyatt
Photo Credit: Andrew Turner

Mr Wyatt then spoke about the Deloitte report providing a 'Review of Native Title Organisations' (the Review). He highlighted the current lack of support for PBCs, which continue to face challenges due to limited funding from Government; an issue that needs to be addressed as a matter of urgency. He discussed that the Review is calling for funding to be reallocated from the broader Indigenous Affairs budget and directed to PBCs. Another recommendation from the report he mentioned is that native title programs be retained and funded as a specific Commonwealth responsibility.

He then raised that the NNTC will continue to argue for increased support to Native Title Repesentative Bodies in order to allow them to pursue those things that matter to people on the ground, which include:

- capacity building and governance structures;
- funding, resourcing and the ability to deliver services, particularly given the growing number of PBCs across the country;
- Human Rights, including the UN Declaration on the Rights of Indigenous Peoples, which includes free, prior and informed consent; and
- negotiating agreements and managing benefits.

All speaker presentations are now available on our website.

www.aiatsis.gov.au/ntru/ntc14papers.html

DEVELOPING A TOOLKIT FOR PBCS: A COLLABORATION BETWEEN AIATSIS AND THE NORTH QUEENSLAND LAND COUNCIL

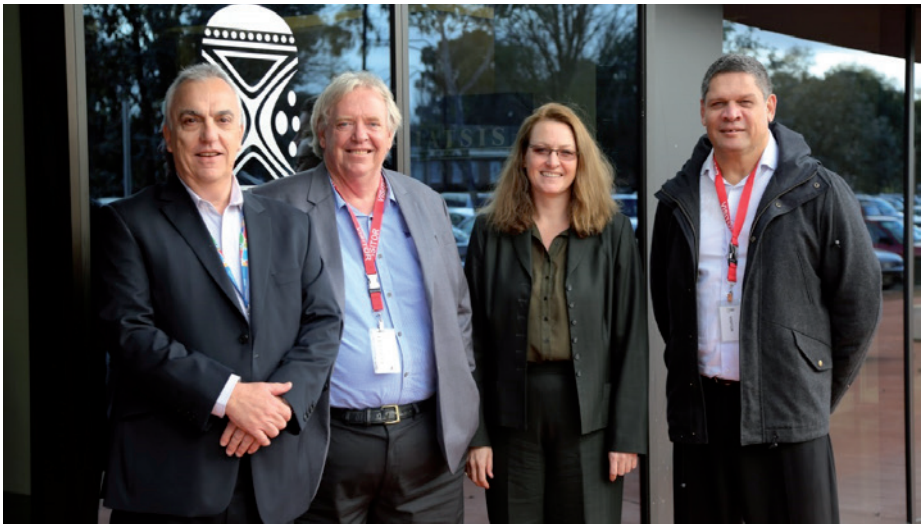
By Claire Stacey, Project Manager, NTRU and Christine Deng, Project Officer Legal, NTRU

The Native Title Research Unit at AIATSIS and the North Queensland Land Council (NQLC) are currently working together to develop a comprehensive information resource for the directors, staff and management of the 23 Prescribed Bodies Corporate (PBCs) in the NQLC region. AIATSIS and NQLC have been discussing the concept for a PBC toolkit over the past year, and in June formalised the partnership through an agreement which will see a team of AIATSIS and NQLC staff dedicating time over the next 6 months to develop the content for a PBC toolkit.

This project is a continuation of the support AIATSIS has been offering to the PBC sector through the PBC Support Project. To date this project has involved coordinating national and regional PBC meetings, developing a PBC website (www.nativetitle.org.au), producing PBC funding and training guides for each jurisdiction, coordinating the flow of information to PBCs through a national email network and collaborating with PBCs through a range of research projects.[1]

PBCs have a significant role to play in the management of land and water in Australia. Yet it is well known that the PBC journey traditional owners face following a determination of native title is not an easy one. A chronic lack of adequate funding, particularly in the initial phase of PBC setup is the most significant hurdle facing PBCs. As at June 2013, over 80% of PBCs nationally were classified as 'small' corporations under the *Corporations Aboriginal and Torres Strait Islander Act 2006* (Cth), meaning that they have little to no income or assets available to run their corporations.[2] In the NQLC region, 21 of the 23 PBCs were classified as small corporations.[3]

PBCs also face an under resourced support sector, with NTRBs/NTSPs receiving little to no direct operational funding to provide support services to PBCs, instead relying on the already



From left to right, Rob Powrie (AIATSIS) Ian Kuch (NQLC) Lisa Strelein (AIATSIS) & Brad Foster (NQLC) Photo Credit: Bryce Gray

limited resources of NTRB/NTSP staff to provide support to an ever expanding PBC sector.[4] In their submission to the Native Title Organisations Review, NQLC outlined a range of support activities requested by PBCs in their region that they would only be able to provide with additional Commonwealth funding. These requests for support included: cultural heritage, monitoring and implementation of ILUAs, compliance, administration training, governance training, funding application preparation, coordination of regional PBC meetings and networks, and advice on organisational structures.[5] Currently NQLC is only able to dedicate 1 full time staff member to support the 21 PBCs in the region.

While the struggle of PBCs has been recognised, there has been little acknowledgement of the resilience and hard work of native title holders who are often forced to provide services without being paid. PBCs need to operate effectively in order for native title holders to discharge their land management obligations, participate in the future acts processes and take advantage of opportunities to derive economic and other benefits from native title. As identified in the final report for the Native Title Organisations Review, "well-functioning RNTBCs[PBCs] could play an important role empowering Indigenous communities" through systems of community based decision making and the aspirations to pursue social, cultural, economic and environmental outcomes for native title communities.[6]

A PBC Toolkit aims to address the significant gap in support available to PBCs, and provide practical and detailed advice about the broad range of activities and functions that fall under PBC business. At the core of these functions are the legal and administrative requirements PBCs face under the various laws and regulations (*Corporations Aboriginal and Torres Strait Islander Act 2006* (Cth); *Native Title Act 1993* (Cth); Native Title (Prescribed Bodies Corporate) Regulations 1999). These include: roles of directors and members, decision making processes, and compliance and financial administration. Beyond these core functions, the toolkit – in its initial phase - aims to focus on additional elements such as strategic planning, employing staff, applying for grant funding, charging fees for service and engaging with key stakeholders.

The Toolkit aims to assist PBC directors and staff to run the day to day operations of their PBC, and provide a one stop shop for all the information and advice required to set up and run a PBC. The toolkit will be divided into modules which will focus on one broad topic and incorporate all the necessary information required by each activity, including an extensive collection of forms and templates. AIATSIS and NQLC are also working to ensure that the toolkit is accessible, interactive and engaging for PBC directors and staff.The creation of this document has involved the input of PBCs in the NQLC region from the outset, and the continued input and feedback from PBCs will be sought to guide the progress of the first, and future, drafts. If this project is successful, AIATSIS aims to work towards adapting the content for other audiences, with the potential for a national PBC toolkit in future years.

---

[1] For more information please see: www.aiatsis.gov.au/ntru/pbc.html

[2] PF McGrath, C Stacey & L Wiseman, 2013, 'An overview of the Registered Native Title Bodies Corporate regime', in T Bauman, L M. Strelein & J K, Weir (eds), "Living with native title: the experience of registered native title corporations," AIATSIS Research Publication, 2013(p.33).

[3] Office of the Registrar of Indigenous Corporations, viewed 25/07/2013

[4] Review of the Roles & functions of native title organisations, Deloitte Access Economics, NTO report, March 2014(p.16) viewed 25/07/2014.

