Native Title Newsletter

AIATSIS Native Title Research Unit

AIATSIS
Australian Institute of Aboriginal and Torres Strait Islander Studies

July/August 2002 No.4/2002

Contents

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 media 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.

The Newsletter is now available in ELECTRONIC format. This will provide a FASTER service for you, and will make possible much greater distribution. If you would like to SUBSCRIBE to the Native Title Newsletter electronically, please send us an email on ntru@aiatsis.gov.au, and you will be helping us provide a better service. Electronic subscription will replace the postal service, please include your postal address so we can cross check our records.

The Native Title Conference 2002: Outcomes and Possibilities – Report

The *Native Title Conference 2002* gathered a huge crowd of over 400 people from around the country to Geraldton, 450 kilometres north of Perth, Western Australia. The Native Title Representative Bodies sent on average between five to ten staff, with the local rep body Yamatji Land and Sea Council represented by over thirty people, and almost twenty people in attendance from the Pilbara Native Title Service. Participants included native title claimants and holders, the National Native Title Tribunal, the Attorney General's Department, private legal firms, government departments, academic institutions, industry, and media.

The sessions were dominated by people expressing frustration with the native title system: the complete absence of funding for Prescribed Bodies Corporate, which are required by law to manage native title lands but do not have any institutional support; the complicated technical detail of the Native Title Act and common law decisions, and the role of professionals; and, the general experience of native title determinations delivering more difficulties than rights. Ways of working around the frustrating system were also explored: Yorta Yorta spokesperson Monica Morgan made a particularly important contribution to this discussion. The conference was also an opportunity to discuss and analyse the recent *Miriuwung Gajerrong* High Court decision.

The huge crowd in attendance stretched the capacity of all the venues, social events, and the staff capacity of the conference organisers. This was especially a result of conference registrations increasing by 150 people in the three days prior. The strength of this attendance ensured strong and powerful debate. Problems that were raised from the floor or by speakers on Day 1, were addressed by the speakers that followed, as the body of people used the forum to move the native title debate forward.

The conference was the result of the successful collaboration between AIATSIS and the Yamatji Land and Sea Council. AIATSIS wishes to take this opportunity to thank again the staff and volunteers coordinated by Yamatji Land and Sea Council for all their hard work.

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New Issues Paper

The Unit has published Issues Paper number 17 titled "*Western Australia v Ward on Behalf of Miriuwung Gajerrong*, High Court of Australia, 8 August 2002: Summary of Judgment" by Dr Lisa Strelein.

The Miriuwung Gajerrong decision was anticipated as one that would resolve important questions regarding the nature and content of native title. This paper provides a summary of the findings in the decision.

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Native Title Resource Pages

The NTRU has developed a number of resource pages on their website which provide relevant and up to date information regarding specific native title cases and concerns.

To access the weblink, go to the AIATSIS web page <www.aiatsis.gov.au> click on the native title research unit link and click on 'Resources'. The pages include articles and discussion papers and also links to other resources. They are updated regularly and others are currently under construction for future use.

The current resource pages are:

- The concept of native title - *Miriuwung-Gajerrong* Determination High Court 8 August 2002
- Compensation and native title
- Sea Rights - The *Croker Island* Decision and Native Title Offshore
- General native title resources

Review of the Treaty Conference

The National Treaty Conference held in Canberra from 27-29 August 2002, provided a space for re-igniting the debate and sign-posting possible directions that the debate may go in the future. Unfortunately, however, for some commentators, the conference was configured as providing a panecea.

Despite these restrictions in regards to the outcomes, the conference achieved one of its primary aims, namely to get the notion of a treaty or agreement between Indigenous and non-Indigenous Australians back on the agenda. And while a "treaty" is not on the government's agenda, "agreement making" certainly is.

The conference also had some strong speakers and papers, particularly David Irvine from Northern Ireland and Professor Larissa Behrendt, both of whom stressed the importance of maintaining a human dimension within the debate.

The conference also provided a forum that stressed the need for negotiation with all Australians. This point was particularly emphasised by Greg Phillips representing Indigenous youth. Overall the conference confirmed that a treaty will always be on the agenda.

Opening of Mabo Room

On Tuesday 9th July during NAIDOC week, AIATSIS formally named the public seminar room, the Eddie Mabo Room. This was out of respect for the pioneering work of Eddie Mabo in fighting to overturn the great legal myth of *terra nullius*. With Mrs Bonita Mabo and other members of the Mabo family as special guests, the room was formally opened by AIATSIS Chairperson, Mick Dodson. The celebration also included a dance performance from members of the Gerib Sik Torres Strait Islander Dance Group.

The following extract is taken from the speech given by Mick Dodson honouring Eddie Mabo.

"I would like to acknowledge and pay my respects to the Ngunnawal people, on whose ancestral land we stand.

I would also like to welcome Mrs Bonita Mabo and her family. We thank you for joining us on this special occasion and we are honoured by your presence. I would like to thank all of you for coming along today to join with us in NAIDOC week to celebrate the naming of our public function room as the Eddie Mabo Room.

Eddie Mabo was a Meriam man of the Piadram clan. His name is well known throughout Australia for his initiative, together with four other Murray Islanders, in instituting proceedings against the State of Queensland in the High Court. As all of us here will know, it was an action which resulted in the High Court's historic judgment, the *Mabo* decision, which changed the law to recognise the native title rights of Indigenous peoples to their land.

