

NATIVE TITLE NEWSLETTER

DECEMBER 2014



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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: 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](https://twitter.com/NTRU_AIATSIS) on Twitter or 'Like' NTRU on Facebook.



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Cover image: Nyangumarta Warrarn Aboriginal Corporation (NWAC) Meeting Bidyadanga. Credit: Dr Pamela Faye McGrath.

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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FROM THE NTRU



By Ludger Dinkler and Alexandra Muir, Native Title Research Unit, AIATSIS

The AIATSIS Native Title Research Unit has been busy this year working on lots of different projects and products. Below are links to some of the information and resources we provide. To find out more about what we are doing, please visit the [AIATSIS website](#) and the [Native Title Research Unit pages](#).

Our publications

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

- [Native Title Newsletter](#)
 - Keeps organisations, practitioners and individuals involved in native title up to date with developments in native title
- [Land, Rights, Laws: Issues of Native Title](#)
 - Issues papers provide analysis of emerging issues in native title research in a condensed and accessible short form
 - » The latest issues papers are: [In the native title 'hot hub': expert conferences and concurrent expert evidence in native title](#) by Vance Hughston SC & Tina Jowett

The staff at AIATSIS and the Native Title Research Unit would like to wish everyone a safe and happy holiday period. We wish you all the best for your native title work in 2015.

- » *Black and green revisited: understanding the relationship between Indigenous and environmental political formations* by David Ritter
- [Discussion papers](#)
 - Contribute to a greater understanding of contemporary issues in Indigenous Studies, introducing new research topics and innovative approaches
 - » The latest discussion paper - [What's needed to prove native title? Finding flexibility within the law on connection](#) by Nick Duff

Above: Artworks by Tony Hart at his trade stall during the Native Title Conference 2014. Credit: Andrew Turner, AIATSIS.

- » An upcoming discussion paper – *Reflections on a native title anthropology field school* by Andrew McWilliam and Jodi Neale
- [Books](#)
 - Develop topical themes in native title in a cohesive work of scholarship containing specialist analysis and review and integrating relevant research
 - » The latest book — [Living with native title: the experiences of registered native title corporations](#) by Toni Bauman, Lisa M Strelein and Jessica K Weir (eds)
 - » An upcoming book chapter on rights and interests - Strelein, LM (forthcoming), 'The right to resources and the right to trade' in S Brennan and M Davis (eds) *Native title: a vehicle for change and empowerment*

- [Native Title and Indigenous cultural heritage management bibliography](#) by Robert Williams and Pamela Faye McGrath
 - Provides a list of relevant legislation research and commentary on Indigenous cultural heritage management in Australia since the implementation of the *Native Title Act 1993* (Cth)

Our Native Title information resources and services

- [What's New in Native Title](#)
 - Monthly round-up of native title information, publications and events designed to assist organisations, practitioners and individuals involved in native title to access news, information and resources from a broad range of sources
- [Native Title in the News](#)
 - Monthly summaries of newspaper articles and media releases relevant to native title
- [Native title information handbooks](#)
 - Provide a summary of resources and information relating to key areas of native title at national, and state and territory level
- [Native Title Collections Access](#)
 - The Native Title Research and Access Officer (NTRAO) provides information about the native title resources held in the AIATSIS Library and Audiovisual Archives. Contact the the NTRAO, Alexandra Muir, on 02 6261 4223 or alexandra.muir@aiatsis.gov.au

Our PBC resources

- [PBC Funding & Training Guides](#)
 - Provided to assist native title holders to access information and resources regarding funding and training opportunities that may be relevant to their PBCs at national, and state and territory level
 - Most recently we updated the [National PBC Funding & Training Guide](#)
- [PBC Website](#)
 - Designed as a resource for PBCs and for those engaging with them, the website provides information on legislation and policy, events,

resources and publications, training and running a PBC

- [PBC Profiles](#)
 - Are created for all PBCs in Australia. The profiles are organised by state and contain information about the organisation recognised as a PBC

Our legal resources

www.aiatsis.gov.au/ntru/projects.html#agreement

- Most of our legal and other resources are closely linked to NTRU projects. They comprise research resources, reference lists, bibliographies, reports, conference papers and many other useful resources – in fact too many to list them here, so please visit the [Research Projects](#) section of our website
- [Law and policy submissions](#)
 - Provide balanced advice to government on matters that affect Indigenous peoples and communities in the form of submissions to parliamentary inquiries and other review processes
 - Most recently AIATSIS provided submissions to
 - » [AIATSIS submission to Australian Law Reform Commission Review of the Native Title Act](#)
 - » [Submission to the Australian Heritage Strategy](#)
 - » [Inquiry into the Development of Northern Australia](#)
 - » [Inquiry into the Queensland Regional Planning Interests Bill 2013](#)

- Case summaries
 - All native title determinations, as well as some of the most relevant court decisions relating to native title, are summarised and published monthly in [What's New in Native Title](#)
- Extended case summaries
 - Are provided for particularly significant cases either in the [Native Title Newsletter](#) or under the native title jurisprudence section of the [NTRU website](#)

The Annual National Native Title Conference

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

- [The Annual National Native Title Conference](#) is going into its 16th year in 2015. It attracts a cross section of everyone with an interest in native title matters, with about half of the around 700 conference delegates every year identifying as Aboriginal and Torres Strait Islander people
- National Native Title Conferences since 2000 are listed on the website and presentations / conference papers can be downloaded from the website

Feedback

The NTRU at AIATSIS is always interested in what you have to say about the information we provide and the work we do. If there is anything you think we could be doing better or provide more information about, please let us know at ntru@aiatsis.gov.au.