[5] North Queensland Land Council Submission: To the review of the roles & functions of native title organisations, September 2013(,pp.54-58)

[6] Deloitte report, see above ennote iv, p.2

ANTHONY 'TONY' PERKINS

MEMBER OF THE GARBY ELDERS OF CORINDI BEACH NSW

The National Native Title Conference 2014 was held in Coffs Harbour on the traditional lands of the Gumbaynggir people. On 24 December 2013, the New South Wales Land and Environment Court handed down the long awaited decision, regarding the area known as Red Rock Beach, ruling in favour of the Coffs Harbour and District Local Aboriginal Council. The original claim was filed in 1993 and covers areas significant to the Gumbaynggir peoples, including beach and surrounding areas between the townships of Red Rock and Corindi (approximately 3.7km of beach and foredune). This decision could prove significant for future land claims on land deemed essential for public purpose.

My name is Anthony Perkins. Anthony Clarence Perkins, but they call me Tony. Clarence, that's sort of given me what I call a homeland name for the Clarence River, and that's my grandfather's first name, Clarence, so that's why I got that name Anthony Clarence Perkins. I was born in Grafton, but back when I was born, we weren't allowed to be born in a hospital. We could go onto the front veranda of the hospital, but you had to be born outside, you couldn't be born inside the hospital, and that caused some problem later, where back in the time you didn't have birth certificates and things to show people.

And when I go through my time as a kid we started off in a bark hut, same as everybody else, dirt floor, bark hut, and no fridge, nothing. We used to have a fire going all the time out the front of the camp, and when you got wallaby or fish, anything like that, you'd tie it above the smoke, and you would smoke it for a couple of days, and when you wanted something to eat you'd just cut some off and leave it hanging over the fire, and it kept it good all the time. That's how we used to live, like that. But then we moved on and we made a tin hut, we used to go to the tips and get the tin to make a tin hut. Then we moved on and we had the wooden huts, built them out of wood. We were connected to a lot of people, people up further by Yugal, those places, and then asbestos mining was going on up there. So we used to get the sheets of fibro and bring it back, and we made a fibro hut then. Then we moved on from that and we built a brick house. So all the way through, we started from way back here, travelling with the new ways coming up. And it was 1970 before I first saw power, never knew what power was in my time. And that's sort of how we started off.

I have come through life as a Gumbaynggirr, the Gumbaynggirr tribe, language speaking group. I was 14, when I got out of school. And I went to Sydney. I came back home onto my own land here. I was 27 when I came back. So I had been gone for a fair while. In my mind I kept on thinking "I've got to go home, because my people are still suffering." I knew that. Back in the time every Aboriginal organisation that was set up was what was called a Housing Cooperative. And I used to wonder "Why are we just Housing Cooperatives?" When I came back, one of the first things I did was to sit and write down all these rules and things to register a corporation that would cover employment, education, training, housing, everything, and registered that, because I couldn't understand why we were just worried about housing. I actually established then what's called the Yarrawarra Aboriginal Cultural Centre. In 1982 myself and a couple of others that are deceased now, established the firstAboriginal Land Council in Coffs Harbour (Coffs Harbour and District Local Aboriginal Land Council) under the *Aboriginal Lands Right Act 1983* (NSW) that came out. Then in the year 2000, I knew my old people had to be given better, and I established the Jagan Aged Care company. And that company is going to put respite centres in for our old people, to look after our old people. Because we took a lot away from them. We took all the knowledge from them, we took all the

cultural information from them, but we forgot to give something back, and they need respite, they need somewhere to lie down, be looked after. And that's my journey now.

Native Title

Native title to me is not getting back, but giving back, giving back land that we can't survive without. Because we can't teach our children, we can't teach our kids anything. It's giving back land that can give us back our culture, give us back our customs and traditions, so that we can teach that to our kids. And at the same time, we can break free from government dependency, if we do it right, if we do it right. Sometimes we've got to think outside that square that we're put in. We have to think of our culture, passing on, do it on the land. At the same time, that same land, somehow it has either got to feed us or earn us money. We've got no other way to look at it. And until we all think that way, that that is how we retain our own independence and break away from welfare handout. I know a lot mightn't agree with me, but that's what we have to do. I never thought it would have an ending, I'll be honest. It's been going a long while. To me we may say it's taking too long to be awarded native title to our property or country or whatever areas. But again we've got to look at the fact that there's a lot to be done in the process. We've been sort of disconnected for lots of years, and we've got to pull all the information back before we can go forward, and that sometimes frustrates a lot of people. But to us it's a step in the right direction.

Hosting the National Native Title Conference 2014

Look, to us, it called recognition. That's the greatest thing for us. Sometimes it might be thought that Aboriginal people living on the coast, we don't have any culture and tradition no more. But that's not right. And by holding the conference on our land here, in the Gumbaynggirr land, it gives recognition all over this country, and even to government, that we still have Aboriginal people who can speak their language and retain their tradition and culture living on the coast in amongst big tourist areas. We're still here. I think to me we know that again we all dream of what we want. But unless we attend these types of conferences, and we hear, we hear from those that we don't really see all the time who's working for us, they could be the solicitors, they could be all sorts of people, on what you really have to have together to go anywhere in what you're doing, that is what we gain from here. And there is a lot of information that came from this conference that we didn't really know about, on how does it work, are there changes, because a lot of the time we have to read the changes in the newspaper or wherever it is. By presenting those changes and how things are done, and going to be done, by presenting them face to face, that's a black fella's way of doing it, that's what we understand. And that's the beauty of these conferences, is face to face you ask a question. New technology, great for some things, but when we go into important, very important things to Aboriginal people, like we're talking about return of land, we need to get it spot on. And these are the conferences that we need to bring us up to date, speak to us face to face, so we ask the questions, so we are very clear on what we have to do, and I appreciate these types of conferences being held to give us that information.

Tony's book *Singing the Coast* is available through Aboriginal Studies Press www.aiatsis.gov.au/asp/aspbooks/singingthecoast.html

ROLE OF THE ACNC IN THE NATIVE TITLE SPACE

By Annie Keely, Victor Lovett & Caitlin Patterson

The Australian Charities and Not-fo-profits Commission (ACNC) opened its doors on **3 December 2012**.

All organisations that had been granted charity tax concessions by the ATO before then were automatically registered with the ACNC as a charity.

Since then any organisation wanting to become registered as a charity or get charity tax concessions has needed to make an application to the ACNC.

To be a charity, an organisation must have a charitable purpose and be for the public benefit.

From 1/1/2014, the new *Charities Act 2013* sets out definition of 'charity' and lists 12 charitable purposes which are relevant for all Commonwealth legislation.

ACNC started on 3/12/12

All new charities must apply to the ACNC to become registered if they want Commonwealth tax concessions. Apply online

ACNC currently has 6 Aboriginal and Torres Strait Islander staff, 3 of whom answer advice phone calls, so ring **132262** and ask to talk to one of them

From 1/1/2014 the new *Charities Act 2013* defines 'charity' and lists 12 charitable purposes

ACNC *Commissioner's Interpretation Statement on Indigenous Charities* makes it easier for Indigenous charities to be registered.

Indigenous charities

The ACNC has 3 Aboriginal & Torres Strait Islander advice officers who can answer your phone calls and help with your questions.

Previously some Indigenous charities had trouble meeting the public benefit test because the members or beneficiaries were related to each other or were descendants of apical ancestors. This issue has now been fixed for native title groups and traditional owner groups.

