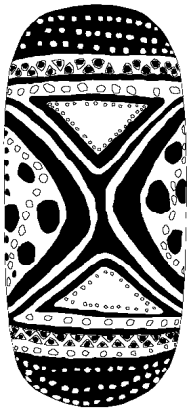

A I A T S I S

AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

Native Title Research Unit

NATIVE TITLE NEWSLETTER

July and August 2000

No. 4/2000

The Native Title Newsletter is published on a bi-monthly basis. The newsletter includes a summary of native title as reported in the press. Although the summary canvasses newspapers from around Australia, it is not intended to be an exhaustive review of developments.

The Native Title Newsletter also includes contributions from people involved in native title research and processes. Views expressed in the contributions are those of the authors and do not necessarily reflect the views of the Australian Institute of Aboriginal and Torres Strait Islander Studies.

Contents

List of abbreviations

Note: Where an item also appears in other newspapers, etc, an asterisk (*) will be used. People are invited to contact the Native Title Research Unit at AIATSIS if they want the additional references. The NTRU will try to provide people with copies of recent newspaper articles upon request.

Ad = Advertiser (SA)
Age = The Age
Aus = Australian
CM = Courier Mail (QLD)
CP = Cairns Post
CT = Canberra Times
DT = Daily Telegraph
FinR = Financial Review
HS = Herald Sun (VIC)
KM = Kalgoorlie Miner
ILUA = Indigenous Land Use Agreement
IM = Illawarra Mercury
LE = Launceston Examiner
LR News = Land Rights News
LRQ = Land Rights Queensland
Mer = Hobart Mercury
NNTT = National Native Title Tribunal
NTA = *Native Title Act 1993*
NTN = Native Title News (State editions)
NTRB = Native Title Representative Body
SC = Sunshine Coast Daily
SMH = Sydney Morning Herald
TelM = Telegraph Mirror (NSW)
WA = West Australian
WAus = Weekend Australian

NEWS FROM THE NATIVE TITLE RESEARCH UNIT

The Native Title Research Unit announces with some pride publication of ***A Guide to Australian Legislation Relevant to Native Title***. The Guide provides summaries of over 500 pieces of legislation of relevance to native title as at January 2000. In two volumes, its scope is inclusive, covering Acts specific to native title and land rights as well as Acts with indirect application. The Guide is divided by jurisdiction (the States, Territories and the Commonwealth) and then further divided into six subject areas, including land and environment, heritage, local government, marine, minerals and native title. The text describes those provisions of the Act which bear upon Indigenous land issues.

It will be an important reference book generally and will give ready access to legislation that will impinge on native title and legislation that groups holding title can use to develop their land and resources. Dr. Mary Edmunds, then Director of Research, initiated work on the Guide in 1997. It was compiled by Christian Fabricius in 1997 and 1998 with the assistance of Jon Stanhope in its early stages. Ann Jackson Nakano edited the first version of the text in 1999. Jessica Weir updated the text to incorporate amendments to legislation to January 2000.

RRP $49.50 (incl. postage, handling and GST) from Aboriginal Studies Press at the Institute (02 6246 1186 or sales@aiatsis.gov.au).

Kimberley National Parks

by Peter Yu

Executive Director, Kimberley Land Council

On 19 August 2000, Western Australian Premier Richard Court announced the creation of more than 500,000 hectares of new national parks and conservation parks in the north-west Kimberley, on the Mitchell Plateau and in the King Leopold Ranges.

The parks are all within country owned by the Wanjina/Wunggurr native title claim group. This group includes people who speak Wunambal and Ngarinyin languages. The owners have registered native title applications to their country, united under the law of the Wanjina and Wunggurr creator beings. Those applications are called Wanjina/Wunggurr-Ungguu and Wanjina/Wunggurr-Wilinggin.

Aboriginal owners of the area have not given permission for their land to be turned into national parks or conservation parks and were not notified of the government's decision to change the land tenure on 10 July.

They regard this act as theft of their property. The Kimberley Land Council described it as 'an appalling case of home invasion'. The Western Australian Premier has been reported as stating that the national parks will thwart native title claims for exclusive possession, and that national parks and native title can co-exist.

Much of the country turned into conservation reserves was previously Vacant Crown Land and as such would have had an unimpeded opportunity to receive a positive native title determination. Future act procedures were not followed, and the parks are arguably invalid by the operation of the Native Title Act.

Moreover, it is racially discriminatory to take away a property interest on Aboriginal land when non-Aboriginal property interests would not be acquired in the same way. Therefore, the creation of the parks in the north-west Kimberley also arguably contravenes the Racial Discrimination Act.

Regional, state, national, and international conservation groups — such as Environs Kimberley, Conservation Council of Western Australia, the Australian Conservation Foundation, the Wilderness Society, and the World Wildlife Fund for Nature — are supporting the Traditional Owners and the Kimberley Land Council in their call for the State Government to withdraw or suspend the park declarations, pending negotiations to reach agreements about joint management.

The Western Australian Government and the Department of Conservation and Land Management have rejected an excellent opportunity to create Western Australia's

first co-managed national parks, protecting nature and Indigenous culture, and respecting Aboriginal people as land owners and managers. Kimberley Traditional Owners are leading a direct action and legal campaign to make this opportunity a reality.