To help us to communicate and engage more successfully with all levels of stakeholders we are currently undergoing a full web audit. If your webpage links to AIATSIS or NTRU pages, please let us know so that we can do our best to ensure that your links are still working once our new website is launched in the first quarter of next year.

AN INTERVIEW WITH PETER MURRAY

MEMBER OF THE NGURRARA, THE GREAT SANDY DESERT



My name is Peter Murray and I come from Ngurrara, the Great Sandy Desert. Our PBC is Yanunijarra Aboriginal Corporation in Fitzroy Crossing, which mainly manages the Great Sandy Desert area. Our country is all native title claimed land within the Great Sandy Desert. Sand dunes, water holes, rock holes and a few creeks are the main source out there. It's all desert lands.

Native Title

I was involved in native title at a very young age with my fathers and mothers out on country making negotiations to get our land back and to claim it. It really taught me a lot of things. At the same time I was learning my culture and the mainstream of negotiation. We all live in two worlds, a cultural world and a mainstream world of Australia, and we're trying to balance those two methods while trying to get along with life. It's been a hard road learning about land management and native title. It's been a long road and hard road for a lot of people fighting out there to get their land back.

The determination

That was marked down as one of the most special days on the calendar to really celebrate land and for any native title group who gets their land back through native title. It's one of the biggest celebrations any group would even have on country; getting their country back and being able to celebrate with traditional owners, your elders and your younger generations there. It's real good.

Now that we've started our PBC

Before you start a business you need to lay your foundation and by laying your foundation is the governance that we practise with making those good governance decisions at ground level. Then start putting in all your structures, putting in your form work, like building a house. We're now at that stage where we're building that house. We want to branch out and start looking at business opportunities where we take on a lot of those contracts within the land management of the Ranger Project, negotiations with mining companies and still branch out to other businesses within Ngurrara native title lands and all the other stakeholders involved. So

Above: Ngurrara country. Credit: Yanunijarra Aboriginal Corporation.

Left: Peter Murray, Member of the Ngurrara, the Great Sandy Desert.

we're channelling it through the PBCs to create more employment opportunities for our members.

National Native Title Conference 2014

Networking is one of the biggest things these days — opportunities in having that network and looking at other groups around Australia that are having a similar struggle as we did and those who have done well economically. We can measure ourselves to try and reach those same aspirational goals that everyone else is trying to reach.

It's AIATSIS's 50 birthday this year, do you want to say anything?

Happy birthday AIATSIS. It's been a privilege coming to these events and let's celebrate it together.



TRADITIONAL OWNERS SPEAK OUT ON THE IMPORTANCE OF HERITAGE PROTECTION

By Yamatji Marlpa Aboriginal Corporation

On 26 September over 200 Traditional Owners and other interested community members from across Western Australia met at Yule River, 60km southwest of Port Hedland, to voice their concerns over the proposed amendments to the *Aboriginal Heritage Act 1972* (AHA).

The meeting was hosted by the Yamatji Marlpa Aboriginal Corporation's (YMAC) Pilbara Regional Committee. Respected Njamal Elder and YMAC Co-Chairperson Mrs Doris Eaton was joined by respected Banjima Elder Maitland Parker to lead the discussion. These discussions provided a much needed opportunity for Traditional Owners to contribute their voice to discussions surrounding Aboriginal Heritage protection in WA. Key concerns raised at the meeting were a lack of consultation with Aboriginal people and the ongoing inequality between Aboriginal people and industry under the AHA.

Mrs Eaton urged those in attendance to unite with one voice.

"These proposed amendments to the *Aboriginal Heritage Act* do not respect Aboriginal heritage and culture. Traditional Owners must be at the centre of decisions that affect their country. We will stand united and speak with one voice until our heritage is given the same respect as built heritage," she said.

Aboriginal Representative Bodies and members of Parliament MLA Brendan Grylls, Member for the Pilbara, and MLC Robin Chapple, Member for Mining and Pastoral Region, attended the meeting to take part in the discussions and were also given the opportunity to address the meeting. The Minister for Aboriginal Affairs, MLC Peter Collier, declined an invitation to attend.

Simon Hawkins, YMAC CEO, said opposition to the amendments was widespread.

"Since the Yule River meeting over 1600 people from around Western Australia have signed a petition calling on the Government to abandon the proposed

amendments and create a new process more inclusive of Traditional Owners.

"The WA legislation, in its current form, is not at a standard expected in the 21st century when it comes to the conservation and management of heritage sites. We want to see this legislation reflect a modern view and it must be consistent with other similar legislation in Australia," he said.

A delegation travelled to Parliament on 20 November. The delegation called on the Legislative Assembly to form a Select Committee, with the intention to develop a new framework to reform the AHA, this time including a meaningful discussion with Traditional Owners.

Above left: Traditional Owner Anthony Dann speaking at the meeting.

Above right: Banjima Elder Maitland Parker addressing the meeting.

Credits: Yamatji Marlpa Aboriginal Corporation



Yamatji Marlpa
ABORIGINAL CORPORATION

SAVE THE DATE & CALL FOR PAPERS

NATIONAL NATIVE TITLE CONFERENCE 2015

LEADERSHIP, LEGACY AND OPPORTUNITY

By **Shiane Lovell, Conference Manager, AIATSIS**

The 2015 National Native Title Conference, to be co-convened by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and Cape York Land Council (CYLC), will be held on the traditional lands of the Kuku Yalanji people in Port Douglas, Queensland.