State/ Territory	Small with no assets / income	Small with some assets / income / staff	Medium	Large	Totals
NSW	2	0	1	0	3
NT	12 incl 1 not ORIC reg'd	2	0	0	14
Qld	17	10	2	0	29
Qld: TSI	16	2	1	0	19
SA	3	3	4	0	10
Vic	0	1	1	0	2
WA	9	6	2	1	18
Totals	**59**	**24**	**11**	**1**	**95**

In December 2013 the ACNC introduced the Commissioner's Interpretation Statement on Indigenous Charities. Under it, the ACNC

- Recognises the unique position of Indigenous people and the continuing disadvantage suffered, and
- Accepts that an Indigenous charity that describes its members or beneficiaries by family relationships or by descent meets the public benefit test, as they are a sufficient section of the public.

You can read it here www.acnc.gov.au/ACNC/Publications/Interp_IndigenousCharities.aspx

The *Charities Act* has some similar provisions for organisations that receive, hold or manage native title or traditional owner land related benefits (s.9).

PBCs – to be or not to be a charity

The ACNC has carried out some initial research on native title PBCs to see how many are registered as a charity and how many are not. Of the 118 PBCs established by December 2013 only 23 are charities and 95 are not charities.

As you can see from the table above, there are 59 small ones with no assets or income that may not find it useful to have tax concessions at this stage – so there may be no benefit in registering with the ACNC. But there are 36 others, particularly the 11 medium and 1 large PBC that could possibly benefit from the tax concessions that flow from being registered charities.

We know that PBCs often have access to good advice through NTRBs or NTSPs or their own lawyer and some will have decided not to become charities as it doesn't suit their needs. But there may be other PBCs who aren't aware of the potential benefits of being a charity.

How we can help

If you have a PBC and you aren't sure if it is a charity, you can check by searching the ACNC Register: www.acnc.gov.au/ACNC/FindCharity/ACNC/OnlineProcessors/Online_register/Search_the_Register.aspx?noleft=1&hkey=4687b2e5-a38e-4488-b02c-3134249a6e37

If you have a PBC that is not a charity and you want to know more about the advantages for your organisation, you can look at our website on www.acnc.gov.au or contact us on 132262 weekdays 8.00 a m to 7.00 pm AEST. There are a range of publications available to help.

For more information on possible charity tax benefits you can go to the ATO website Non-profit section at www.ato.gov.au/Non-profit/Gifts-and-fundraising/In-detail/Endorsement/Charities/Endorsement-to-access-charity-tax-concessions/

The ACNC is hoping to work with AIATSIS on developing some targeted guidance materials to help PBCs and other Indigenous organisations to become registered charities if they want.

The ACNC has staff that can come to training workshops or meetings to help groups or PBCs to understand better what is involved in becoming a charity and the reporting and governance obligations of charities. You can contact us by phone or email to ask.

We attended an AIATSIS workshop for West Australian PBCs by videoconference to fill them in on what the ACNC does. We hope we will be able to expand on that work to assist PBCs in different regions in the future.

We have enjoyed participating in the NTRB conference the last two years and getting to know more PBC members and communities as well as NTRB/NTSP staff.

We look forward to continuing to work with Aboriginal & Torres Strait Islander native title groups and communities to provide what assistance we can.

The 3 ACNC Aboriginal Liaison Officers: Victor Lovett, Caitlin Patterson and Brooke Smith.

You can call them on 132262 on weekdays from 8.00 am to 7.00 pm AEST

ALRC NATIVE TITLE ACT REVIEW

By Lee Godden

What is the ALRC Inquiry about?

The Australian Law Reform Commission (ALRC) is at the halfway point in its Inquiry into the *Native Title Act 1993*. The *Native Title Act 1993* (NTA) represented an important step in building the relationship between Aboriginal and Torres Strait Islander people and other Australians. For Aboriginal and Torres Strait Islander people, the recognition of native title has great significance. As the native title system has developed over 20 years there have been adjustments, and at times substantial changes. In August 2013, the ALRC was asked to inquire into and report on the Commonwealth native title laws and legal frameworks, including what, if any, changes could be made to improve the operation of native title laws. Under the Terms of Reference the ALRC Inquiry is to focus on two important areas.

1. Connection requirements for the recognition and scope of native title

The first area is connection requirements for the recognition and scope of native title. The ALRC is looking at what the law requires to be proven in a court (or agreed between parties to a native title determination) to establish native title. As part of this process, Aboriginal or Torres Strait Islander people must show a connection to the claimed area of land or waters. The process for establishing native title is complex. Aboriginal or Torres Strait Islander people have to bring sufficient evidence of maintaining a connection with the land and waters since before European settlement; and that they have continuously acknowledged traditional law and observed traditional custom from settlement to the present. That practice of law and custom must be substantially uninterrupted, and referable to a 'normative society'. A determination of native title recognises the nature and scope of the rights and interests held by the native title holders.

The ALRC Native Title Inquiry team, together with Professor Rosalind Croucher, President of the Commission.

2. Authorisation and joinder

The second area relates to the people involved in native title claims. Firstly, the Inquiry is to examine the native title authorisation process for determining the applicant for the claim (including their powers to act in respect of a claim). Also, the ALRC is examining legal procedures and rules around who is able to apply to the court to join a legal action for a native title claim.

The Inquiry process

A brief explanation of the Inquiry process and how it relates to Commonwealth Government procedures in the future may be helpful. The ALRC is an independent Commonwealth authority and this frames the conduct of the Inquiry.

Under the Terms of Reference for the Inquiry, the ALRC must have regard to the Preamble and objects of the NTA. In addition, the Issues Paper identifies further guiding principles. We have asked for comment on their appropriateness. The Issues Paper is available on the ALRC website and we are now reviewing almost 40 submissions. We are grateful to those who prepared these submissions. A final report is to be provided to the Commonwealth Government in March 2015 and will then be tabled in Federal Parliament. The ALRC plays no further role once the report is handed over; however, the ALRC has a reasonably strong record in having its recommendations implemented.

Native title claims – are there difficulties?

The Issues Paper sought to identify major issues with the connection requirements for recognising native title. Our Terms of Reference identified five areas for reform, but was less precise about the actual problems to be addressed. For that reason, we have asked open questions in the Issues Paper to help us identify problems but, also where things are working well. We are interested in hearing from people about their experiences with the native title claim process.

Data on native title: trends and effects

It is important to gather as much information as possible. For example:

- Is there evidence that native title claims are taking a longer time to resolve than in the past? If so, what factors are relevant to these time frames? [1]
- What evidence is there, if any, that overlapping claims and disputes affect connection requirements, authorisation and joinder procedures?
- Do financial and capacity constraints pose a barrier for claimants, potential claimants, and respondents in relation to native title determinations?

There are different views about trends in, problems with, and advantages of the native title system, so the ALRC seeks to canvass a wide range of responses.

Connection: five options for reform

The definition of native title appears in section 223 of the NTA. Native title claimants must address a number of requirements to satisfy section 223, as interpreted by the Courts.[2]

While the ALRC is asked to consider five specific measures, the Inquiry can be more wide-ranging in its suggested measures to improve the native title system. These options for reform are still being examined and the ALRC is yet to determine its final position.