Eddie Mabo left his mark in other areas too. He fought throughout his life for social justice through his involvement at both the national and local levels, in organisations such as the National Aboriginal Education Committee, the Aboriginal and Islander Advancement League, FCAATSI, the Aboriginal Legal Service and Magani Malu Kes, an organisation stressing Torres Strait Islander identity and autonomy. Importantly, in 1973 together with his wife, Bonita, Eddie also set up the Black Community School in Townsville, which continued to operate until the mid-1980s.

I am proud to say that Eddie Mabo also had a long association with the Institute. He had been a Member of the Institute since 1978 and, for a time in the late 1970s, he was a member of our Education Advisory Committee.

Eddie Mabo also received two small grants from the Institute. The first was in 1979, which went towards the establishment of the Magani institute and another, in 1985, to

research the traditional land ownership boundaries on Mer and to record significant sites. As a result of both grants and his High Court Challenge, Eddie Mabo frequently visited Canberra and the Institute, and many of us got to know him well as a friend and a colleague and to respect him and the work he was doing.

It therefore gives me great pleasure in this year of the tenth anniversary of the *Mabo* decision to formally name our public function room as the Eddie Mabo Room."

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News from the Tribunal

Background information concerning the recent High Court decision in *Wilson v Anderson*, can be found at the NNTT's website: http://www.nntt.gov.au/

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Senate Committee Review

The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund has re-advertised the review of the effectiveness of the National Native Title Tribunal. The inquiry is in accordance with s.(d)(i) of the *Native Title Act 1993* and was advertised in *The Australian* on 11 September 2002.

The Committee is calling for comments and submissions to be lodged by the new deadline of mid-October 2002. Responses can be made to:

The Secretary
Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Fund
Parliament House, Canberra, ACT
ph: 02 6277 3419
fax: 02 6277 5866 or
email: nativetitle.joint@aph.gov.au

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Research Support Request

ARC Linkage project, 'Agreements, Treaties and Negotiated Settlements with Indigenous Peoples in Settler States: their role and relevance for Indigenous and other Australians'

The aim of the project is to examine treaty and agreement-making with Indigenous Australians and the nature of the cultural, social and legal rights encompassed by past, present and potential agreements and treaties. It will include an examination of the legal history and foundations of agreements and treaties, an audit of current agreements, their purposes, status and outcomes, and will include international comparative research on treaty and agreement-making. While many of the agreements we examine will be related to land, our research will also examine non-land based agreements such as those agreements made in the areas of health, education and research.

The project began in March 2002 and the research will be conducted over three years. Along with our industry partner, ATSIC, this project involves researchers from both The University of Melbourne (Professor Marcia Langton, Chair of Indigenous Studies, and Ms Maureen Tehan of the Faculty of Law, and Dr Lisa Palmer, Postdoctoral Research Fellow) and The University of Technology Sydney (Professor Larissa Behrendt of the Faculty of Law and Jumbunna Indigenous House of Learning). The project is also supported by AIATSIS.

Outcomes of this project will include an online database on treaties and agreements in Australia and overseas and the publication of a collection of papers. It is anticipated that the project will contribute to the efforts of Indigenous organisations to secure political and economic rights through agreements with governments, industry and the broader Australian community.

One of our first tasks is to compile, to the extent possible, a complete database of all current or recently completed agreements (excluding any confidential information contained within these agreements) and to

identify, amongst other things, the range of characteristics, conditions and forms.

We have written to many stakeholders to request their assistance with this project. Such assistance may, in the first instance, involve the provision of actual agreements or information relating to agreements for inclusion in our database. We continue to seek any individuals and organisations who are able to provide information on and/or make available agreements which contain information which could be made available in the public domain. At a later stage we may also seek to arrange interviews and obtain further information in relation to particular agreements.

If you can assist us with our research or if you would like further information about our project please contact Dr Lisa Palmer, Postdoctoral Fellow, on 03 8344 3462 or email: lrpalmer@unimelb.edu.au

Replies and/or information pertaining to agreements can be sent to:

Dr Lisa Palmer
ARC Linkage Treaties and Agreements Project
SAGES
The University of Melbourne,Vic 3010

Visit the website at: www.indigenous.unimelb.edu.au/atns

FEATURES

Miriuwung Gajerrong: an invitation to understanding

by Wayne Bergmann, Executive Director, Kimberley Land Council

On Monday, 19 August 2002, the Miriuwung and Gajerrong peoples held a meeting in Kununurra to discuss the outcome of the High Court's native title determination. Many aspects of this complex decision were explained and options discussed.

The tone of the meeting was sad and tired and the question was asked, "After this decision, is there any more native title?"

In many ways this decision delivers the bucket-loads of extinguishment promised by Tim Fisher, then Deputy Prime Minister, following the 1997 *Wik* native title decision and before the 1998 amendments to the *Native Title Act 1993* (Cth) For example, native title on national parks and conservation reserves in WA is extinguished by this decision.

But, even though this extinguishment of our rights is deemed to have taken place in Australian law, it is not as if that part of Miriuwung Gajerrong peoples' traditional country has gone away. Nor have the people with responsibilities to care for that country gone away. People do not give up on their law and culture just because Australian law is incapable of recognising it. In this way, the decision changes nothing.