The conference will take place from Tuesday, 16 June to Thursday, 18 June. It has been scheduled to coincide with the Laura Aboriginal Dance Festival, which will be held on the following weekend, 19–21 June.

The National Native Title Conference is recognised as the leading Indigenous policy conference in Australia. It promotes public debate about native title and Indigenous peoples' interest in land and waters; fosters the acquisition of knowledge in the dynamic areas of agreement making, natural resource management and economic development; and provides an opportunity for native title parties to share information and experiences on broader policy topics.

The conference will comprise one day of closed workshops for Indigenous people and their native title representative bodies (NTRB and PBC Day) followed by a two-day public program. The dynamic cultural program will include a Welcome to Country ceremony.

CONFERENCE THEMES

'LEADERSHIP, LEGACY AND OPPORTUNITY'

- Platform for inspirational leadership
 - Building on our legacy
 - Passing the flame – new generation leadership
 - Youth engagement
- Springboard for economic success
 - Sustainable development
- Foundation for cultural resurgence
 - Learning from our elders
 - Cultural practice and wellbeing
- Support structures that work
 - Law and policy reform
- Gathering from the four corners
 - Collaboration and regional coordination
 - Stories of challenge and triumph
 - A place for big ideas

CALL FOR PAPERS

Proposals for papers, panels, dialogue forums and Indigenous talking circles are invited for consideration by the conference convenors.

If you would like to submit a proposal to present at the National Native Title Conference 2015, please complete our 'Call for Papers' form with an abstract of up to 200 words, and a biography of up to 150 words for each presenter.

Download the form from our website www.aiatsis.gov.au/events/native_title/2015

Please send your proposal to AIATSIS no later than Monday 2 March 2015 via:

Post

AIATSIS (Shiane Lovell)
GPO Box 553
Canberra ACT 2601

Email

ntconference@aiatsis.gov.au

Fax

02 6261 4288

For more information, email Shiane Lovell, Conference Manager at shiane.lovell@aiatsis.gov.au or call her on (02) 6246 1108.



Cape York Land Council

CARPENTARIA LAND COUNCIL ABORIGINAL CORPORATION

30TH YEAR CELEBRATIONS

STANDING STRONG AND LEADING THE WAY 1984–2014



By Thomas Wilson, Chairperson, Carpentaria Land Council Aboriginal Corporation

On the evening of 28 September 2014, more than 1000 Traditional Owners, special guests and locals helped CLCAC celebrate 30 years of *Standing Strong and Leading the Way*. The celebrations were held in Burketown over a 3 day period as part of the inaugural Morning Glory Festival. The celebrations included a 30 Year Timeline display of CLCAC's achievements which still can be viewed at the Burketown Visitors Information Centre, Ranger Tag Along Tours, Helicopter Tour and a Gala Dinner Celebration with bush tucker and guest speakers the Hon Nigel Scullion and Professor David Trigger.

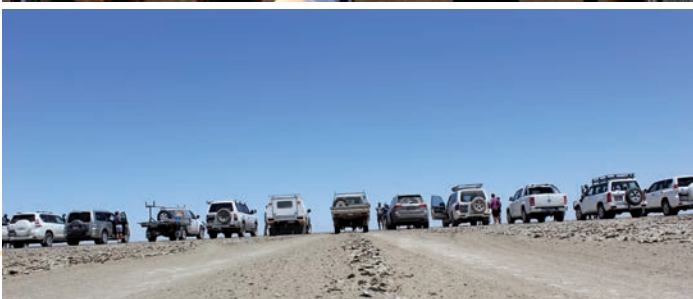
As the Chairperson of CLCAC, I am so proud of the Corporation, our members and our communities and of the achievements accomplished over the 30 years to remain strong and lead the way in the southern Gulf of Carpentaria. We have assisted 6 of the 9 traditional owner groups in our region to obtain successful determinations of native title, completed the transfer of large areas of land under the *Aboriginal Land Act* and helped with the acquisition of significant parcels of other forms of tenure. I am especially proud of the achievements of our Indigenous Ranger Program, which is one of the best in the country and was recently awarded the

Environmental and Landcare award at the QLD Regional Achievement & Community Awards.

Please visit our website www.clcac.com.au to view more photos from the celebrations.

Thomas Wilson
Chairperson

Below clockwise from left: Woomera Dancers opening the Gala Dinner; CLCAC 30 Year timeline of achievements and history; Entry to CLCAC 30 Year timeline of achievements and history. Rainbow serpent made from ghost net collect by the CLCAC Rangers; and CLCAC Ranger Tag Along Tours. Credits: Carpentaria Land Council Aboriginal Corporation



THE WORK OF RIGHTS

PRELIMINARY FINDINGS FROM THE NYANGUMARTA NATIVE TITLE CORPORATE HISTORY PROJECT

By Dr Pamela Faye McGrath, Research Fellow, NTRU

We all know that getting and managing native title rights involves a lot of hard work on the part of Aboriginal and Torres Strait Islander traditional owners. But there is very little comprehensive information available about how much time the governance of rights actually takes, how many different people are involved, and the kinds of activities they are required to do.

NTRU Research Fellow, Dr Pamela McGrath, has been working with the Nyangumarta Warrarn Aboriginal Corporation (NWAC) and their local representative body, Yamatji Marlpa Aboriginal Corporation (YMAC), to try and answer these questions through a longitudinal case study of Nyangumarta native title corporate activities.