1. **Presumption:** There have been several proposals put forward for the NTA to include a 'presumption of continuity' in the acknowledgment and observance of traditional laws and customs since pre-sovereignty. Some suggest it may address difficulties for claimants in providing evidence of connection prior to European settlement. Generally speaking, a presumption is a rule of evidence that affects how a fact in issue is proved. If adopted, a presumption could allow continuity to be presumed once basic facts are proven. Some commentators suggest it may have other impacts on claims litigation and consent determinations. The ALRC is considering whether to recommend a presumption. Submissions received so far vary on its formulation and its effectiveness.[3]
2. **Traditional:** Central to the definition of native title, is that native title rights and interests are possessed under 'traditional' laws and customs. Traditional laws and customs are those acknowledged and observed when the British settled Australia. Determining exactly what are the traditional laws and customs for a claim group may be difficult. In turn, the term 'traditional' raises queries about the extent to which laws and customs can evolve and adapt and still be 'traditional'. *Yorta Yorta* requires that traditional law and custom must link to a pre-sovereign 'normative society'.[4] The ALRC is considering whether to recommend setting a statutory definition of 'traditional' or to allow case law to evolve. Again, submissions on the issue vary.[5]
3. **Commercial native title rights and interests:** In *Akiba,*[6] the High Court held that native title rights and interests could comprise a right to take for any purpose resources in the native title claim area. The right could be exercised for commercial or non-commercial purposes. A number of interconnected issues arise: for example, what might 'commercial' mean? The ALRC is asked to consider the utility of amending the NTA to confirm that native title includes commercial rights and interests, and whether 'commercial' should be defined.
4. **Physical occupation and recent use:** The ALRC is considering whether there should be confirmation that claimants' 'connection with the land and waters' does not require physical occupation or continued or recent use. While the High Court has said, 'the connection which Aboriginal peoples have with country is essentially spiritual',[7] the absence of physical occupation is still raised as a challenge to proving native title in some claims.[8] The ALRC is examining the utility of potential codification or, alternatively, whether it is best to simply allow existing law to apply.[9]
5. **Substantial interruption:** Case law requires that claimants must prove that acknowledgment of traditional laws and observance of traditional customs has continued 'substantially uninterrupted' by each generation since pre-sovereignty.[10] Such 'continuous acknowledgement and observance' is not an absolute standard, but can represent a high hurdle in proving native title. The ALRC is asked to consider whether there should be 'empowerment of courts to disregard substantial interruption or change in continuity of acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so'. There are two suggested components to any reform option: first, is it appropriate to define 'substantial interruption';[11] and secondly, in what circumstances, if at all, should the courts be empowered to disregard 'substantial interruption'. These issues attract a diversity of opinion.[12]

The ALRC will examine proposed options; and other measures in the forthcoming Discussion Paper.

Authorisation

Authorisation involves the process which native title claimants must use to give permission for certain claim group members to be 'the applicant'. The applicant brings the claim on behalf of all the claimants, and the NTA gives the applicant the power to deal with matters arising in relation to that application. Authorisation is necessary for Indigenous land use agreements as well.

From the submissions there remains substantial support for the authorisation process,[13] although they indicate difficulties with various parts of the process, including:

- identifying the claim group and deciding upon 'the applicant';
- cost of authorisation proceedings;
- resolving disputes within the claim group;
- replacement of applicant members; where a member dies or is unable/ unwilling to act; and
- concerns around the scope of authorisation – and consequently the powers of the applicant.

Submissions were helpful in making detailed suggestions.[14] The ALRC notes the broad support for authorisation and will seek to address concerns in draft proposals in the Discussion Paper.

Joinder

Native title proceedings are unique in the range of parties and interests that may be involved in an application for a determination. Basically, there are two ways to join a native title claim:

1. During the initial 3-month notification period in which, under s 84 (3) of the NTA, there is a list of persons who can join including claimants and people 'whose interest, in relation to land and waters, may be affected by a determination'; and
2. At any time, if the Court is satisfied that the person's interests may be affected; and it is in the interests of justice to do so.[15]

There are a range of circumstances in which groups or individuals may seek to join relatively late in the proceedings. Late joinder of parties may impact resolution of native title determinations. Again though, situations are complex. There is the other consideration of the need for parties to be heard by the Court prior to a determination. The ALRC will evaluate these issues and develop proposals that reflect among other things:

- whether the legal system is responding appropriately or are there barriers in place?

- what principles should guide joinder?

Next steps

The Discussion Paper, due for release at the end of September, will:

- provide further examination of connection requirements for the recognition and scope of native title rights and interests, authorisation, joinder, as necessary;
- set out draft proposals in relation to these areas; and
- may request information to clarify legal issues and the operation of the native title system.

The ALRC welcomes further consultation as the Inquiry proceeds and we look forward to hearing from people. Our contact details are on the ALRC website.

[1] See, e.g. Western Australian Government, *Submission 20;* Queensland South Native Title Services.

[2] For a discussion see *Lander v South Australia* [2012] FCA 427 [32]–[34].

[3] See, e.g., North Queensland Land Council, *Submission 17*; National Farmers Federation, *Submission 14.*

[4] Members of the *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

[5] See, e.g. National Native Title Council, *Submission 16*; South Australian Government, *Submission 34*.

[6] *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1.

[7] *Western Australia v Ward* (2002) 213 CLR 1, [14].

[8] See for example, North Queensland Land Council, *Submission* 17.

[9] There are a range of views, e.g. Western Australian Government, *Submission 20*; Northern Territory Government, *Submission 31*; Just Us Lawyers, *Submission 2*.

[10] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

[11] See e.g., Australian Human Rights Commission, *Submission 1;* South Australian Government, *Submission 34.*

[12] See e.g., Northern Territory Government, *Submission 31*; NSW Young Lawyers Human Rights Committee, *Submission 29:* National Congress of Australia's First People, *Submission 32.*

[13] National Native Title Council, *Submission 16:* Western Australian Government, *Submission 20.*

[14] Queensland South Native Title Services, *Submission 24*; Association of Mining and Exploration Companies, *Submission 19*; Kimberley Land Council, *Submission 30*; Cape York Land Council, *Submission 7*.

15 *Native Title Act* 1993 s 84(5).

SECTION 47A - A CASE FOR THE REVIVAL OF NATIVE TITLE RIGHTS

By Christine Deng, Project Officer Legal, NTRU

The recent Federal Court case of *Adnyamathanha People No 3 Native Title Claim v State of South Australia [2014] FCA 101* (the *Adnyamathanha No.3* case) was originally filed to test the limits of s47A of the *Native Title Act, 1993* (Cth) (the NTA). This is because the section has in the past been interpreted and applied differently by a number of Federal Court Judges.

Section 47A operates to enliven native title where it was extinguished in the past. It follows that a successful claim under s47A, also gives the native title holders rights in relation to Future Acts. These rights include the right to be notified and negotiate with mining companies and other stakeholders.

In the *Adnyamathanha No.3* case, Mansfield J applied s47A of the NTA, ruling that the extinguishment of native title rights over a substantial area of land to the north of Hawker in South Australia should be disregarded. Although this decision is seen to have clarified some of the outstanding issues in relation to this section, it also led to media backlash against the NTA.[1] This article will specifically explain the reasoning and the implications of the application of s47A of the *Native Title Act* in the *Adnyamathanha No.3* case.

Section 47A of the NTA

1. This section applies if:
   a. a claimant application is made in **relation to an area;** and
   b. When the application is made:
      i. a freehold estate exists, or a lease is in force, over the area or the area is vested in any person, if the grant of the freehold estate or lease or **the vesting took place under legislation** that makes provision for the grant or vesting of such things only to, in or for the benefit of, Aboriginal peoples or Torres Strait Islanders; or
      ii. the area is held **expressly for the benefit** of, or is held on trust, or reserved, expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders; and
   c. when the application is made, one or more members of the native title claim group **occupy the area.**
2. For all purposes under this Act in relation to the application, any extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by any of the following acts must be disregarded:
   a. the grant or vesting mentioned in subparagraph (1)(b)(i) or the doing of the thing that resulted in the holding or reservation mentioned in subparagraph (1)(b)(ii);
   b. the creation of any other prior interest in relation to the area, other than, in the case of an area held as mentioned in subparagraph (1)(b)(ii), the grant of a freehold estate for the provision of services (such as health and welfare services).