In other respects the decision is not as bad for Aboriginal peoples as it could have been – partial native title survives on pastoral leases and mining leases, providing those partial rights do not get in the way of those of the pastoral or mining lease-holders. If, however, the rights of the pastoral or mining lease-holder get in the way of the native title rights, then too bad. As someone else at the Miriuwung Gajerrong meeting said, "We're always going to be on the losing side." And, "All we get are the left-overs after everybody else has finished with the land – kartiya (non-Indigenous) rights will always come first and blackfellas get what's left."

This lesser status, this subordination, is a terrible position for the first peoples of this nation to be in. Each time we go back to court, we lose a little more. Those native title rights that survive extinguishment by State and Commonwealth legislation must be recognised by the courts in the Australian common law. This common law is based on

centuries old legal principles laid down in a vastly different culture from ours on the other side of the world. Given this, it is not surprising that the courts find it difficult to find a match between this common law and our law and custom, which comes out of the land and waters of our traditional country.

In this case, the High Court has said that more information on traditional law and custom is required; so that how law and custom can be recognised as rights in Australian law can be more specifically pinned down. This approach treats us like a dead butterfly to be pinned onto a board and exhibited as part of a collection – something that is admirable to look at from a reasonable distance, even to show to others, but that cannot grow and change, only fade and slowly decay. This has been called the frozen in time approach to traditional law and culture: it denies us our growth and cultural dynamism.

It also raises another fundamental issue for us as Aboriginal peoples, summed up in the following, also said at the meeting, "My law comes from that creation – that gives us our law, [tells you] what you gotta do. How much of that do we want to tell them, or write that down, so they can look at that and say 'that's rubbish law, we don't recognize your law'?" And, from another meeting participant: "You've got to ask the question whether they can understand us too."

Despite the best intentions in the world on the part of those involved, the answer to that question has to be, 'No'. Without that understanding, the Australian courts cannot and will not deliver justice to our people. This is because the fundamental issue is not understood and given legal recognition. We are the first peoples of this nation and as such we are unique and deserve substantive equality. Expressed simply, this issue is about the right to be ourselves and secure our children's futures. We are not you, and attempts at assimilation – to turn us into pale imitations of you – have not, and will not, work.

Regardless of the decisions of Australian courts, we will never feel any less for our traditional country, for our law and culture, or for our rights. We cannot give up – we have nowhere to go.

And it is clear that we cannot go back to court. It wastes taxpayers' money, and it exhausts our people. Too many of our old people die – taking their leadership, knowledge and experience with them – while the native title process grinds on.

Governments must find a way to accept the fundamental truth of who we are; and treat us accordingly. The nation must also accept that we have a contribution to make. We do not want any more special treatment; such as the separation of our children, and the subordination of our rights and interests in land to others. All we want is a fair go.

The Western Australian Government must negotiate with the Miriuwung Gajerrong peoples, as equals and with an attitude of mutual respect, and they must do it now. The time for well-intentioned rhetoric has passed; the time for meaningful negotiation and action is upon us.

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Summary of judgment – *Ward on behalf of Miriuwung Gajerrong v Western Australia* High Court of Australia (8 August 2002)

by Dr Lisa Strelein, NTRU

1. Central Issues

The High Court concentrated on the nature and principles of extinguishment in framing the decision. The two questions posed were: whether there can be partial extinguishment and the principles for determining extinguishment.

These issues were dealt with comprehensively and attempt to clarify the operation of the *Native Title Act 1993* (Cth). However, the orders state that both appeals are allowed. As Gleeson CJ stated when delivering the Court's judgment, no party was entirely successful in these proceedings. A number of issues were sent back to the Fed-

eral Court for further evidence to be adduced.

2. Bundle of rights

The Court only briefly discussed the bundle of rights versus interest in land debate. The 'bundle of rights' idea was said to be useful as a metaphor to illustrate that there may be more than one right or interest in a particular piece of land. In addition, the 'bundle of rights' metaphor reflected their view that there may be several kinds of rights and interests, not all of which are fully or accurately expressed as rights to control what others may do on land.

The Court suggested that the inquiry into the nature and extent of native title must focus on what the traditional laws and customs say about the relationship to the land. In this way expressing greater particularity about the laws and customs and the rights conferred by native title.

The Court drew a distinction between areas of land where native title might be equated with exclusive possession (with which they did not concern themselves in this decision) and areas where the rights to control access and use of land to the exclusion of all others may have been compromised by other interests. Of course the occurrence of areas unaffected by other tenures are incredibly scarce. This of course has significant implications for the proof of native title and the presentation of evidence.

3. Proof of native title

The High Court reconfirmed the view that native title rights and interests are derived from traditional law and custom and the common law recognises those rights and interests through the device of native title. However, the High Court placed a greater emphasis on the content of the laws and customs and the relationship with the rights and interests conferred by native title than has been the case previously.

The Court confirmed that the requirement for rights and interests to have a connection to land (under s.223(1)(b)) does not require a physical connection and is not directed to how Indigenous peoples use or occupy the land. Absence of evidence of recent use does not lead to the conclusion that there is no relevant connection. However, the requirement of a connection to land limited the rights and interests protected by native title under the NTA. Protection of cultural knowledge is a native title right/interest only in so far as it relates to land, for example in denying/restricting access to sites or areas. In part this seems to reflect the constraints of operating within the Act.