For further information contact the Kimberley Land Council at media@bme.klc.org.au

Torres Strait Determinations

On the 6th and 7th July 2000 the Federal Court sat for the first time in its history in the Torres Strait. The sitting of the Court was to give effect to six consent determinations relating to native title applications. These covered the islands of Dauan, Mabuiag, Warraber, Poruma, Masig and Damuth. The determinations formally recognise, under Australian law, the native title rights and interests held by those communities under traditional law.

This latest round of successful applications brings the total number of native title determinations within the Torres Strait to nine. Eight of these have been obtained under the *Native Title Act 1993* and follow on from the initial Murray Islands (*Mabo*) court case handed down by the High Court in 1992.

The consent determinations handed down in July come 18 months after the first native title determinations under the amended *Native Title Act 1993*. These were in relation to Moa and Saibai Islands. Saibai Island, at the time, was put forward as a test case by the Torres Strait Regional Authority and was considered as having implications for other native title applications in the Torres Strait.

At issue in reaching these outcomes has been how one party's rights will articulate with those of others. Native title determinations in the Torres Strait (excluding the *Mabo* case) have been preceded by formal agreements between the native title applicants and other parties. These have predominantly been struck with companies providing infrastructure to the area and have followed from the successful strategy employed by Torres Strait Regional Authority in the Saibai Island application.

The determinations obtained under the *Native Title Act 1993* only apply to areas of land. Native title rights in relation to the sea are yet to be claimed. The Torres Strait Regional Authority is currently engaging in consultation with communities across the region. It is hoped that putting in a regional application covering relevant marine areas will get over the difficulty of trying to delineate between different claim boundaries out at sea.

David Leigh
Native Title Research Unit, AIATSIS

The Legal Concept of Native Title

Cape York Land Council Workshop

21 – 23 July 2000, Cairns, Queensland

The *Miriuwung Gajerrong* appeal (*Ward v Western Australia*), with leave to appeal to the High Court heard on 4 August, has highlighted the fact that there is no clear and coherent concept of common law native title. There are a number of fundamental aspects of the nature and content of the title that are disputed and more that have not been thoughtfully considered. The Federal Court decision in *Miriuwung Gajerrong* squarely addressed the debate over whether native title is a bundle of rights or an interest in land, as well as the nature and extent of extinguishment. But the discussion in the cases lacked depth in a jurisprudential sense.

A number of people have begun to address the need for greater emphasis on the concepts behind native title as well as the practical workings of the Act, because, as *Miriuwung Gajerrong* has demonstrated, the theoretical directions taken by the courts can have serious practical effects on the extent to which native title will be recognised in determinations and negotiations.

Some time ago Noel Pearson floated the idea of a small workshop devoted to the legal concept of native title. This coincided with my own research project on this issue and the Native Title Research Unit's plans for such a workshop. Noel has been working on a research project, with the assistance of Peace Decle, and sponsored by the Cape York Land Council, examining the concept of native title as a possessory title. In July the CYLC hosted the workshop, which brought together the legal teams that had worked on the various appeals, and other practitioners, as well as a number of academics, anthropologists and Indigenous people who have been turning their minds to these issues.

With only around forty people in attendance, the workshop allowed thoughtful and thought provoking discussion of the current approach of the courts and some of the limitations of that approach as well as investigating strategic direction for future argument and presentation of cases.

Those present expressed some dismay at the judges, and particularly Kirby J, who reiterate that native title is a vulnerable and fragile title; the failure of the courts to afford native title the same protections as other property rights; and the willingness to find that native tile has been extinguished.

The workshop was designed as an opportunity for Noel and Peace to present their theory of native title and to discuss its principles, implications and

supporting authority. The idea behind the theory is a development of Noel's ideas presented to the '20 Years of Land Rights: Our Land is our Life' Conference hosted by the Northern and Central Land Councils in Canberra in 1996. It also draws heavily on the ideas of Kent McNeil, a Canadian academic, in his 1997 article, 'Aboriginal Rights and Aboriginal Title: What's the Connection'. Some aspects also draw on work by anthropologists such as Peter Sutton and Bruce Rigsby.

The theory focuses on the aspects of the judgements of Brennan and Toohey J J in the *Mabo* case that clearly discuss native title as a proprietary interest based on possession and occcupation. Pearson and Decle distinguish those aspects of the decision that highlight the variable nature of native title, which differs in accordance with the laws and customs of the group, to argue that this latter aspect is an internal dimension to native title. Externally, native title is established by proof of occupancy and gives native title holders rights of possession under the common law, similar to freehold title. They argue that if native title is something less than full ownership, then that is a result of the impact of laws and grants, not a reflection of the nature of the title itself.

The purpose of this rethinking of native title is to move away from the emphasis on law and custom as the necessary proof of native title. It seeks to avoid the misconception, characterised by the 'bundle of rights' approach, that native title is a collection of freestanding rights, each of which must be proved through evidence of law and customs and that once proved, the native title is limited to those activities and uses. It is also consistent with the kinds of determinations that have been made in cases, including the *Mabo* case, that grant rights to possession, use, occupation and enjoyment. Law and custom is, instead, only relevant to a limited number of issues, such as entitlement and extent of territory.