The Nyangumarta people's country is located in the east Pilbara/west Kimberly between the town of Port Hedland and Broome, around 80 Mile Beach. Nyangumarta first started working on their native title claim in the mid-1990s, and in 2009 finally achieved recognition of their rights over 33,000km² of country. In 2012 they achieved a second determination of jointly-held rights with their Karajarri neighbours over a further 2000km².

This innovative case study involved Pam spending two weeks in the Perth office of YMAC reading files, reports and other documents from as far back as 1999 in order to capture information about the numbers of meetings, negotiations, mediations, surveys, workshops and fieldtrips that Nyangumarta people have been involved over the past 15 years. She also looked at the length of

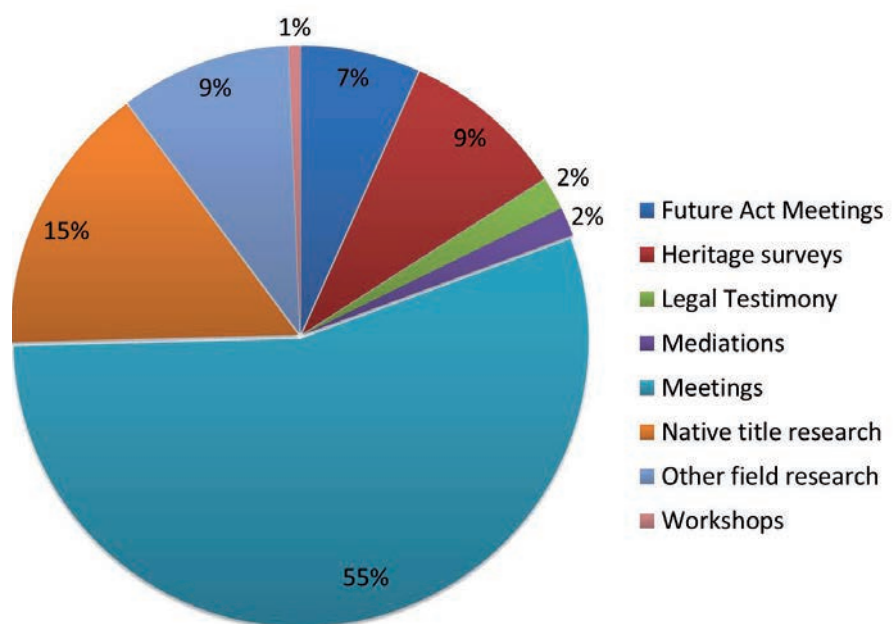


Figure 1: Percentage of Nyangumarta Time by Event

these events and who attended them, recording all the different organisations and individuals that the Nyangumarta people met and worked with during this period.

The results give a very good sense of the amount of time and volunteer labour that Aboriginal and Torres Strait Islander people invest in the native title system. They also demonstrate the extent to which other government agencies, companies and other interest groups are engaging with the Nyangumarta people over access to and use of Nyangumarta country. Some key preliminary findings of the case study show that over the past 15 years, over 130 different Nyangumarta people have been involved in at least 304 native title events, including:

- **155 meetings** held over a total of 180 days
- **23 heritage surveys** held over a total of 66 days
- **65 fieldtrips and interviews** held over 97 days
- **14 negotiation meetings**
- **22 mediations**

The majority of these events (56%, see Figure 1) were meetings, underscoring the fact that meetings are a key feature of native title work. (We suspect this will not be news to many of our readers!) Figure 1 also illustrates the effort that goes into dealing with future acts, especially those related to mining and exploration. Over the past 15 years, at least 15% of the Nyangumarta people's native title work has been related to future act business,