Section 47A (2) essentially provides that, if all the three requirements in s47A (1) are satisfied, then all prior interests are to be ignored in determining whether native title exists. The type of prior interests would include previous and current freehold grants and leases.

Importantly, the section does not remove the requirement for the applicant to prove the existence of any connection with the land or waters concerned that may be required by the common law concept of native title.

Background

The Adnyamathanha People lodged an application for a native title determination on 18 May 2010. The application was amended on 2 December 2010 and on 11 March 2011, the amended application was registered by the Native Title Registrar. The native title claim related to three categories of land comprising perpetual lease land, freehold land and un-allotted Crown land. The perpetual lease land and the un-allotted Crown land were each comprised of 16 parcels of land, while the freehold land was made up of 9 parcels of land.

The Indigenous Land Corporation

The freehold land and the perpetual lease land were both initially held under perpetual leases by the Crown. In February 2000, the leases were transferred to the Indigenous Land Corporation (ILC) under the *Crown Lands Act 1929* (SA).

The ILC assists Aboriginal and Torres Strait Islander persons to acquire land, and to manage Indigenous held land, for the economic, environmental, social or cultural benefit of Aboriginal and Torres Strait Islander People. The ILC's functions are set out in s191 of the *Aboriginal and Torres Strait Islander Act 2005* (Cth), (ATSI Act) previously called the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (ATSIC Act). One of the main features of the ILC's land acquisition functions is its function to acquire by agreement interests in land for the purposes of granting interests in land to Aboriginal Corporations.

After acquiring land, the ILC will lease the land to Indigenous organisations, with the intention of transferring the land to the organisation, if the Indigenous organisation demonstrates their capacity to manage and use the land or property to achieve sustainable benefits for Indigenous people.

In the *Adnyamathanha No.3* case, the ILC granted the 16 parcels of perpetual lease land and the nine parcels of the freehold land to the Viliwarinha Yura Aboriginal Corporation (VYAC), a registered Aboriginal and Torres Strait Islander Corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI ACT). It is worth noting that VYAC surrendered nine of the perpetual leases transferred to them by the ILC to the State in exchange for freehold grants.

Previous case law

Prior to the *Adnyamathanha No.3* case, the question of reviving native title was considered mostly under s47A(1)(b)(ii) and s47B of the NTA. For example, in *Hayes v Northern Territory*,[2] Olney J considered whether native title rights and interests had been extinguished with respect to a number of parcels of land near Alice Springs. In that case, before applying s47B of the NTA, Olney J noted that s47A did not apply as the lease in question was not granted under legislation of the type referred to in s47A(1)(b)(i), nor was the land held expressly on any of the bases referred to in s47A(1)(b)(ii). Similarly, in *Risk v Northern Territory,*[3] it was found that s 47A(1)(b)(ii) did not apply in relation to a piece of land over which native title was sought because there was no express prescription under the relevant legislation or in the lease itself that that land was held for the benefit of Aboriginal people.

In *Neowarra v State of Western Australia,*[4] Sundberg J concluded that the particular lease in question, which had been granted under the Land Act 1993 (WA) to the Aboriginal Lands Trust, was held expressly for the benefit of Aboriginal people within the meaning of s 47A(1)(b)(ii) this was because s23 of the 1972 WA Act so provided. Similarly in *Rubibi Community v Western Australia* (No 7).[5] Merkel J reached a similar conclusion in relation to freehold titles held by associations incorporated under the *Aboriginal Councils Associations Act* (1976). Likewise in *Moses v Western Australia*,[6] the Full Federal Court was faced with the question of whether the areas of a particular lease was held expressly for the benefit of Aboriginal people so as to enliven s47A(1)(b)(ii). In adopting the approach to the construction of s47A(1)(b)(ii) taken in *Risk*, the Full Court concluded on the facts that the absence of any legislative or executive indication that the leaseholder was required to hold the particular land under consideration in a particular way, meant that s47A(1)(b)(ii) was not enlivened.

It is relevant to point out that the approach taken by Sundberg J and Merkel J, in the cases noted above, in relation to the application of s47A(1)(b)(ii) was from the perspective of the entity now holding the land. The central question in the construction of the section is whether the land was being held for the benefit of Aboriginal peoples.

This construction of s47A(1)(b)(i) and s47A(1)(b)(ii) adopted by Sundberg J and Merkel J, in the cases mentioned above, arguably has two limitations. Firstly, it limits the revival of native title rights and interests under s47A(1)(b)(i) to grants of freehold or leases or vesting under Commonwealth, State or Territory 'land rights' legislation. This construction ignores the application of other legislation such as the *Crown lands Act* 1929, where the State may have granted land and that grant benefits Aboriginal people. Under this approach, although the grant provides the benefit, if it cannot be established that the grant was made for the benefit of Aboriginal people because the entity is not holding the land in a particular way, the revival of native title rights and interests under s47A(1)(b)(i) will not be applied. Secondly, the cases focus on s47A(1)(b)(ii) in seeking revival of native title rights and interests, which prevents the opportunity to look at the issues raised in s47A(1)(b)(i), as Mansfield J had the opportunity to discuss in the *Adnyamathanha* No.3 case.

The reasoning in the Adnyamathanha case

In the *Adnyamathanha* No.3 case, Mansfield J followed the approach in the cases noted above and adopted a narrow interpretation of the word 'grant'. He found that perpetual leases vested in VYAC at the time of application did not have the quality of being granted under legislation of a particular character, as the word 'grant' is limited to the entity making the original grant, (the Grantor) which is usually the State, under Crown

Lands Legislation. Similarly the grant of the freehold estate by the State to VYAC in 2009 was not made under legislation of the required character. Typically legislation of the character required for the grant to fulfil s47A(1)(b)(i) would include 'land rights legislation' such as the *Aboriginal Lands Trust Act* 1966 (SA).

However, His Honour adopted a wider interpretation of the term 'vested' or 'vesting' in s47A(1)(b)(i) to signify the existence of three states of affairs that must exist at the time of application to fulfil the section:

1. the existence of a freehold estate, or
2. the existence of a lease, or
3. the existence of the area being vested in a person.

Then, the subsection requires that the event by which the state of affairs exists be:

1. the grant of the freehold estate, or
2. the grant of the lease, or
3. the taking place of the vesting.

The use of the word 'vesting' shifts the focus to the time at which the state of affairs arose. This means that, when the event took place, it must have had the particular characteristic of being undertaken pursuant to legislation that makes provisions for such grants or vesting only for the benefit of Aboriginal People. Hence, if the term vesting is used in the present case, it would mean that the perpetual leases had been vested by the ILC in VYAC under the (Cth)(ATSI Act) which he treated as legislation satisfying s47A(1)(b)(ii). In other words, the transfer of the perpetual leases in the present case took place under the ATSI Act because it was the ILC exercising its powers under the ATSI Act which enabled it to transfer the perpetual leases to VYAC. It is clear that such a vesting under the ATSI Act, meets the further requirement of s 47A(1)(b)(ii).

However, the freehold grants made by the State in exchange for 9 of the perpetual leases had not been granted under legislation of the character required under s47A(1)(b)(i). It follows that although VYAC held the leasehold interest in circumstances where the vesting of that interest from the ILC satisfied s47A (1)(b)(i) the interest was surrendered to the State.