The workshop provided an opportunity to begin an intellectual discussion of these issues and we await the full development of the ideas in the form of a discussion paper and other publications. It is an approach to the common law that prioritises the exclusive possession aspects of native title and therefore requires close scrutiny to ensure that there is no disadvantage in diminishing the role of law and custom in the theoretical foundation of the title as well as its proof. Nonetheless it does provide an alternative conception of native title that highlights the absurdity of the bundle of rights approach and will be a valuable contribution to the thinking in this area.

Lisa Strelein

Native Title Research Unit, AIATSIS

NATIVE TITLE IN THE NEWS – JULY & AUGUST 2000

National

The National Native Title Tribunal has launched a multimedia information kit to help people understand the complex native title laws. The kit aims to assist parties to native title applications. *(NNTT Media Release, 2 August)* (see report page 16)

The ALP joined with the Democrats in the Senate to vote against six of the Attorney Generals determinations regarding Queensland's native title alternative procedures legislation but voted with the Government to pass the remaining seven. *(Aus, 31 August, p5)**

Federal Opposition Aboriginal Affairs spokesman Daryl Melham resigned from the Labor front bench in protest over the Federal ALP decision to support the Queensland alternative procedures legislation. *(Aus, 31 August, p5)**

New South Wales

The New South Wales Government has agreed to the transfer of 253 hectares of land to the Wiradjuri community as freehold land. The transfer represents the first New South Wales handover of land following a native title claim. Mrs Rose Chown lodged a native title application over the land in 1994, 17 days after the Native Title Act was passed. *(SMH, 26 July, p6)**

Victoria

An agreement has been reached between the Gunai/Kurnai People, the Victorian Government and mining companies Pacific Minerals Pty Ltd and ABC Resources Pty Ltd over the grant of a 240 hectare mining licence near Tabberabbera in East Gippsland. National Native Title Tribunal Deputy President Chris Sumner said Federal native title law provided a negotiation process to balance the interests of miners, explorers and native title holders. 'The parties are to be congratulated on settling the matter by agreement. It shows that with perseverance and good will, negotiation can achieve results that meet the interests of everyone concerned,' he stated. *(NNTT Media Release, 10 July)**

The National Native Title Tribunal has advertised in local and metropolitan newspapers giving interest holders three months to register as parties if they want to join the mediation for the Wadi Wadi native title application which covers approximately 14.2 square kilometres of crown reserves adjacent to the

Murray River in the Nyah area near Swan Hill. The Tribunal has also sent letters to people with registered interests in the application area inviting them to join the mediation. *(NNTT Media Release, 18 July)*

Victoria's first non-mining Indigenous Land Use Agreement, relating to a parcel of land in the township of Birchip in northwest Victoria, has been signed. The agreement allows for the expansion and relocation of the police and health services on to crown land that had been subject to a native title claim. Victoria's Attorney General, Rob Hulls, stated, 'The Birchip Indigenous Land Use Agreement shows what can be achieved through trust, co-operation and mediation. The agreement highlights the co-operative attitude of Indigenous people claiming native title rights and provides a useful model for resolving potential land disputes where there are clear public benefits at issue'. Mr Hulls said he congratulated the parties involved in the ILUA on the use of the mediation process to achieve outcomes benefiting all parties. He also stated that the agreement was the first to be initiated by the Government and not a resource developer. *(Attorney General, Media Release, 20 July)**

Five new native title applications have been lodged in Victoria's north west. Four of the claims replace a single claim lodged by the North West Aboriginal Nations in 1998. The Barapa Barapa, Wemba Wemba and Wadi Wadi peoples have lodged a claim to an area around Swan Hill and Nyah; the Latji Latji people have lodged a claim to an area around Ouyen; the Latji Latji and Wergaia peoples have lodged a claim to an area near Mildura; the Yupagalk people have lodged a claim to an area near Warracknabeal and Lake Tyrrell; and the Dja Dja Wurrung people have lodged a claim to an area between Bendigo and Charlton. *(Victoria/Tasmania NTN, August, p2)**

The Victorian State Government has been issued with a notice prohibiting logging in the Goolengook Forest in East Gippsland. The notice has been issued by Albert Hayes, an Aboriginal leader of Bidwali descent. The Goolengook area, near Orbost, is the subject of a native title claim by the Bidwali people. 'While native title claims are unresolved and no consent has been given from the Bidwali people, the State Government cannot let logging go ahead in these ancient forests,' said Mr Hayes. *(Age, 10 Aug, p4)*

The Indigenous Land Corporation has purchased 259 hectares of Murray River land for the Yorta Yorta Nation. The former farm is surrounded by one of the largest native red gum forests in the world. 'We're looking forward to working with the Department of Natural Resources and Environment on this place. We'd like to stock it with Murray cod and yellow-belly and reintroduce

medicines and plants' stated Monica Morgan, Yorta Yorta spokesperson. *(Age, 16 Aug, p7)*