4. Principles for extinguishment

The Court reiterated its position that the Act is at the core of native title litigation where applications are brought for determination under the Act. They highlighted that native title is not able to be extinguished contrary to the Act (s.11), but held that the Act mandates the recognition of partial extinguishment.

The Court confirmed that within the framework of the Act, the principles established in *Wik* and other cases still applied. That is, despite other interests, to some extent native title might survive or there might be no inconsistency in the relevant sense at all. Further, statute may regulate the exercise of native title without abrogating it.

'Inconsistency of Incidents' was held to be the appropriate test for determining extinguishment and co-existence. Taking its lead from Toohey J in *Wik* the Court affirmed: 'Inquiry into extinguishment and the extent of inconsistency requires comparison of particular rights and interests conferred by native title on the one hand and by the statutory grant or interest on the other'.

They rejected any subjective interpretation of 'clear and plain intention'. The Court argued that the requirement that legislation or authorised act have a demonstrated clear and plain intention to extinguish native title should be understood within the framework of the test set out above.

One positive that may be gleaned from this is the detail to which non-native title parties are also subjected. Each Act and tenure must be assessed according to its terms to determine the extent of inconsistency between the two sets of rights. The Court, in applying this test seemed to attribute a more robust character to native title than has been the practice since *Wik*. However, together with the requirements of proof, the intricacy of this test appears to make litigation almost impossible as a method of resolving the relationship between native title and other interests.

One other positive outcome may be the Court's rejection of 'operational inconsistency' as a separate basis for extinguishment.

The Court's treatment of pastoral leases provides an illustration of the operation of the test of extinguishment. The Court described pastoral leases under Western Australian legislation as a 'precarious' interest, even more so in some respects than leases considered in *Wik*. On no view, they argued, could the pastoral leases be said to give the holder exclusive possession.

Mining leases under the *Mining Act* (WA), similarly, were held to grant exclusive possession for mining purposes only. It is a limited right to exclude others from mining. It does not give the right to exclude native title holders. While certain native title rights in certain areas of the mining lease may be extinguished and the remaining rights must yield to the leaseholder's enjoyment of rights under the terms of the lease, native title is not completely abrogated.

In discussing the effect of these two forms of tenure, the Court draws a distinction between inconsistent incidents and extinguishment as opposed to the enjoyment of rights by the leaseholder prevailing over but not extinguishing native title rights and interests. In the latter case, activities would impact on the enjoyment of native title rights only as long as that activity was being undertaken.

5. Reservations, resumptions and vesting

The Court confirmed the opinion of the Courts below that a reservation for public purposes of itself does not affect native title. The Court considered that reservation or dedication was not a 'public work' under the Act but that that dedication may demonstrate an assertion of rights that are inconsistent with a native title right for example to determine future inconsistent use of the land. However, they confirmed that the Crown may create an interest in itself that would be inconsistent with native title. This reasoning also led the Court to reconsider the opinion of both lower courts that had held that mere vesting did not affect native title and was merely a means of management.

The Crown's vesting and assertion of property in minerals and petroleum was distinguished from that with respect to the fauna legislation considered in *Yanner* and held to extinguish native title rights to minerals and petroleum.

6. Applicable law

The Full Court wrongly took the applicable law to be that in force at the time of the original hearing (cf *CDJ v VAJ* (1998) 197 CLR 172). This led the Court into error in not considering State and Commonwealth validation and confirmation provisions passed pursuant to the 1998 amendments to the *Native Title Act* 1993. The matter was sent back for further consideration by the Federal Court in relation to impact of these provisions, in particular: possible extinguishment [s.23C (PEPAs), s.23G (PNEPAs)]; possible suspension, under the non-extinguishment principle [s.15]; and possible compensation pursuant to the Racial Discrimination Act [s.23J; s.45].

This would also require further particularity in the findings of traditional laws and customs and native title rights and interests in different areas and the interests conferred by grants or other instruments.

In addition to this summary the newly released Issues Paper provides an extended analysis of the decision by Lisa Strelein.

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The Nevada Indians: land rights and human rights

by Denise McVae, Indian Law Resource Centre, United States

The Inter-American Commission on Human Rights has publicly released a report regarding the longstanding land dispute between the U.S. government and the Western Shoshone Indians of Nevada. The report finds that the United States government is violating international human rights laws in regard to its treatment of Mary and Carrie Dann, two Western Shoshone Indians who have been embroiled in a land battle with the U.S. government for several years.

The report calls into question the US governments handling of millions of acres of land, mainly in the West, that have been subject to Indian claims in the federal Indian Claims Commission. The report affirms the Dann's argument that the U.S used illegitimate means to gain control of the Indians' ancestral lands.

The dispute manifested itself in certain incidents between some Western Shoshone Indians and the Federal Bureau of Land Management, which charges the Indians fees for grazing cattle on public lands and impounds livestock if fees are not paid. The Human Rights Commission found that the claims process, which the U.S says extinguished the Western Shoshone rights to most of their land in Nevada, was a flawed process that denied Mary and Carrie Dann, and other Western Shoshone Indians, their human rights. The Commission concluded that the U.S violated several articles of the American Declaration on the Rights and Duties of Man, including the right of equality before the law, the right to a fair trial, and the right to property.