Mansfield J supports the conclusion that while s47A(1)(b)(i) addresses the process by which the person holding the interest came to acquire it, s47A (1)(b)(ii) addresses the basis of the current tenancy or the right to tenancy of the area. This is relevant to s47A(1)(c), which addresses the status of existing prior interests and Crown interests and the applicability of the non-extinguishment principle, contained in s238 of the NTA. Mansfield J in his reasoning stated that the ILC being a statutory entity established under Commonwealth legislation, and acting within its powers, had transferred to VYAC both the perpetual lease land and the freehold land within the scope of 47A(1)(b)(ii). He explained that s47A(1)(b)(ii) applies to the freehold land because the covenants between ILC and VYAC, preclude VYAC from using the freehold land for any other purpose but for the benefit of Aboriginal people. He states that the purpose of s47A(1)(b)(ii) is to prevent private entities who have structured their corporations in such a way so as to attract certain land within s47A(1)(b)(i) for their own benefit, s47A(1)(b)(i) applies to make sure the arrangement between the private entities is made for the benefit of Aboriginal people.

The implications of Mansfield J's approach to the interpretation of s 47A of the NTA in the *Adnyamathanha* No.3 case has expanded the scope of s 47A(1)(b)(i) in relation to the wide interpretation of the term 'vesting'. Mansfield J explained that the word 'vesting' would have little to offer if it is was simply a mirror image of the word 'grant', as used in its conventional conveyancing sense. Also following the decision in *Moses*, it was likely that a s47A claim relying for success solely on the view of s47A(1)(b)(ii), which considered the issue from the perspective of the entity now holding the area for the benefit of Aboriginal people was unlikely to succeed. Mansfield J's approach provides better chances of success for claimants if the issue is approached from the perspective of the grantor.

It follows Mansfield J's approach arguably offers a better interpretation of what s47A actually says. His interpretation of the section appears to restrict the issue to the perspective of the entity making the original grant (that is, the grantor of the land, e.g. the State). This approach is more consistent with the Explanatory Memorandum relating to the s47A addition to the NTA in 1998, which provides that the evident purpose of s47A is to create a statutory exception to provisions which preclude native title being claimed over land that had been the subject of past extinguishment. It follows that s47A provides two broad categories of land grant capable of enlivening statutory exception. Similarly the section's general purpose is to enable Aboriginal people in occupation of an area where there are no longer competing third party interests to have the court disregard the earlier tenure history of an area in determining whether native title rights and interests exist.

Although Mansfield J arguably provides a more correct interpretation of s47A, the application of s47A(1)(b)(ii) is still limited to where the interest is held under binding restrictions to ensure the long term benefits to Aboriginal and Torres Strait Islander people. Nevertheless, the broad application of s47A(b)(1)(i) is a step in the right direction in relation to testing the full capacity of the provision.

---

[1] Mark Schleibs, New Native title claims to exploit loopholes, 30/04/2014, viewed 10/07/2014.

[2] Hayes v Northern Territory [1999] FCA 1248.

[3] Risk v Northern Territory [2006] FCA 404.

[4] Neowarra v State of Western Australia [2003] FCA 1402.

[5] Rubibi Community v Western Australia (No 7) [2006] FCA 459.

[6] Moses v Western Australia [2007] FCAFC 78.

Bibliography

Richard Bradshaw, Reviving native title through section 47A, at the National Native Title Conference Coffs Harbour NSW, 3-4 June 2013.

TSILHQUOT'IN NATION V BRITISH COLUMBIA 2014 SCC 44

26 June 2014, Rights and limitations of Aboriginal title, Supreme Court of Canada

McLachlin CJ with LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ concurring

By Dr Lisa Strelein, Director of Research, AIATSIS and Donna Bagnara, Senior Project Manager, Legal, NTRU.

It may be surprising to Australian audiences that the decision in the Tsilhquot'in (Chilcotin) case is the first time that a Canadian Court has made a positive declaration of Aboriginal title. In the past the court has fallen short of declaring that title exists on some technicality preferring to see cases resolved through negotiation. The case began in 2002 and in this decision, the Canadian Supreme Court allowed an appeal from the Court of Appeal for British Columbia and granted a declaration of Aboriginal title in relation to approximately 4,380km2 of land claimed by the Tsilhquot'in Nation.

The Tsilhquot'in case is one of the most significant Aboriginal rights cases in Canadian history; the Court held, like Mabo, that terra nullius did not form part of the law of Canada (although the understanding of terra nullius is somewhat limited). Perhaps most importantly, the Court took an expansive view of Aboriginal title, akin in some ways to Australian native title law, although there are aspects of the formulation of the recognition that could provide a useful point of comparison. The Canadian Supreme Court also declared that British Columbia breached the duty to consult that it owed to the Tsilhquot'in Nation.

Background

This matter has a long history, beginning with the centuries that the Tsilhquot'in Nation had lived in in a remote valley bounded by rivers and mountains in what would come to be known as central British Columbia. The Tsilhquot'in Nation is a grouping of six bands sharing common culture and history, living in villages and who managed and defended their lands from settlers, including setting terms for European traders to come onto their lands.

In 1983, the Province granted a forest licence to cut trees, under the British Columbia Forest Act. One of the Tsilhquot bands sought a declaration of prohibition to stop the commercial logging, which led to a blockade that was lifted only after the Premier promised no further logging without consent. In 1998 the claim was amended to include a claim for Aboriginal title for all Tsilhquot'in territory.

The federal and provincial governments opposed the claim and in 2002, the matter went to Court. Following five years of hearings, Justice Vickers of the Supreme Court of British Columbia found that the Tsilhquot'in people were in principle entitled to a declaration of Aboriginal title. However, in 2012, the British Columbia court of Appeal held that the Tsilhquot'in might be able to prove title to specific sites within the area claimed, but for the rest, were confined to Aboriginal rights to hunt, trap and harvest.

Jurisprudence

The Supreme Court followed a long line of authority in coming to the decision in this case, including *Calder, Guerin, Sparrow, Delgamuukw and Haida Nation* to establish the following propositions:[1]

- Aboriginal land rights survived European settlement, unless extinguished by treaty or otherwise.[2]
- The radical title acquired by the Crown upon sovereignty was burdened by pre-existing legal rights held by Aboriginal people.[3]
- Content of Aboriginal title includes the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices, customs and traditions which are integral to distinctive Aboriginal cultures; and it is group title and cannot be alienated in a way that deprives future generations of the control and benefit of the land.[4]
- All existing Aboriginal rights were recognised and affirmed in s 35 of the Constitution Act 1982.[5]
- A fiduciary duty is owed by the Crown with respect to those rights.
- Aboriginal title can only be infringed by governments if they establish a 'compelling and substantial' public interest purpose and only then if the government fulfils its fiduciary obligation, which requires involvement of the affected Aboriginal group in decisions about its land.[6]
- Involvement of the affected Aboriginal group in decisions about its land is extended to situations where development is proposed on land over which Aboriginal title is asserted but has not yet been established. And, the Crown has a legal duty to negotiate in good faith to resolve land claims.[7]

The Test for Aboriginal Title

In overwhelming support for the reasons provided by the trial judge, the full bench of the Canadian Supreme Court affirmed the test for recognising Aboriginal title. Their Honours reiterated that Aboriginal title:

- flows from occupation in the sense of regular and exclusive use of land; and
- 'occupation' must be sufficient, continuous (where present occupation is relied on) and exclusive.

In determining what would constitute sufficiency of occupation, the Supreme Court preferred the trial judge's finding that regular and exclusive use established title to village sites, to areas maintained for harvesting of roots and berries and to larger territories which ancestors had used regularly and exclusively for hunting, fishing and other activities.

With respect to the issue of exclusivity of occupation, the Supreme Court stated, at [59]:

> Most of the Province's criticisms of the trial judge's findings on the facts are rooted in its erroneous thesis that only specific, intensively occupied areas can support Aboriginal title.