Queensland

A series of Federal Court hearings on Native Title were held in the Torres Strait in July. Outdoor hearings were held on Mabuiag and Masig Islands to ensure the full participation of the local people. National Native Title Tribunal President, Graeme Neate, stated, 'Mediated agreements show how the recognition of native title is going to work on the ground, and are a firm basis for ongoing harmonious relationships'. There are now twice as many native title outcomes achieved through mediation as through litigation Mr Neate said. *(NNTT Media Release, 7 July)** (see report page 4)

The National Native Title Tribunal has advertised in local and metropolitan newspapers giving interest holders three months to register as parties if they want to join the mediation for three native title applications in the Torres Strait. The native title applications have been lodged by the Torres Strait Regional Authority on behalf of the traditional owners of Badu, Boigu and Dowar and Waier Islands. *(NNTT Media Release, 12 July)*

An agreement has been signed by Transtate Limited and the Wiri and Yuibera People to allow development of a $150 million tourism and residential development for Mackay's East Point. The agreement secures a site for an Indigenous cultural centre and provides for ongoing employment and training for local Indigenous people. A full environmental impact statement will now be undertaken before a development application is lodged. *(FinR, 17 July, p26)**

The Indigenous Land Corporation has handed over the title deeds of the pastoral lease known as Strathgordon Station to Poonko traditional owners. Balkanu Cape York Development Corporation Executive Director, Gerhardt Pearson, said, 'This is a significant event for Aboriginal people in Cape York. The return of this country means the mob can now live on their country and make decisions about the activities that happen there'. *(CM, 1 Aug, p3)**

South Australia

The Narungga People of South Australia are preparing to lodge a native title claim over a large part of the Yorke Peninsula including surrounding waters and islands. Mr Parry Agius, manager of the Native Title Unit of the South Australian Aboriginal Legal Rights Movement, stated that if native title rights were granted over the waters in question they would have to co-exist with

those rights of fishing operators and the general public currently using the area. *(Koori Mail, 12 July, p3)*

The National Native Title Tribunal has advertised in newspapers statewide giving landholders and other interest holders three months to register as parties if they want to join the mediation for nine native title applications in regional South Australia. The applications cover land and inland waters in the Eyre Peninsula, Lake Eyre, Flinders Ranges, Lake Torrens, Coorong and Mallee regions. Tribunal State Manager Chris Uren said that if mediation was unsuccessful the applications would be listed for trial in the Federal court. *(NNTT Media Release, 31 July)**

Beach Petroleum and Magellan Petroleum have been allocated one of the Cooper Basin exploration licences put out for tender by the South Australian Government. Any claims under the Native Title Act have to be negotiated before the licences are granted and exploration can begin. *(FinR, 9 Aug, p22)**

Western Australia

The National Native Title Tribunal has advertised in local and metropolitan newspapers giving interest holders three months to register as parties if they want to join the mediation for nine native title applications in regional Western Australia. The applications cover land and inland waters and all exclude private freehold land. Tribunal State manager Andrew Jaggers said, 'We're advertising these applications so that anyone with an interest in the land or waters covered by an application can be involved in discussions about whether native title exists in the area and, if so, how it might be recognised and respected in a way that preserves everyone's interests'. *(NNTT Media Release, 12 July)*

Mediation of a native title application covering the area from the City of Rockingham including parts of the Shires of Beverley, Chittering, Gingin, Northam, Toodyay and York and including an area of sea encompassing Rottnest Island has been unsuccessful and the application is to be tried in the Federal Court. The National Native Title Tribunal has advertised for people or organisations who may be affected by the application to register as parties with the Federal Court within three months. *(NNTT Media Release, 12 July)*

Western Australia's native title legislation has won preliminary acceptance from Attorney General Daryl Williams. Mr Williams stated that he would contact all Aboriginal and Torres Strait Islander Representative Bodies in Western Australia notifying them of the proposed determinations and seeking their comments. *(Aus, 19 July, p6)**

The Western Australian Government and the Yamatji Land and Sea Council have agreed to 'co-operate wherever possible to sort out native title issues in the region,' stated Premier Richard Court. 'The co-operative planning agreement did not involve State Government recognition of native title and still required native title claimants to produce appropriate evidence to justify claims,' Mr Court said. *(Koori Mail, 26 July, p28)*

The Noongar Land Council, with the support of the Western Australian Municipal Association (WAMA), the National Native Title Tribunal and the Federal Attorney General, held meetings with local government authorities throughout the south-west of Western Australia to discuss the negotiating of native title agreements specific to local needs. The WAMA has employed a native title lawyer to draft a protocol for the development of agreements. *(Koori Mail, 23 Aug, p19)*

The first agreement to formally recognise native title in Western Australia has been formalised in the Federal Court. The combined Nganawongka/Wadjari and Ngarla application was formed in 1999 from four original applications lodged with the National Native Title Tribunal in 1995. The application covers around 50,000 square kilometres and includes 24 pastoral interests, 28 mining companies, Telstra, the Shire of Meekatharra and the Western Australian government. The largest negotiated determination of native title gives local Indigenous people access to pastoral land and a stake in future mining rights. Tribunal President Graeme Neate said, 'This is proof positive that native title laws can work in Western Australia, as elsewhere, with an investment of perseverance and goodwill. After the application went to the Federal Court, the Court was able – at strategic points – to seek further mediation in an effort to avoid a lengthy trial. This would not have been possible prior to the amendments to the Native Title Act.' *(NNTT Media Release, 29 August)**