The Commission recommended that the government take steps to provide a fair legal process to determine the land rights of Mary and Carrie Dann and that of the other Western Shoshone Indians. This report will have important implications for Indian nations all over the country that have complained for years about losing their lands as a result of fraudulent or high-handed claims in the Indian Claims Commission, said Robert T. Tim Coulter, executive director of the Indian Law Resource Center, which brought the case before the Inter-American Commission on the Dann's behalf. At last, there is a thorough, legal decision concluding that these procedures are seriously wrong and that they violate the most basic human rights of the Indian peoples involved.

A controversial Bill, sponsored by Senator Harry Reid, D. Nev., would distribute the money awarded by the Indian Claims Commission in the Western Shoshone case. The Bill is scheduled for a hearing in Washington D.C. on Friday 2 August 2002. Many Western Shoshone tribes, including Mary and Carrie Dann oppose the bill because of concern that it would undermine their rights to their lands and compound the human rights violations identified by the Inter-American Commission.

The Inter-American Commission on Human Rights is a body of the Organization of American States with headquarters in Washington D.C.

This is the first decision of the Inter-American Commission finding that the US has violated the rights of American Indians.

A summary of the Inter-American Commission's report and the full text of the report are available on the website of the Indian Law Resource Center: www.indianlaw.org/

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National

Following the *Miriuwung Gajerrong* decision the NNTT has announced that there will be some changes to the Registration Test. At this point these are still to be determined, however NNTT is keeping an update on this on its website at http://www.nntt.gov.au/

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Northern Territory

The Giants Reef Mining Company and Warumungu traditional owners will sign an agreement next week allowing the Chariot mine project to go ahead. The mine site near Tennant Creek is the ninth new mining lease in Central Australia approved under the Northern Territory's *Aboriginal Land Rights Act*. It is anticipated that the mine will provide employment, royalties and training for the traditional owners. *ABC Online* 11 July 2002

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Western Australia

The Western Australian government is pushing ahead with the proposed $6 billion resources investment on the Burrup Peninsular without the agreement of all three registered native title claimants over the area. Government negotiators have added to the original deal in an offer of $5.8 million in up front payments and continued rent from the mining companies. With the approaching deadline and the standstill in negotiations between the Government and the Wong-Goo-Tt-Oo native title claimants, the Government is attempting to get the other two groups to sign the deal. If they do sign, then it is expected that the State Government will attempt to get approval from the NNTT to develop an industrial estate without the Wong-Goo-Tt-Oo's consent. *The West Australian* 16 July 2002

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The State Government has chosen arbitration to settle the dispute between the State Government and the Wong-Goo-Tt-Oo. The government has called in the NNTT to urgently resolve the matter. Ian Viner QC who represents the Wong-Goo-Tt-Oo argued that the Government was acting improperly by pursuing arbitration when some members of the groups had not formally signed the deal. *West Australian* 7 August 2002

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According to WA State Government figures, the amount of money spent on administering native title has increased by 600 per cent over the past year. The total amount allocated to the Office of Native Title in the current financial year is $6.5 million. This amount is in comparison to the annual funding amount of $960,000 during the previous eight years of coalition government. *West Australian* 22 August 2002

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Over 330 mining tenements are at risk of being ruled invalid following the *Miriuwung Gajerrong* decision, that found pastoral leases did not extinguish native title. The tenements were granted under the previous coalition State Government and followed the Federal Court ruling in March 2000. The tenements include 140 prospecting licences, 89 mining leases and 73 exploration licences. *West Australian* 24 August 2002

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Queensland

An application by the Koinjmal People for native title has been accepted by the NNTT. The area subject to the application covers approximately 731 sq km located in the St Lawrence Region. Any person wishing to become a party to the application has until the 23 October to write to the Registrar of the Federal Court in Brisbane. *Koori Mail* 10 July 2002

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The Barada Barna Kabalbara and Yetimarla People application for native title has been accepted by the NNTT. The application covers an area of about 19,640 sq km located in the St Lawrence and Dysart regions. Any person wishing to become a party to the application has until the 23 October to write to the Registrar of the Federal Court in Brisbane. *Koori Mail* 10 July 2002

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The Ankamuthi application remains on the register of native title claims after Justice Drummond of the Brisbane Federal Court ruled that the Cape York Land Council (CYLC) had broken the law by changing solicitors without the knowledge or consent of the Ankamuthi People. The lawyers representing the Ankamuthi People said the ruling meant it would not be possible for the CYLC to register an overlapping claim over the existing Ankamuthi application. *Koori Mail* 24 July 2002

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The NNTT has accepted an application for an area agreement on the Register of Indigenous Land Use Agreements, by the Ewamian People. The agreement covers an area of approximately 394 sq km and is located in the vicinity of Einasleigh in North Queensland. Any person claiming to have native title in relation to land in this area may wish to make a native title determination application, this application must be made by the 7 November 2002. *Koori Mail* 7 August 2002

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Registration of interest in the Port Curtis Coral Coast native title claim closed on the 28 August 2002. The Gladstone – Bundaberg claim covers about 19,280 sq km taking in areas such as Briggenden, Gayndah, Isis and Kolan. *Bundaberg Mail* 10 August 2002

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One of the largest native title claims has been lodged for waters in the Torres Strait, between Cape York and Papua New Guinea. The claim covers over 44,000 sq km of sea. The claim has been released ahead of public notification on September 4, 2002. *MX-Melbourne* 23 August 2002