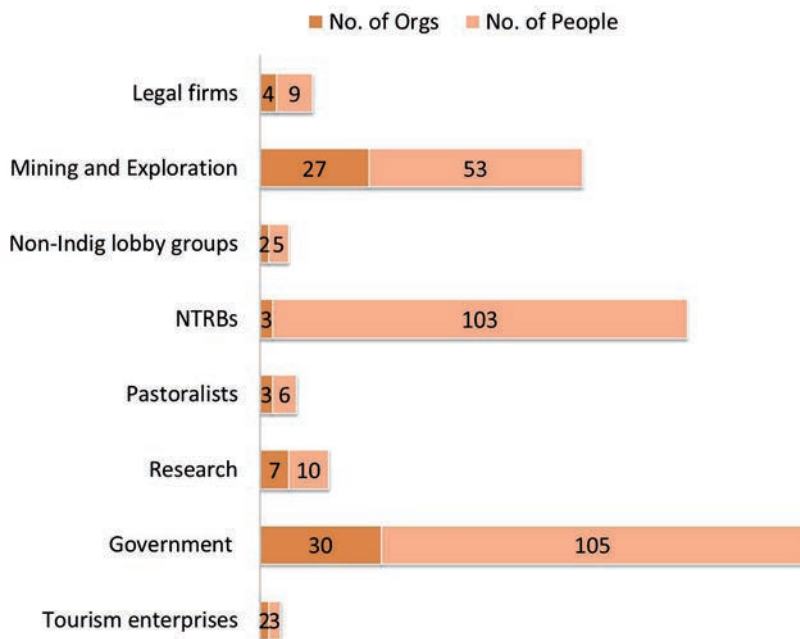


Figure 2: No. of outside organisations and people, by organisation type

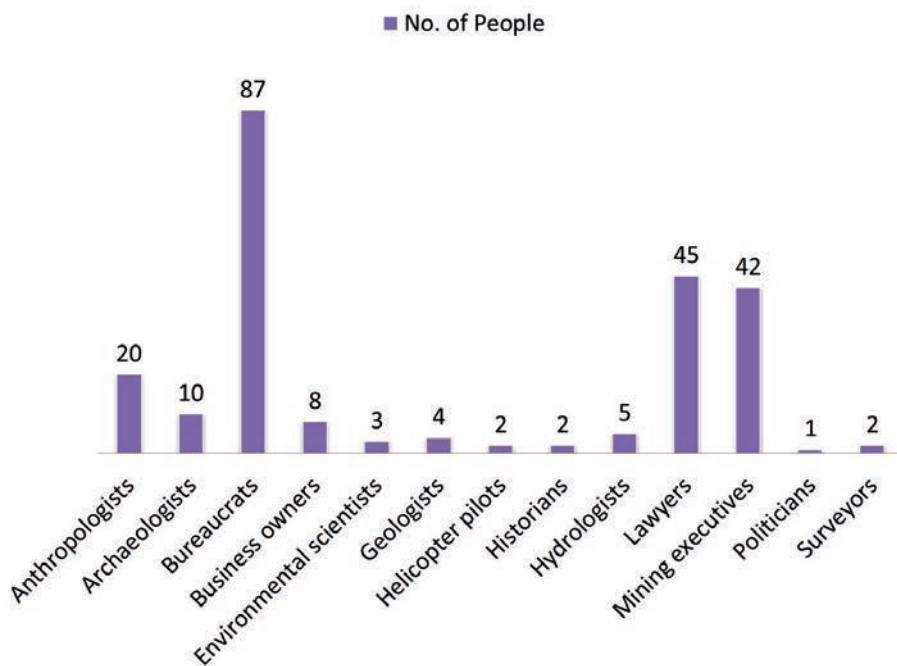


Figure 3: No. of outside people, by profession

specifically negotiation meetings and heritage surveys.

This may seem like a lot of work, but people who are familiar with native title business in the Pilbara tell us that compared with other groups the workload of the Nyangumarta is relatively light. In relation to the management of future acts, for example, during the 2012 year alone YMAC organised 247 heritage surveys comprising 1,428 days on behalf of the 25 or so native title groups they represent.² The busiest native title groups regularly have multiple teams

of people participating in simultaneous archaeological and ethnographic heritage surveys for weeks on end, with their breaks carefully scheduled to allow those involved to come back into town not for a rest, but to attend native title meetings.

When we look at the number of outside organisations and people who have been involved in Nyangumarta native title activities (Figure 2), the demands of facilitating future acts are again emphasised. During the period of the case study, Nyangumarta dealt with more than 305 non-Nyangumarta

individuals from over 85 different organisations, including more than:

- 53 representatives from 27 different mining companies
- 100 different government employees from over 30 state and Commonwealth departments
- 103 different people from 3 different land councils (Pilbara Aboriginal Land Council, YMAC and Kimberley Land Council)

The reasons behind the high turn-over of professional staff within NTRBs that these figures suggest are complex, and the constant educating of new employees is at times a burden for traditional owners. But the contributions and commitment of so many individuals over the years are greatly appreciated by the Nyangumarta and their departures are never easy. As Nyangumarta woman Margaret Rose, YMAC Senior Community Liaison Officer, explained:

You've worked with a group of people for some time, for even a year. People get to know each other. The Aboriginal people get to know you, and the anthropologists get to know the individual people, how they are. And the lawyers are the same. And you build that kind of relationship, some form of bonding with each other. You become close. And you just become a part of a family to that people in that group.

So when it comes down to that, it is a very difficult situation when people part with [NTRB staff]. You know, when the lawyers and anthros the Nyangumarta have a connection with leave, they are not easily forgotten. They always stay in the back of our minds.

The total numbers of lawyers and anthropologists the Nyangumarta have 'grown up' over the years are illustrated in Figure 3: 20 anthropologists and 45 lawyers. Most of these professionals worked for NTRBs, but some were engaged by respondent parties, government or mining companies and did not have long-term relationships with the group.

The numbers of professional bureaucrats who have been involved in Nyangumarta native title business is also remarkable: at least 87 different individuals from more than 30 agencies.

The encounters that Nyangumarta have with the employees of government and mining companies are not always easy. They are usually brief and, despite the goodwill of all involved, they are burdened by a heavy history of past injustices. Again, Margaret Rose explains:

That becomes like a different scenario, a different story to all of it. Because government people, or companies, come to you because they have to come to you. They got something planned that they want to do there...They come for the meeting, and then they hang around a bit and then they are gone.

When [government and miners] talk to the group, [Nyangumarta] people already know that they will have to give up their rights to certain areas where they are wanting to do work. And sometimes that country means a lot to us and we know that they are going to go there and wreck the place, destroy the place.

Well, we fought hard to get this country back. We had to prove to the government on paper...that the country is ours, when it is already ours.

So it's a long, long journey, you know. And that's why the people have that anger still in them when mining companies and governments come, because its 'do this and do that', and it's another struggle again; we're going to lose another bit of our land that we fought hard to get back.