Northern Territory

The native title claim over the proposed Davenport Range National Park will be heard by Justice Mansfield in September this year. The native title application includes land surrendered from the Kurundi pastoral lease southeast of Tennant Creek in 1993. *(LR News, July 2000, p14)*

The National Native Title Tribunal welcomed the Federal Court finding of native title in relation to most of the old St Videon's pastoral lease land and adjoining rivers in the Roper River region of the Northern Territory. Tribunal President Graeme Neate said that the determination by Justice Olney was

another milestone in the recognition and protection of native title and was further confirmation that native title was here to stay. *(Koori Mail, 9 Aug, p5)**

APPLICATIONS

National

The National Native Title Tribunal posts summaries of registration test decisions on their website at: http://www.nntt.gov.au

The following decisions are listed for July and August 2000.

Wom-Ber (amended 03/07/2000)	not accepted	Singleton	accepted
Widi Mob (amended 04/07/2000)	not accepted	Lot 3160 Katherine	not accepted
Ngunawal (NSW)	accepted	Dangalaba 6	accepted
Euahlay-i # 3	accepted	Ngempa People	accepted
Euahlay-i #2	accepted	Nanda (amended 31/07/2000)	accepted
Darumbal People	accepted	Balanggarra #3	accepted
Hutt River	accepted	Gnaala Karla Booja (amended 10/08/2000)	accepted
Njamal People #10	accepted	Gumbaynggirr People #2	accepted
Jangga People	accepted	Gumbaynggirr #3 (Nambucca)	accepted
Gkuthaarn People #3	accepted	Gumbaynggirr #4	accepted
Northern Kaanju People & Yianh People	accepted	Dja Dja Wurrung Peoples	accepted
Badimia People (amended 20/07/2000)	accepted	Wamba Wamba, Barapa Barapa and Wadi Wadi Peoples	accepted
Dangalaba 2	accepted	Yupagalk People	accepted
Dangalaba 4	accepted	Djugun	not accepted
Dangalaba 5	accepted		

The decision indicates whether an application has met or not met each of the conditions of the registration test against which it was considered.
'Abbreviated' decision indicates that the application has been tested against a limited number of conditions.
The applicant may still pursue the application for determination of native title. If an application does not pass the registration test the applicant may seek a review of the decision in the Federal Court.

NOTIFICATIONS

Applications currently in Notification

Notification period is 3 months from the Notification start date.

NEW SOUTH WALES

26 July 2000

Deniliquin Local Aboriginal land Council (non-claimant) NN00/4

9 August 2000

Howard Garth Scott and Stephen Sameul Heap (non-claimant) NN00/5
Barkandji (Paakantyi) #4 NC97/18
Gomilaroi #3 NC98/2
Bogan River Wiradjuri NC98/22
Dharawal People NC98/23
Dharawal People NC98/27
Dharawal People NC99/7

23 August 2000

PA & SL Harford (non-claimant) NN00/6

VICTORIA

26 July 2000

Wadi Wadi VC97/9

QUEENSLAND

12 July 2000

Badu (Badu Islanders) #1 QC96/63
People of Boigu Island #2QC98/29
Waier and Dowar Islands QC98/34

23 August 2000

Kudjala People QC00/1
Ankamuthi People #1(Combined Application) QC99/26
Woolgar Group QC99/14
Juunyjuwarra People QC99/7
Muluridji People QC98/38
Kombumerri People #2 QC98/24
Santo clan of Kudjala People QC98/2
Kudjala and Jirandali People QC98/1
Kudjala, Jirandali/Mitjumba QC97/57
Kaanju/Umpila #2 QC97/7

SOUTH AUSTRALIA

2 August 2000

Adnyamathanha SC99/1
Kokatha Native Title Claim (Combined Application) SC99/2
Ngarrindjeri #2 SC98/4
Arabunna People's Native Title Claim SC98/2

SOUTH AUSTRALIA cont'd

2 August 2000

Ngarrindjeri #1 SC98/3
Yankunytjatjara/Antakirinja SC97/9
Gawler Ranges NT Claim SC97/7
Barngarla SC96/4
Edward Landers Dieri People's Native Title Claim SC97/4

WESTERN AUSTRALIA

12 July 2000

Maduwongga People WC99/9
Wongatha (Combined Applicaton) WC99/1
Combined Metropolitan Working Group WC99/6
Bunuba (Combined Application) WC99/19
Lamboo (Combined Application) WC99/20
Nyigina and Mangala (Combined Application) WC99/25
Central West Goldfields (Combined Application) WC99/29
Central East Goldfields (Combined Application) WC99/30
Scotty Birrell & Ors (Combined Application) WC99/40
Malarngowem (Combined Application) WC99/44

NORTHERN TERRITORY

26 July 2000

Timber Creek #2 DC00/8
Leanyer (YBAC) DC00/7
Sec's 1706/1714 & NTP 4732 Hundred of Guy (YBAC) DC00/6
Sec's 1706/1714 Hundred of Guy DC00/5
Part NT Portion 4732 Hundred of Guy DC00/4
Part NT Portion 4732 Hundred of Guy DC00/3
Sec's 1706 & 1714 Hundred of Guy DC00/2
Larrakia No. 2 (amended 29/6/99) DC99/1
Blue Mud Bay DC98/13
Daly River DC98/12
Wurdaliya - Wuyaliya DC98/2
West Arnhem Seas DC97/5
Edward Pellew Seas DC97/4

A non-claimant application is one made by someone who is not claiming native title themselves but who has an interest in the area which is not a native title interest, and they want the Federal Court to determine whether anyone has a native title interest in the same area.