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New South Wales

In the *Wilson v Anderson* case, the High Court has confirmed that perpetual grazing leases in the Western Division of NSW extinguish native title. According to the judgment, extinguishment is to have occurred when the lease was granted. This means that the areas covered by native title applications in the Western Division of NSW have been significantly reduced. However in the judgment, the High Court dismissed an appeal by a Walgett grazier against the Federal Court decision in relation to the native title claim by the Euahlay-i Dixon Clan over his property. *Daily Liberal (Dubbo)* 9 August 2002

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The NSW Aboriginal Land Council has reassured its membership that it will still be possible to negotiate access to land for traditional purposes despite the recent High Court decision in *Wilson v Anderson*. Under the Native Title Act, local Aboriginal land councils can negotiate agreements with owners and occupiers of land to provide access to Aboriginal people for the purposes of exercising traditional activities. *Riverine Grazier (Hay)* 21 August 2002

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The NNTT has accepted the application for native title by the Wiradjuri People. The application over land 35 km north to north east of West Wyalong covers 2,637 hectares. The claim was lodged in response to a mining lease application made by Barrick Gold of Australia. The Wiradjuri People started negotiating the native title application two weeks after Barrick Gold of Australia received the all clear to recommence drilling on the Lake Cowal project. Any person with interest in the claim has until the 9 October to apply to the District Registrar of the Federal Court in Sydney to become a party to the application. *Forbes Advocate* 2 July 2002

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Representatives from the NNTT will visit West Wyalong later this month to discuss the native title claim currently lodged by Wiradjuri elders over the proposed Cowal Gold Project mining lease area. The discussions will endeavor to answer questions about the native title process and better inform the community about native title issues. *West Wyalong Advocate* 20 August 2002

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The Minister for Land and Water Conservation John Aquilina, has refused to recognise the bulk of the native title claim by the Darkinjung Aboriginal Land Council. The claim was first lodged in January 1991 and covers land at Norah Head partly overlooking Soldiers Beach, and includes a Wyong Council Caravan Park, Soldiers Beach Surf Club and Sewerage Ponds. *Central Coast Express, Wyong-Tuggerah* 10 July 2002

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Negotiations between the Arakwal native title claimants and the Byron Bay Shire Council have tentatively discussed the hand over of management of the Broken Head Caravan Park. The Caravan Park is on Crown land and makes an estimated annual profit of $300,000. The hand over of the caravan park is one of a number of proposals being negotiated between the council, the Arakwal people and the State Government as part of a planned Indigenous Land Use Agreement (ILUA). The agreement is aimed at settling the Arakwal native title claim that was made in 1995 over Byron Bay Crown land and waters. *Byron Shire News* 22 August 2002

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Victoria

The NNTT has accepted an application for native title by the Gunai/Kunai People. The area subject to the application covers an area of about 39,100 sq km located east of Melbourne in eastern Victoria. Any person wanting to become a party to the application has until the 6 November to write to the Registrar of the Federal Court in Melbourne. *Koori Mail* 24 July 2002

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Two western Victorian native title claims will go to full trial if the parties involved are unable to reach an agreement. Justice North of the Federal Court said it was time that the Wotjobaluk and Gournditch-Mara native title claims settled. Justice North warned that if the claim failed to show signs of settling by September 19 when he would review both applications then the applications should go to full trial. The claim remains in mediation until that period. *Wimmera Mail Times* 12 July 2002

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Justice North of the Federal Court of Australia has ordered representatives of the parties involved in the Gunditjmara claim on Crown land across much of South West Victoria to a mediation session in Portland in early August. This will be the first time such a session has been held in a country area. Prior to the scheduled session to be held on August 9, there will be a pre-mediation case management conference, the first for Australia. The Gunditjmara claim covers 20,360 sq km of land and a sea claim stretching from the high water mark out to 22 nautical miles. *Hamilton Spectator* 20 July 2002.

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The Gunai-Kurnai People have applied to the Federal Court to have their traditional rights recognised over much of Eastern Victoria, making it the largest native title claim in Victoria. The claims falls within the shires of Alpine, East Gippsland, Cardinia, Delatite, Wellington, Baw Baw and Yarra Ranges and covers and area of 39,000 sq km. Around 4,500 letters have been distributed to parties including the State, local and Commonwealth governments, people with timber permits, fishing permits, grazing licences and mining licences. *Pakenham Gazette* 31 July 2002

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There is increasing concern among the Gunditjmara native title claimants that ATSIC is failing to support their native title claim. The Gunditjmara claim covers 20,360 sq km of land across South West Victoria and 22 nautical miles into the sea. The concern is increasing with the approaching mediation talks because the native title claimants feel they will not have enough funding to properly put their case. *Hamilton Spectator* 30 July 2002

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The Glenelg Shire Council has agreed to register as a party to the Gournditch-Mara native title determination application. Prior to its meeting on the 23 July 2002, the Glenelg Shire Council was only one of two local councils who had not registered as an interested party in the claim. *Casterton News* 31 July 2002

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Following a case management conference, the Gournditch-Mara native title claim has begun mediation. There are up to 174 interested parties including local and state governments and the Victorian Farmers Federation. In addition the Wotjobaluk native title claim covering 36,700 sq km in Wimmera and western Victoria will be heard in the Federal Court on the 19 September. *Wimmera Mail Times* 9 August 2002