The Supreme Court affirmed the trial judge's finding of continuity of occupation, based on evidence of more recent occupation alongside archaeological evidence, historical evidence and oral evidence from Aboriginal elders about their legal traditions and relationship to their traditional territories, through legal title, use and occupation.

Content of Rights

The Supreme Court affirmed that Aboriginal title is *sui generis* or unique. The title holders have the right to the benefits associated with the land — to use it, enjoy it and profit from its economic development. Following the line of precedent discussed above, the Supreme Court, at [73]-[74], affirmed that Aboriginal title is similar to fee simple[8], except it is collective title held for all succeeding generations. Therefore, the land must not be used, encumbered or developed in ways that would substantially deprive future generations of its benefit.

Crown encroachment on Aboriginal title

The consequence of the finding that Aboriginal rights to lands survive colonisation is that the Crown does not retain a beneficial interest in Aboriginal title land. The content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it. What remains is:

- a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands; and
- the right to encroach on Aboriginal title, but only if the government can justify this in the broader public interest.

While the Court declared that terra nullius was not part of the Canadian law of Aboriginal title because the land rights of the Indigenous inhabitants survived; like Australia, the vestiges of the Doctrine of Discovery remain firmly in place in this decision. The Court recognised that the Crown retained the right to 'encroach' on Aboriginal lands (what we would call extinguishment) based on the Crown's underlying or radical title. Unlike Australian courts, however, the Canadian Courts have recognised that this power to encroach gives rise to a fiduciary duty. The Supreme Court ruled that the fiduciary obligation owed by the Crown required the government to:

1. respect the nature of Aboriginal title, in that the beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land (at [86]); and
2. ensure the incursion is necessary, goes no further than necessary, and that any benefit is not outweighed by the adverse effect on the Aboriginal interest (at [87]).

Failure to Consult

The Court held that the Crown is required to consult in good faith about proposed uses of the land with any Aboriginal groups asserting title to the land and, if appropriate, accommodate the interests of such claimant groups. The Supreme Court discussed, at [91]-[92], that the extent of the duty corresponds to the extent of the interest. Therefore, the duty to consult increases as the strength of the claim increases.

The Court held that the strong *prima facie* claim to the land held by the Tsilhquot'in meant the Province had a duty to consult that fell at the high end of the spectrum. However, the Province did not consult and, therefore, breached its duty to consult when it granted licences allowing forestry activities on Tsilhquot'in land.

Provincial Laws – Application of the Forest Act to Aboriginal Title

The Court considered, at [98]-[148], whether the *Forests Act,* under which the licences had been granted, and which were of general application, had force with respect to Tsilhquot'in land. This included an examination of the power to regulate, the limitation imposed by s 35 of the Constitution Act 1982, and whether the *Forest Act* is ousted from Aboriginal lands by operation of the Federal Constitution.

Provincial governments may regulate with respect to all land within the province, including lands held under Aboriginal title. However, s 35 of the Constitution Act 1982 requires any limitations or impact on Aboriginal title to be undertaken only pursuant to compelling and substantial government objectives, consistent with the Crown's fiduciary relationship with title holders.

The Court held that all three factors of the following test must be applied in order to determine whether a law of general application results in a meaningful diminution of an Aboriginal right, giving rise to a breach:

1. whether the limitation imposed by the legislation is unreasonable; and
2. whether the legislation imposes undue hardship; and
3. whether the legislation denies the holders of the right their preferred means of exercising the right.

It is interesting to note that, at [105], the Court considered that laws of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will normally meet this test. However, spurious claims to environmental purposes, such as were argued by the Province, would not be entertained. The finding was, therefore, that:

> granting rights to third parties to harvest timber on Tsilhquot'in land is a serious infringement that will not lightly be justified.

The Court's reasoning with respect to the application of the Provincial laws was somewhat inconsistent with the principles of Aboriginal title. The Court, at [116], expressed a view that the land remained Crown land until such time as it was confirmed aboriginal land by agreement of Court order; only then was the beneficial title vested in the Aboriginal group rather than the Crown. This reasoning is inconsistent with the notion that aboriginal peoples' right to land survives the acquisition of sovereignty and Aboriginal title is not dependent

on Crown recognition. On this view, the Court found that the *Forest Act* did apply to lands under claim, up to the time title is confirmed by agreement or court order. In Australian law we understand that where native title still exists to be determined by the Court, it has always existed. As such, the burden on the Crown underlying title was enlivened at the point at which sovereignty was asserted.

The Federal Government's constitutional power with respect to 'Indians, and Lands reserved for the Indians', under s 91(24) of the Constitution Act 1867 also has application to this matter. With Federal Indian powers and state land management powers both at play, forestry on Aboriginal title lands falls under both the provincial and the federal jurisdiction. Where there is a jurisdictional conflict, the doctrine of paramountcy and the doctrine of interjurisdictional immunity may apply to ensure the two levels of government can operate without interference in their core areas of exclusive jurisdiction. Like Australian constitutional law, where there is a conflict or inconsistency between two laws, federal law prevails. The Court found there was no inconsistency in this case and thus there was no paramountcy consideration.

The Court did, however, look to whether provincial legislation such as the *Forest Act* is ousted pursuant to interjurisdictional immunity. The purpose of the doctrine is to resolve conflict between provincial and federal powers generally, rather than in relation to any particular conflicting legislation. The Supreme Court overturned the findings in *Delgamuukw* as applied by the trial judge that interjurisdictional immunity applied to Aboriginal title and thus no provincial jurisdiction applies. They argued that this was a practical compromise:

> The result of its [the Forest Act's] application is a protection of Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society. (at [139]).

This limitation under s 35 of the Constitution Act applies to both levels of government. Therefore, in this case, the powers were held not to be competing. Rather, the Court found there is a tension between the right of Aboriginal title holders to use their land and the province in regulating that land. The Court suggested, at [147], that to apply the doctrine of interjurisductional immunity could produce 'a legal vacuum'. This view clearly disregards previous Supreme Court decisions that have recognised that where Aboriginal title exists so too does a form of Indigenous jurisdiction. This is a step backward in the jurisprudence of Canadian Aboriginal title.

Conclusion

The Appeal from the decision by the Court of Appeal for British Columbia was upheld, the Court granted a declaration of Aboriginal title over the area and the Court declared that British Columbia breached its duty to consult.

The Court also created precedent by determining that provincial governments are constitutionally permitted to infringe Aboriginal rights where such infringement is justified pursuant to s 35 of the Constitution Act 1982 and, where s 35 of the Constitution Act 1982 applies, there will be no application of interjurisdictional immunity. The Court's promise that terra nullius is not a part of Canadian law is only partially fulfilled by this decision. Canadian Indigenous peoples have much to look to in the Tsilhquot'in decision, but the adherence to the Doctrine of Discovery and the power of Provincial governments to encroach on Aboriginal lands and jurisdiction, with its resonance with Australian native title jurisprudence, continue to hold back the reconciliation of Aboriginal peoples pre-existing rights and the assertion of Canadian sovereignty.

---

[1] *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [18]

[2] Calder v. Attorney General of British Columbia, [1973] SCR 313.

[3] Guerin v. The Queen, [1984] 2 S.C.R. 335.

[4] Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010.

[5] Section 35 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c 11.

[6] R. v. Sparrow, [1990] 1 S.C.R. 1075.

[7] Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511.

[8] An 'estate in fee simple' is a term with historical links to landholdings under feudal English law. In very simple terms, holding land in fee simple is as close to complete ownership of land as the common law system allows.