For further information regarding notification of any of the applications listed contact the National Native Title Tribunal on 1800 640 501.

Self Government Rights in Canada

Campbell v A-G British Columbia and the Nisga'a Nation (unreported decision, BCSC Williamson J, 24 July 2000)

In a recent decision of a single judge of the Supreme Court of British Columbia, the issue of Indigenous peoples' rights of self government were considered. The case concerned a challenge to the validity of the self-government provisions of the Nisga'a treaty, a modern treaty negotiated through the Land Claims Settlement process. The negotiations took over twenty years and involved both the federal government and the provincial government of British Columbia.

The Liberal Party of British Columbia opposed the agreement. They challenged the Treaty on Constitutional grounds, arguing that the Canadian Constitution exhaustively distributed powers between the federal and provincial government and, therefore, any right to self-government of the Indigenous peoples had been extinguished upon confederation.

It is often assumed that if a Canadian case or United States case concerns a treaty then it has little application in Australia. Similarly, the constitutional protection of Aboriginal and treaty rights under the Canadian Constitution is seen as a distinguishing factor that makes these cases irrelevant to our circumstances.

As this case makes clear, however, at base these protections emerge from and add to the Aboriginal or native title rights that survived the assertion of sovereignty. Indeed, his Honour Justice Williamson acknowledged that in signing the Treaty, the Nisga'a were, for the first time, agreeing to the impairment or diminution of their aboriginal rights (para 32).

The Treaty provided for the substitution of Aboriginal title for a grant of fee simple over a smaller area, defined hunting and fishing rights and involvement in wildlife and fisheries management, and for the payment of compensation. The contentious part of the Treaty concerned the recognised legislative jurisdiction over things that go directly to the identity of the Nisga'a nation, such as education, preservation of culture, use of the land and resources and the means by which decisions are made. The Treaty also recognised Nisga'a jurisdiction and the right to establish police services and courts.

The applicants argued that a Treaty cannot establish 'a new order of government'. In contrast the Nisga'a argued that a grant of land and the right to hunt are empty gestures if they have no power to establish rules about the use of law and those rights. The judge agreed, saying:

> On the face of it, it seems that a right to aboriginal title, a communal right which includes occupation and use, must of necessity include the right of the communal ownership to make decisions about that occupation and use, matters commonly described as governmental functions. This seems essential when the ownership is communal. (Para 114)

The Judge added that to find that the right to self-government survived the assertion sovereignty does not challenge the sovereignty of the Crown:

> Without doubt the fact of Crown sovereignty in that sense is binding upon this court ... However, the assertion of Crown sovereignty and the ability of the Crown to legislate in relation to lands held by Aboriginal groups does not lead to the conclusion that powers of self-government held by those Aboriginal groups were eliminated. (Para 124)

The division of legislative powers under the Constitution, however, was a matter internal to the Crown and did not exclude governmental and legislative powers residing in Canada's first nations. The judge points to the various constitutional principles and values that are not set out in writing, but which guide legislative judicial and executive action, as is the case with our own Constitution.

This case is an important development in the potential for colonial legal systems to meet the expectations for self-government that Indigenous peoples hold. Despite recent pronouncements from the High Court regarding the relevance of North American jurisprudence, these cases hold many lessons for our own development because, while the history of treaty-making and constitutional development may be different, the principles for recognition of Indigenous rights are the same.

Lisa Strelein
Native Title Research Unit, AIATSIS

Recent publications

The publications reviewed here are not available from AIATSIS. Please refer to individual reviews for information on obtaining copies of these publications.

Native Title in Brief, National Native Title Tribunal, 2000.

The National Native Title Tribunal has produced a multimedia information kit to help people understand the complex native title laws. Tribunal President Graeme Neate said that practical, accessible information was a critical ingredient in the resolution of the nation's 530 outstanding native title applications. The 18 minute CD-ROM is also available on video.

'Most people recognise that mediation, rather than litigation, is the best way to resolve native title applications and reach agreements which are supported by everyone involved, whether Indigenous people, pastoralists, miners, local authorities or governments. But for those who have to deal with a native title application, the process can be daunting. The CD-ROM covers a range of topics such as the kinds of agreements that are possible under native title law, development and native title, and the stringent registration test that is applied to applications. While the CD-ROM could never be as exhaustive as the 440 page Native Title Act, it is a building block towards greater understanding and more informed participation in the mediation process,' stated Mr Neate.