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The first native title agreement covering onshore oil exploration was signed on the 23 August 2002. The agreement between the Gunditjmara people and Essential Petroleum Resources covers exploration of petroleum in the south-west corner of Victoria over an area of 1,700 sq km. Taking two years to negotiate the agreement will form the basis of a production agreement if Essential finds commercial gas or oil under the permit. *Weekend Australian* 24 August 2002

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South Australia

The South Australian Government is working with the Maralinga Tjarutja people to return the Maralinga lands used for atomic testing. However the state government has made it clear that it will not accept the land, held in trust by the Commonwealth, unless the land is declared clean. *Adelaide Advertiser* 16 August 2002

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Governor-General Peter Hollingsworth has handed back the traditional land of the Kaytetye people at Barrow Creek. Almost 1,200 ha was handed back in a ceremony. Barrow Creek is 280 km north of Alice Springs and was the site of one of the last punitive expeditions against Aboriginal people in the 1920s. *Adelaide Advertiser* 27 August 2002

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A native title meeting was held in Coober Pedy to discuss state wide negotiations for native title. The discussions between the communities that have lodged native title claims and the Antikarinya Land Management Corporation were facilitated by the Aboriginal Legal Rights Movement. The meeting explored solutions and ideas to sell native title to all parties including Aboriginal people. *Coober Pedy Times* 15 August 2002

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APPLICATIONS

The National Native Title Tribunal posts summaries of registration test decisions on <www.nntt.gov.au>. The following decisions are listed for July / August. The first number following the name is the NNTT Application Number, the second is that of the Federal Court. If an application has not been accepted, this does not mean that native title does not exist. The applicants may still pursue the application for the 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.

Ewamian People #3	QC01/16 Q6018/01 **Accepted**
Elizabeth River	DC96/5-2 DG6014/98 **Not Accepted**
Torres Strait Regional Sea Claim	QC01/42 Q6040/01 **Accepted**
Yulluna People #2	QC02/5 Q6004/02 **Accepted**
Binybarra -Totme Road Buffalo Creek	DC96/6 DG6015/98 **Not Accepted**
Wonnarna People	NC02/7 N6008/2002 **Accepted**
Mooka Traditional Owners #3	NC02/8 N6009/2002 **Not Accepted**
New Lakefield	DC02/7 D6008/02 **Accepted**
Ngarla Combined Application	WC99/26-2 WC96/101 WC97/15 WC97/50 WC97/62 WG6185/98 WG6126/98 WG6152/98 WG6178/98 WG6185/98 **Accepted**
Ewamian People #2	QC99/13 Q6009/99 **Accepted**
Taylor Group	WC01/4 W6006/01 **Not Accepted**
Willeroo Delamere	DC02/10 D6011/02 **Accepted**
Wollogorang South	DC02/11 D6012/02 **Accepted**
Indjilandji /Dithannoi People #2	QC02/7-1 Q6007/02 **Accepted**
Iman People #2	QC97/55-2 QG6162/98 **Accepted**
Buchanan Downs	DC02/16 D6017/02 **Accepted**
Hundred of Ayers	DC96/4-2 DG6013/98 **Not Accepted**
McArthur River #2	DC02/14 D6015/02 **Accepted**
Murranji #2	DC02/12 D6013/02 **Accepted**
Dangalaba 7	DC96/8-2 DG6018/98 **Not Accepted**
Dangalaba 8	DC96/9-2 DG6019/98 **Not Accepted**
Town of Adelaide River	DC02/4 D6005/02 **Accepted**
Burramurra	DC02/15 D6016/02 **Accepted**
Pine Creek	DC99/15-2 D6015/1999 **Accepted**
Djiringanj Aboriginal People	NC97/28-2 NG6080/98 **Not Accepted**
Karlu Karlu	DC02/9-1 D6010/02 **Accepted**
Dangalaba 10	DC97/6 DG6026/98 **Not Accepted**
Ngalia Katjungjatja 2	WC02/2 W6001/02 **Not Accepted**

APPLICATIONS CURRENTLY IN NOTIFICATION

Closing Date	Application Number	Application Name
6 November 2002	VC97/4	Gunai/Kurnai People CWTH, VIC
3 December 2002	QC00/12	Mitakoodi People #2 QLD
	QC97/55	Iman People #2 QLD
17 December 2002	QC02/27	Ngarragoonda Claim QLD
	VC99/9	Dja Dja Wrung/Whurung People VIC

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

RECENT PUBLICATIONS

Justice For All? Native Title in the Australian Legal System

Edited by Christopher J F Boge

Justice For All? Native Title in the Australian Legal System is a collection of four papers written by legal practitioners from a variety of areas such as corporate law, property law and litigation. Each paper focuses on differing aspects of native title and explores its operation in relation to challenging questions. Kathrine Morgan-Wicks' paper, titled "Balancing Native Title and Mining Interests: The Queensland Experience" analyses Queensland's alternative State regime, focusing on the right to negotiate, and compares this right with its operation under the federal system. The steps in the Queensland regime are broken down and analysed, and the inclusion of flowcharts aid the understanding of the process.

Helen Grutzner's "Invalidating Provisions of the Native Title Act on Religious Grounds: s.116 of the Constitution and the Freedom to Exercise Indigenous Spiritual Beliefs" is a discussion of the ways in which native title issues are interconnected with Indigenous spiritual meanings, arguing that those provisions of the Native Title Act which extinguish native title may possibly be constitutionally invalid. Mark Boge's "The Emerging Law of Native Title Practice: Select Issues and Observations" examines the practical side of the native title process, focussing on issues such as cost, issues of evidence and the Federal Court's initiatives in the process.