THE SHAPE OF THE FUTURE? THE FINAL REPORT OF THE DELOITTE REVIEW OF THE ROLES AND FUNCTIONS OF NATIVE TITLE ORGANISATIONS

Dr Pamela Faye McGrath, Research Fellow, NTRU

On 21 May 2014, the Department of Prime Minister and Cabinet released the final report of the Review of Roles and Functions of the Native Title Organisations that was initiated in 2012.

The final report, which runs to 140 pages, provides a comprehensive account of the native title system as it currently operates. Locating Registered Native Title Bodies Corporate (RNTBCs) at the core of the native title system, the report highlights the need to strengthen the capacity and governance of native title organisations to support greater social and economic development for Aboriginal and Torres Strait peoples around the country.

The authors of the report recognise that native title is a significant mechanism by which governments can support 'closing the gap' on Indigenous disadvantage, and emphasise throughout that a poorly functioning native title system will detract from achievement of broader policy objectives in the areas of education, employment and community safety.

Running alongside these social justice and equity concerns, the report also finds that the current lack of funding to RNTBCs in the post-determination phase impedes not only the ambitions of native title holders but also those of governments and industry seeking to conduct infrastructure and resource development projects on native title lands.

The fact that the aspirations of native title holders and the ambitions of government and industry are at times incompatible is a silent and unresolved tension that runs throughout.

A key 'take home' message of the report is that both RNTBCs and the native title representative bodies (NTRBs) and service providers (NTSPs) that support them are essential to the effective operation of the system and will need at least basic government funding for the foreseeable future.

RNTBCs in particular need more support beyond what they currently receive, and greater choice in how it is delivered. Such funding should, the report suggests, be temporary and transitional and directed towards strategic planning to achieve long-term independence.

Background to the Review

The primary objective of the Review was to assess the roles and functions of NTRBs/SPs to ensure that they continue to meet the evolving needs of interest groups throughout the system, but in particular the needs of native title holders and their RNTBCs after claims have been resolved.

The specific terms of reference for the Review included consideration of:

- the role of NTRBs and NTSPs in promoting and facilitating sustainable use of benefits flowing from agreements and settlements
- the scope for rationalisation of the numbers of NTRBs and NTSPs currently operating
- whether there should be legislative changes to NTRB and NTSP existing powers and functions specifically to include assistance to RNTBCs
- the current nature of services to native title holders and claimants by non-NTRB and NTSP based professionals, and the impact on the native title system of these services

The terms of reference for the review stated that any recommendations should assume that there will be no new funding available for the sector in the foreseeable future.

The review's findings as set out in the final report are drawn from a broad evidence base. The reviewers held consultations with 50 RNTBCs, 15 NTRBs/NTSPs, all state and territory governments, and a number of industry representatives. They received 58 public submissions from organisations and individuals including many NTRBs, NTSPs, RNTBCs, individual native title claimants and holders, state governments, industry representatives and private law firms.

The reviewers also sought input from a reference group comprising representatives of the Commonwealth Attorney General's Department, the Department of Families, Housing, Community Services and Indigenous Affairs, a number of NTRBs, the Minerals Council of Australia, the Queensland Government, the National Native Title Council, the University of Melbourne, the Law Council of Australia and AIATSIS. (Although there are now over 110 RNTBCs around the country, only one was invited to sit on the reference group).

Findings: The role of NTRBs and NTSPs

In relation to the work of NTRBs and NTSPs, the review found that these organisations will continue to play a central role in the native title system in both pre- and post-determination contexts, and should be supported to do so.

The Report recommends ongoing provision of a base level of funding for NTRBs/NTSPs to maintain their core capabilities in legal services for future acts and agreement negotiation.

It does not, however, support legislative amendment to NTRBs/SPs existing functions and powers to specifically include support to RNTBCs.

It also clearly flags the evolution of the services that NTRBs/NTSPs provide to RNTBCs as requiring a shift from a program delivery model to a fee

for service model that operates in an overarching context of a contestable market.

The implied future for NTRBs is as independent not-for-profit service providers, rather than grant-reliant non-government organisations.

Findings: the role of RNTBCs

The Report articulates in some detail the capacity issues facing RNTBCs. Of most concern is a chronic lack of capacity in the essential areas of administration, planning, engagement with members and provision of expertise.

These capacity issues seriously constrain the abilities of RNTBCs 'to give effect to the Act', interfering with the management of native title lands and associated rights and interests, and compromising the potential of infrastructure and resource development projects. 'Without adequately functioning RNTBCs', the report suggests, 'the native title system will be fragile and the ambitions of stakeholders…will be impeded'.

The solution proposed by the review is well-targeted additional funding for RNTBCs in the form of initial short-term government support provided early in the post-determination phase to get RNTBCs on a 'pathway' to independence, and ongoing base level government funding to help RTNBCs meet compliance and governance obligations.

Such funding should involve case-by-case tailoring of funding to meet the specific needs of individual organisations, and should be subject to means testing and accountability measures. The Report also opens the doors to providing greater choices to RNTBCs about how they contract the services they need.

The authors suggest that the overall amount required to support development of RNTBC capacity will be 'modest' in the context of the broader system. Nevertheless, the question remains: if there are no new monies available, where will this funding come from?

The Report suggests a 're-prioritisation' of existing funding from within the Department of Prime Minister and Cabinet's (PMC) Indigenous Affairs programs. The current review of the Indigenous Land Corporation and Indigenous Business Australia is specifically mentioned as providing an opportunity to consider some re-orientation of funding.

State and territory government settlement agreements are another avenue of potential funding identified within the report. But with such opportunities being difficult to forecast and available to only a few groups, it seems likely that in the short term any increase to funding for RNTBCs will be at the cost of existing programs and services.

Other Findings:

The rationalisation of NTRBs and recognition

The report recommends against any rationalisation of NTRBs/SPs. It also suggests two options for the recognition process. Firstly, recognition could be streamlined so that the additional administrative costs are minimised. Alternatively, the recognition provision of the Act could be removed. Both options would likely require legislative amendments.

Private agents

The report suggests increased transparency and accountability measures within the system to help minimise disputes exacerbated by the actions of private agents, but such measures should not increase regulatory burdens. Such measures might include a register of native title practitioners, or an accreditation system and qualifications for native title solicitors

Effective operation of the system

The report suggests more and better coordination between all levels of government and within and between government departments to deliver more effective support to native title holders.

For the most part, the future of the native title system over coming decades that this report envisages is a positive one. In this future native title holders are well positioned to enjoy their rights, NTRBs/NTSPs have a clearly-defined ongoing role and the ability to respond to their local circumstances, most RNTBCs have the capacity they need to meet their obligations and aspirations, and there is greater alignment between native title and broader Indigenous policy directions.

With much of the new government's Indigenous Affairs portfolio still in flux and a response to the review still pending, it is difficult to foresee how much of this vision will ultimately be realised.

If the final report is any indication, native title organisations are at the very least set to receive a desperately needed boost to funding to address chronic issues of capacity.

It remains to be seen whether RNTBCs will able to achieve the levels of corporate and economic independence aspired to if other parts of the Indigenous policy infrastructure that support native title holders and their families are subsequently depleted by a major funding rearrangement.

The Government is currently considering the findings of the review and has advised that it will respond at an appropriate time.

A downloadable report is available on the website of the Department of the Prime Minister and Cabinet. Copies of public submissions to the Review are available on the Deloitte Access Economics website.

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 the Department of the Prime Minister and Cabinet.

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

ISSN 1447-722X

THE NATIVE TITLE RESEARCH UNIT

AIATSIS acknowledges the funding support of the Department of the Prime Minister and Cabinet.

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

1964-2014 AIATSIS