But despite the hard work and the heart ache, these encounters with outsiders are also something to be celebrated, for they speak to the fact that the traditional owners of Nyangumarta country can no longer be ignored. Through their native title work, the Nyangumarta people are becoming more visible to the broader Australian public and are increasingly better placed to insist that their rights and interests are respected. The fight is not over, but if recent successes such as their collaboration with Department of Environment and Conservation to establish the 80 Mile Beach Marine Park¹ are any indication, a new way is being found that ensures the aspirations of both Nyangumarta and government are achieved.



Above: Rosie Munro, Wally Inbali and Winnie Coppin. Credit: Dr Pamela Faye McGrath.



Above: NWAC Meeting Bidyadanga. Credit: Dr Pamela Faye McGrath.

The Nyangumarta people's decade long journey to gain recognition of their native title rights has been, in their own words, *kaja karti marnti* (a long walk). They are not alone; since 1994, many hundreds of other Aboriginal and Torres Strait peoples around the country have been on similar journeys. These journeys do not end when a group's rights are recognised by the Federal Court.

As the experiences of the Nyangumarta demonstrate, recognition of native title is only the beginning. Governing a PBC and managing country for the benefit of existing and future generations of native title holders is no small thing and requires considerable investments of time, money and effort. But until we undertake more case studies of this kind, our understanding of the challenges and benefits of native title work and its impact on people's lives will remain anecdotal at best.

The NTRU extends our many thanks to the Nyangumarta people and YMAC for the trust they have shown in allowing us into their archives for this project. AIATSIS welcomes expressions of interest from other PBCs interested in partnering with AIATSIS to undertake similar case studies of their native title corporate histories. For more information, email Pam at pamela.mcgrath@aiatsis.gov.au or call her on (02) 6261 4215.

- 1 See <http://ymac.org.au/protection-of-aboriginal-culture-through-eighty-mile-beach-marine-park/> for more information
- 2 Yamatji Marlpa Aboriginal Corporation, *Annual Report 2013*, YMAC, Perth, 2013, pp.42, accessed 20 February 2014, <http://ymac.org.au/wp-content/uploads/2013/10/YMAC-Annual-Report-2013-lr.pdf>

WORKSHOP ON MANAGING INFORMATION IN NATIVE TITLE (MINT)

16–17 MARCH 2015 AIATSIS, CANBERRA

The AIATSIS Native Title Research Unit (NTRU) is organising a workshop with NTRBs and PBCs to discuss the challenges of managing native title information and start working together towards some shared solutions.

Some of the questions we want to work on are:

- What do we do with the enormous amount of information that is generated in the course of pursuing and managing native title?
- How can we make sure information about people, culture and Country is kept safe for coming generations?

- How can we provide legally and culturally safe access to information?
- What tools and resources are available to help us manage our information?

The workshop will be an opportunity to:

- share experiences and ideas about information management with other PBCs and NTRBs
- hear from others about what they have already done and what works (or doesn't!)
- learn about how AIATSIS and other archives manage and look after

collections of cultural and historical information

- collaborate with others to develop shared guidelines and principles for managing native title information
- join a network of people who want to be involved in the development of shared solutions

For more information on the workshop or to register your interest in attending, please contact one of the MINT team. Names and details below.

WORKSHOP ON MANAGING INFORMATION IN NATIVE TITLE

Invitation to participate

WHEN? Monday 16–Tuesday 17 March 2015

WHERE? Mabo Room, AIATSIS, 51 Lawson Cres, Canberra



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- Collaborate with others to develop shared guidelines and principles for managing native title information.
- Join a network of people who want to be involved in the development of shared solutions.

RSVP

For more information on the workshop or to register your interest in attending, please contact one of the MINT team:

Pamela McGrath, Research Fellow | (02) 6261 4215 | pamela.mcgrath@aiatsis.gov.au

Ludger Dinkler, Senior Project Manager | (02) 6246 1603 | ludger.dinkler@aiatsis.gov.au

Alexandra Muir, Native Title Research and Access Officer | (02) 6261 4223 | alexandra.muir@aiatsis.gov.au

THE AUSTRALIAN LAW REFORM COMMISSION AND ITS CURRENT REVIEW OF THE NATIVE TITLE ACT

A brief explanation of the Australian Law Reform Commission's inquiry process and a discussion on the meaning of some of the terms in its current review of the *Native Title Act*

Donna Bagnara, Senior Project Manager (Legal), Native Title Research Unit, AIATSIS.

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.

Over its life, the NTA has been the subject of amendments and proposals for change and reform. For instance, the NTA was amended in 1998, with the introduction of the Howard government's controversial 10 point plan. In 2007, the Howard government made other changes to the NTA. These were not without their own controversy, particularly with respect to administrative and funding arrangements for native title representative bodies and service providers.² Changes to the function of the National Native Title Tribunal were enacted in 2009 and amendments expanding the future acts regime were introduced in 2010. Other laws have been amended which have impacted on native title. For instance legislation dealing with the taxation treatment of native title and the applicability of charitable trusts were enacted in 2013.³

Amendments to the NTA and other pieces of legislation are only one aspect of the many proposals, inquiries and other engagement with the legislative regime surrounding native title.

The Australian Law Reform Commission (ALRC) is currently conducting an inquiry of the NTA (the Review) and, in October 2014, called for submissions to its Discussion Paper. Submissions are due on 18 December 2014 and the ALRC's Final Report is to be submitted

to government in March 2015. It must be tabled in Parliament, but any action with respect to the ALRC's findings and recommendations will be at the government's discretion.

By providing brief descriptions and discussions about the review process and the key areas of the Review, I hope to offer a simplified (if not simplistic) explanation about the need for reform.