"A Fatal Collision at the Intersection? The Australian Common Law and Traditional Aboriginal Land Rights" by Christopher J F Boge is a fine example of legal scholarship that addresses the important issue of how the common law and the Native Title Act do not adequately recognise Indigenous laws and customs, instead they meet at a conservative intersection. Boge's paper goes on to examine the possible relationship of the common law and Indigenous laws and customs in the future. Each paper is well referenced. The collection represents the voicing of several uncertain, practical and important issues that have yet to be resolved in the current native title regime.

Justice for All? is available from Queensland's Online Legal Bookshop and orders can be sent to:

orders@lawbookpublishing.com.au

The publication is priced at $35.75 which includes postage and handling

Issues Papers: Land, Rights, Laws: Issues of Native Title

Native Title Research Unit Issues Papers are available through the native title link at <www.aiatsis.gov.au>; or are available, at no cost, from the NTRU. Receive copies through our electronic service, email <ntru@aiatsis.gov.au>, or phone 02 6246 1161 to join our mailing list.

Volume 2

No 17: Western Australia v Ward on behalf of Miriuwung Gajerrong, *High Court of Australia, 8 August 2002: Summary of Judgment* by Dr Lisa Strelein

No 16: *The International Concept of Equality of Interest in the Sea as it Affects the Conservation of the Environment and Indigenous Interests* by The Hon Sir Anthony Mason AC KBE

No 15: *Preserving Culture in Federal Court Proceedings: Gender Restrictions and Anthropological Experts* by Greg McIntyre and Geoffrey Bagshaw

No 14: *"Like Something Out of Kafka": The Relationship between the roles of the National Native Title Tribunal and the Federal Court in the development of Native Title Practice* by Susan Phillips

No 13: *Recent Developments in Native Title Law and Practice: Issues for the High Court* by John Basten

No 12: *The Beginning of Certainty: Consent Determinations of Native Title* by Paul Sheiner

No 11: *Expert Witness or Advocate? The Principle of Ignorance in Expert Witnessing* by Bruce Shaw

No 10: *Review of Conference: Emerging Issues and Future Directions.* by Graeme Neate

No 9: *Anthropology and Connection Reports in Native Title Claim Applications* by Julie Finlayson

No 8: *Economic Issues in Valuation of and Compensation for Loss of Native Title Rights* by David Campbell

No 7: *The Content of Native Title: Questions for the* Miriuwung Gajerrong *Appeal* by Gary D Meyers

No 6: *'Local' and 'Diaspora' Connections to Country and Kin in Central Cape York Peninsula* by Benjamin Smith

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

Discussion papers

Discussion papers are published in concert with AIATSIS Research Section and are available from the Research Section on telephone 02 6246 1157.

No 10: *The Community Game: Aboriginal Self-Definition at the Local Level* by Frances Peters-Little

No 11: *Negotiating Major Project Agreements: The 'Cape York Model'* by Ciaran O'Faircheallaigh

Monographs

The following NTRU publications are available from the Institute's Bookshop; telephone (02) 6261 4285 for prices.

Native Title in the New Millennium, edited by Bryan Keon-Cohen, proceedings of the Native Title Representative Bodies Legal Conference 16-20 April 2000: Melbourne, Victoria, 2001, includes CD.

A Guide to Australian Legislation Relevant to Native Title, two vols, lists of Acts summarised, 2000.

Native Title in Perspective: Selected Papers from the Native Title Research Unit 1998–2000, edited by Lisa Strelein and Kado Muir.

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.

Regional Agreements: Key Issues in Australia – Volume 2, Case Studies, edited by Mary Edmunds, 1999.

A Guide to Overseas Precedents of Relevance to Native Title, by Shaunnagh Dorsett and Lee Godden. AIATSIS, Canberra, 1998.

Web Resources

Sea Rights Resource Page: Croker Island and Native Title Offshore
http://www.aiatsis.gov.au/rsrch/ntru/news_and_notes/
The High Court decision on *Commonwealth v Yarmirr*; *Yarmirr v Northern Territory* was handed down on 11 October 2001. This web page presents recent papers about the case, as well as other relevant materials on native title and sea rights issues.

Limits and Possibilities of a Treaty Process in Australia
http://www.aiatsis.gov.au/rsrch/seminars.htm
This series explores some of the issues surrounding the proposal for a national treaty. The issues include current proposals, past obstacles, issues for Indigenous representation, political and philosophical questions, national identity, reconciliation, belonging, public law implications, and comparisons with other countries.

ABOUT THE NATIVE TITLE RESEARCH UNIT

The Native Title Research Unit identifies pressing research needs arising from the recognition of native title, conducts relevant research projects to address these needs, and disseminates the results of this research. In particular, we publish this newsletter, the Issues Papers series and publications arising from research projects. The NTRU organises and participates in conferences, seminars and workshops on native title and social justice matters. We aim to maintain research links with others working in the field.

The NTRU also fields requests for library searches and materials from the AIATSIS collections for clients involved in native title claims and assists the Institute Library in maintaining collections on native title.

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For previous editions of this Newsletter click on the native title research unit link at <www.aiatsis.gov.au>.

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