Copies were available from the National Native Title Tribunal on 1800 640 501 or www.nntt.gov.au.

The Valuation or Management of Land Subject to Native Title, Guidance Note 27, The Australian Property Institute, 2000.

The National Council of the Australian Property Institute recommends that this Guidance Note, *The Valuation or Management of Land Subject to Native Title*, be used by members of this professional organisation for the commercial valuation of co-existing property interests subject to native title. Legislation which confers a right of exclusive possession (which extinguishes native title rights and interests) are listed in an appendix to assist members in distinguishing the likelihood of co-existing property interests.

The publication emphasises the importance of identifying where native title exists or may exist in all property valuations or assessments and provides practical tools to do so. Members are advised on how to conduct research on the land, prepare a tenure history, undertake site inspections and consult relevant experts and records, and the potential limitations of these approaches.

The commercial impact of coexistence or likely coexistence of native title is handled by two main approaches. The 'unaffected valuation basis' is to provide the valuation of the land together with an outline of the likely content of any native title rights and interests and a qualification indicating that the property valuation or assessment does not reveal any diminution due to the possible presence of native title. The 'affected valuation approach' requires the preparation of an expert report about the native title rights and interests. The member then uses the report to calculate whether the property's value is discounted and if so by how much. Some guidance is provided in matters that should be taken into account when making such a calculation, including comparison of similar property sales where available. The limited information in this section makes it clear that the Guidance Note expects the expert report to play a leading role in the calculation.

This Guidance Note is effectively written from a non-Indigenous perspective for non-Indigenous professionals about commercial value of land to non-Indigenous people. It declines to address situations where native title rights and interests could increase the commercial value of land. The advice given is practical, factual and dispassionate, and is based in rights as recognised by law. Usefully, the publication also tries to dispel a number of destructive fears that are popularly held, for example, 'Because pastoral rights prevail over coexisting native title rights to the extent of any inconsistency, there is little concern that these tenures are not secure.'

This publication is available for $100 (non-members) and $25 (members) from The Australian Property Institute, phone 02 6282 2411, national@propertyinstitute.com.au

Negotiating the Native Title, papers delivered at a BLEC conference in May 2000, Business Law Education Centre, AIC Worldwide.

Negotiating the Native Title publishes the papers presented at a BLEC conference held in May in Perth. The presenters are from legal, industry, management, community, research and/or Indigenous backgrounds. Their papers chiefly seek to interpret the fundamental tools of negotiating native title for non-Indigenous people working with native title claimants or native title holders.

Fred Chaney's comment, 'We are living and working in the inevitable transitional period between the acknowledgment of the existence of native title within the Australian legal system and formal determinations in particular cases,' summarises the importance for industry of training courses of this nature. His paper on the design and operation of native title corporations constructively sets out how such bodies affect industry. David Ritter contributes two papers which frankly tackle common misconceptions when negotiating native title – *Mission Impossible: understanding the role of native title representative bodies* and *A visit to your neurologist: infrastructure agreements and 'the right to be consulted'*. Greg McIntyre's paper is a good review of current developments at law resulting from recent native title decisions. Other presenters include John Clarke, John Hoare, James Kernaghan, Alan Pitman, Kado Muir, Jeremy Van de Bund and Quenten Jackson.

The publication is surprisingly expensive and similar information may be available elsewhere for much less, or even for free. The publication itself is of a very low production quality. When searching for the title be aware that the odd sounding title may be the result of a typographical error.

This publication is available for $395 from the Business Law Education Centre, tel 02 9210 5700, fax 02 9223 8216.

Native Title Research Unit publications

The following NTRU publications are available from AIATSIS. Please phone (02) 6246 1186, fax (02) 6246 1143 or email: sales@aiatsis.gov.au. Prices listed include postage.

A Guide to Australian Legislation Relevant to Native Title 2 volume set**,** Native Title Research Unit, AIATSIS, 2000. ($49.50)

Native Title in Perspective: Selected Papers from the Native Title Research Unit 1998-2000 Edited by Lisa Strelein and Kado Muir, 2000. ($21.50)

Land, Rights, Laws: Issues of Native Title, Volume 1, Issues Papers Numbers 1 through 30, Regional Agreements Papers Numbers 1 through 7 1994-1999 with contents and index. ($19.95)

Regional Agreements: Key Issues in Australia – Volume 2, Case Studies Edited by Mary Edmunds, 1999. ($19.95)

A Guide to Overseas Precedents of Relevance to Native Title Prepared for the NTRU by Shaunnagh Dorsett and Lee Godden, 1998. ($18.95)

Working with the Native Title Act: Alternatives to the Adversarial Method Edited by Lisa Strelein, 1998. ($9.95)

Regional Agreements: Key Issues in Australia – Volume 1, Summaries. Edited by Mary Edmunds, 1998. ($16.95)

A Sea Change in Land Rights Law: The Extension of Native Title to Australia's Offshore Areas by Gary D. Meyers, Malcolm O'Dell, Guy Wright and Simone C. Muller, 1996. ($12.95)

Heritage and Native Title: Anthropological and Legal Perspectives Proceedings of a workshop conducted by the Australian Anthropological Society and AIATSIS at the ANU, Canberra, 14-15 February 1996 ($20)

The Skills of Native Title Practice Proceedings of a workshop conducted by the NTRU, the Native Title Section of ATSIC and the Representative Bodies, 13-15 September 1995 ($15)

Anthropology in the Native Title Era Proceedings of a workshop conducted by the Australian Anthropological Society and the Native Title Research Unit, AIATSIS, 14-15 February 1995 ($11.95)

Proof and Management of Native Title Summary of proceedings of a workshop conducted by the Native Title Research Unit, AIATSIS, on 31 January-1 February 1994 ($9.95).