AIATSIS, through the NTRU promotes the recognition and protection of the native title of Aboriginal and Torres Strait Islander Peoples. The NTRU uses the quality, independence and ethics of its research to influence thinking and practice and has been involved with the Review in the following ways:

- AIATSIS' Director Research Strategy, Dr Lisa Strelein, is a member of the advisory committee to the Review;
- AIATSIS publications are helping to inform the Review;
- the ALRC Review team consulted with staff from the Native Title Research Unit at AIATSIS;
- the ALRC presented and engaged with stakeholders at the 2014 Native Title Conference in Coffs Harbour; and
- AIATSIS provided submissions to the ALRC's Issues Paper and will be providing a submission to the ALRC's Discussion Paper.

The ALRC Inquiry Process

The ALRC was established in 1975 as an independent government body to conduct inquiries into areas of law reform. These inquiries are initiated at the request of government.

The ALRC may only begin any inquiry/review if the federal government asks. Through the Attorney-General, the government will give the ALRC terms of reference that set out the subject and goals of any inquiry.

The ALRC will then look at the terms of reference and scope its inquiry. After that, the ALRC's process is usually to:

1. undertake initial research (this can include consultation with identified stakeholders and setting up an advisory committee or a panel of experts);
2. prepare an issues paper and invite stakeholders to provide submissions;
3. review submissions to the issues paper and undertake further consultation;
4. prepare a discussion paper and invite stakeholders to provide submissions;
5. review submissions to the discussion paper and undertake further consultation; and
6. provide a final report to government (through the Attorney-General).

The ALRC's final report must be tabled in Parliament and then it may be made available to the public. After the final report is tabled in Parliament, it is up to the Government what it does with the ALRC's findings and recommendations.⁴

ALRC Review of the NTA – Terms of Reference

In early June 2013, the Attorney-General gave three weeks' notice to the public to comment on draft terms of reference for a review of the NTA.

AIATSIS' submission on the draft terms of reference was one of many amongst the

22 submissions that strongly encouraged that the terms of reference extend beyond issues to do with the recognition of native title. For example, AIATSIS asked that the Review look at the extent to which native title rights and interests, once recognised, can be regulated by statutory regimes for the management of land and water.⁵

The Attorney-General gave the final terms of reference to the ALRC in August 2013. The draft and the final terms of reference were substantially the same, in the sense that the aspects of the NTA to be reviewed remained the same. However, the Attorney-General did provide a broader set of parameters, or 'scope', under which these aspects would be reviewed.

The Attorney-General appointed Professor Lee Godden to lead the inquiry and report on Commonwealth native title laws in relation to:

1. Connection; and
2. Authorisation and Joinder.⁶

Professor Godden explains the parameters of the terms of reference as follows:

Under the Terms of Reference for the Inquiry, we were to be guided by the Preamble and the Objects of the Native Title Act. In addition, the Inquiry has developed five guiding principles to underlie reforms: acknowledging the importance of the recognition of native title; acknowledging the many interests in the native title system; encouraging timely and just resolution of determinations; consistency with international law; and supporting sustainable futures. Our proposals seek to improve the operation of the Native Title Act within this principled framework.⁷

ALRC Review of the NTA – Research, Consultation and an Issues Paper

The ALRC Review team undertook initial research and consultation in late 2013. Then, on 20 March 2014, the ALRC released its Issues Paper.

The Issues Paper asked 35 questions against the following aspects of the NTA in the context of the limitations, opportunities and the significance of native title to Aboriginal and Torres Strait Islander peoples as well as non-Indigenous Australians:

1. Connection requirements, with respect to:
 - a. a presumption of continuity;
 - b. the meaning of traditional;
 - c. whether native title rights and interests can include interests of a commercial nature;
 - d. confirmation that connection does not require physical occupation or continued or recent use; and
 - e. empowerment of courts to disregard substantial interruption or change in continuity, where it is in the interests of justice to do so.
2. Barriers imposed by authorisation and joinder provisions.

The ALRC's Issues Paper was widely circulated and made publicly available on the ALRC website. The ALRC Review team also undertook face to face consultations with stakeholders from around Australia to discuss the Issues Paper or any relevant matter. These consultations offered the ALRC Review team and stakeholders the opportunity for open dialogue. The integrity of this process was supported by the ALRC referencing only written submission, published by the ALRC, in the development of its Discussion Paper.

The value of this process is highlighted by the ALRC in its annual report as follows:

Speaking to Indigenous communities, aboriginal land councils, mining companies, agriculturalists, fisheries, local councils, judges and lawyers who work in the native title area, has made an invaluable contribution to our thinking, and again we are extremely grateful for the time that stakeholders have given us in this process.⁸

ALRC Review of the NTA – Discussion Paper

On 23 October 2014, the ALRC released its discussion paper. This contains a range of proposals and questions, building on all elements of the Review, including ALRC's engagement with submissions to the Issues Paper.

The ALRC have called for submissions, which may be in response to specific proposals and questions within the Discussion Paper or to background material and analysis. Submissions are due by 18 December 2014.

AIATSIS will be making a submission to the Discussion Paper.

Connection

A simple explanation of 'connection' is not possible and it is much easier to describe the term than define it. It's about evidence to prove a native title claim, it's about

a complex set of statutory provisions in the NTA and associated case law, policy and practices, such as connection reports.⁹

However, 'connection' is about much more than a set of legal requirements and evidence.

When using the NTA to have native title recognised, Aboriginal and Torres Strait Islander claim groups are asked to prove connection to land and waters. Proving 'connection' is about demonstrating a relationship with land and waters based on the native title claim group's laws and customs. Native title will not be recognised unless the observance of those laws and customs is proven to have been continuously acknowledged from settlement to the present.

The law on connection is complex and has not been made clearer by the courts. To quote Dr Lisa Strelein:

... the words 'connection' and 'traditional' have resulted in torturous and costly research focused on establishing the continued observance of laws and customs, which have their roots in the pre-existing normative systems and have remained vital through 'each generation' since the assertion of British sovereignty. To complicate matters, each state and territory has imposed different guidelines for 'proving' native title.¹⁰

Authorisation

Under the NTA, a person may only apply for a determination of native title if they are authorised by all the members of the native title claim group. In this context, authorisation is the empowerment of an individual or a group of individuals to make decisions and represent their interests.

The NTA requires that authorisation be an outcome of a traditional process of decision-making. It is only where there is no such process that authorisation may take place using a process agreed by all the members of the native title claim group.

There are significant issues with the requirements for the processes of authorisation in the NTA. For instance, there is a lack of clarity of the term 'traditional'. There are also issues about the differences in legal systems: that Aboriginal and Torres Strait Islander societies do not all relate the same way to the legal requirements under the NTA. The issues are varied and complex and can make the authorisation process difficult. Added to these difficulties is the fact that there can be serious time pressures on coming to a decision (for example, a claim must be lodged within three months to attract the right to negotiate a proposed future act).

Joinder

The people involved in a court case are called 'parties'. If a court case is started by way of an application (for example, an application for a determination of native title), the parties are called 'applicant' and 'respondent'.

In native title matters, the person or people who have been authorised by the native title claim group will be the 'applicant'.

The 'respondent' will be the State/Territory party and other parties such as mining or pastoral leaseholders or those people or companies holding a fishing licence or a shooting licence. Often electricity provider companies will be respondent parties to ensure their right to access their infrastructure. There is a wide range of interests that might be affected by native title and the number of respondent parties to native title cases can be a significant issue.

Parties can be joined to a native title matter using different legal processes. The effect is that sometimes parties that have very tenuous interests in the native title claim area can become heavily involved in the processes of reaching an agreement that native title exists. Another serious issues with the law on joinder is that parties might be joined very late in the process, which can interrupt and delay outcomes.

However, dismissing parties or refusing to join parties on the basis of the type of interest held may not always be appropriate. For instance, when applying the type of interest recognised at property law, a competing claim

group, whose claim is not registered with the National Native Title Tribunal, does not hold as strong an interest as a grazing leaseholder. However, the leaseholder's activity is restricted to the terms of the lease and that may well be dealt with on the paper. Whereas, the competing claim group's interest may require more consideration in order to afford procedural justice.

The issues of connection, authorisation and joinder are the main subject of the Review into the NTA. These issues have been examined in detail in the ALRC's issues paper, in the 40 submissions it received in response and now in the ALRC's discussion paper.

Submissions to the discussion paper close on 18 December 2014. For more information about the review of the *Native Title Act 1993*, visit the Australian Law Reform Commission's website at www.alrc.gov.au or contact them on 02 8238 6333. For more information about AIATSIS' input to the ALRC review, please contact Donna Bagnara on 02 6246 1602.

leases in the Land and Other Legislation Amendment Bill 2014 introduced to the Queensland Parliament in March 2014).

- 6 For more information on the terms of reference and appointment of Professor Lee Godden, see ALRC News and Media at <http://www.alrc.gov.au/news-media/media-release/final-TOR-native-title>.
- 7 Australian Law Reform Commission 'Proposals for reform of the native Title Act: ALRC calls for submissions' <http://www.alrc.gov.au/news-media/native-title-dp>, Published 23 October 2014, Accessed November 2014.
- 8 The Australian Law Reform Commission, Annual Report 2013-14, p 6
- 9 The Australian Law Reform Commission, review of the Native Title Act, *Issues Paper* 45, 2014.
- 10 Dr Lisa Strelein, 2014, Reforming the Requirements of Proof: The Australian Law Reform Commission's native title inquiry', 8(10) *Indigenous Law Bulletin*, 6-10, 7.

- 1 The Australian Law Reform Commission 'ALRC Native Title Act review', *Native Title Newsletter*, August 2013.
- 2 See [Angus Frith \(with Ally Foat\), 'The 2007 amendments to the Native Title Act 1993 \(Cth\): technical amendments or disturbing the balance of rights?' Monograph series \(Australian Institute of Aboriginal and Torres Strait Islander Studies. Native Title Research Unit\); no. 2008/3.](#)
- 3 See Nick Duff, 'Reforming the Native Title Act: Baby Steps or Dancing the Running Man?' *Australian Indigenous Law Review* Vol 17 No 1, 2013 (56-70).
- 4 The Australian Law Reform Commission, Review of the *Native Title Act* – at a glance, 12 March 2014, <http://www.alrc.gov.au/native-title-act-infosheet> Accessed November 2014.
- 5 The High Court has provided some clarification on the extent that s 211 of the NTA intersects with the operation of Commonwealth and State laws (see *Karpany v Dietman* [2013] HCA 47 and *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33). However, legislative challenges to native title rights and interests continue (for example, amendments to the North Stradbroke Island Protection and Sustainability Act that extend sand mining leases (currently being challenged in the High Court by the Quandamooka people); and the proposed extension of large agricultural, grazing or pastoral

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

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