The following publications are available free of charge from the Native Title Research Unit, AIATSIS, Phone (02) 6246 1161, Fax (02) 6249 1046:

Issues Papers published in 1998, 1999 and 2000:

Volume 2

No 5 ***Limitations to the Recognition and Protection of Native Title Offshore: The Current 'Accident of History'*** by Katie Glaskin

No 4 ***Bargaining on More than Good Will: Recognising a Fiduciary Obligation in Native Title*** by Larissa Behrendt

No 3 ***Historical Narrative and Proof of Native Title*** by Christine Choo and Margaret O'Connell

No 2 ***Claimant Group Descriptions: Beyond the Strictures of the Registration Test*** by Jocelyn Grace

No 1 ***The Contractual Status of Indigenous Land Use Agreements*** by Lee Godden and Shaunnagh Dorsett

Volume 1

No. 30 ***Building the Perfect Beast: Native Title Lawyers and the Practise of Native Title Lawyering*** by David Ritter and Merrilee Garnett

No. 29 ***The compatibility of the amended Native Title Act 1993 (Cth) with the United Nations Convention on the Elimination of All Forms of Racial Discrimination*** by Darren Dick and Margaret Donaldson

No. 28 ***Cultural Continuity and Native Title Claims*** by Ian Keen

No. 27 ***Extinguishment and the Nature of Native Title, Fejo v Northern Territory*** by Lisa Strelein

No. 26 ***Engineering Unworkability: The Western Australian State Government and the Right to Negotiate*** by Anne De Soyza

No. 25 ***Compulsory Acquisition and the Right to Negotiate*** by Neil Löfgren

No. 24 ***The Origin of the Protection of Aboriginal Rights in South Australian Pastoral Leases*** by Robert Foster

No. 23 '***This Earth has an Aboriginal Culture Inside*' *Recognising the Cultural Value of Country*** by Kado Muir

No. 22 '***Beliefs, Feelings and Justice*' *Delgamuukw v British Columbia: A Judicial Consideration of Indigenous Peoples' Rights in Canada*** by Lisa Strelein

No. 21 ***A New Way of Compensating: Maintenance of Culture through Agreement*** by Michael Levarch and Allison Riding

No. 20 ***Compensation for Native Title: Land Rights Lessons for an Effective and Fair Regime*** by J. C. Altman

Regional Agreements Papers published in 1998 and 1999

No. 7 ***Indigenous Land Use Agreements: New Opportunities and Challenges under the Amended Native Title Act*** by Dianne Smith

No. 6 ***The Yandicoogina Process: a model for negotiating land use agreements*** by Clive Senior

No. 5 ***Process, Politics and Regional Agreements*** by Ciaran O'Faircheallaigh

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Our phone number is:	02 6246 1161
Our fax number is:	02 6249 1046
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This newsletter was prepared by Ros Percival

PRELIMINARY NOTICE

Native Title and Archaeology Workshop

Sponsored by

AIATSIS Native Title Unit

&

Department of Archaeology, Flinders University

To be held in conjunction with the AIMA/ASHA Conference
November 27th, 2000; 9.00am-6.00pm
St Marks College, North Adelaide, South Australia.

Cost: $20 for the workshop to be paid on registration; meals and accommodation will be optional extras.

Following the successful Post Contact Workshop held prior to the last AAA conference, it was agreed that a workshop using the same informal approach would be held prior to the AIMA/ASHA conference in Adelaide this year.

This notice to is bring you up to date with planning for this workshop and to ask for ideas.

It is proposed that the workshop be divided into four main sessions each addressing a specific issue and that the last hour be spent summarising the outcomes of the workshop. There is to be an invited panel and individual panel members will lead the discussion at each session of the workshop.

Panel members to date include representatives from AIATSIS Native Title Unit, Aboriginal Legal Rights Movement (South Australia) and the S.A. Indigenous Land Use Agreements Negotiation Team. It is also hoped that a representative of the Native Title Tribunal will be on the panel. Other suggestions for panel members, session topics and issues to be dealt with under issue topics are welcome.

Suggested topics to date are:

- Defining the NT Act
- Interpretations of the NT Act (including 1998 amendments)
- Negotiated Agreements
- The role of archaeology

It is expected that the program will evolve over the next two or three months and the final program will be available by September.

Enquiries and ideas to:
Pam Smith, email: Pamela.Smith@flinders.edu.au phone/fax: 08 82788172.
Early registrations to:
Bill Jeffery, email: bjeffery@dehaa.sa.gov.au Phone: 61 8 82049311.
Registration forms via the web and snail mail will be available shortly.