Native Title Newsletter

AIATSIS Native Title Research Unit

March / April 2002 No.2 / 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 papers 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.

STOP PRESS!!

AIATSIS and YAMATJI LSC announce

The Native Title Conference 2002: Outcomes and Possibilities

3-5 September

Geraldton WA

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.

Upcoming conferences

AIATSIS and the Yamatji Land and Sea Council are convening the third Native Title Representative Bodies conference *The Native Title Conference 2002: Outcomes and Possibilities.*, Geraldton, Western Australia, 3–5 September 2002. The conference receives principal sponsorship from ATSIC, and additional sponsorship from the National Native Title Tribunal, the Attorney General's Department, and the WA government's Mid West Development Commission.

The key themes are:
Report card on the first ten years
Key issues for the next ten years
Latest developments: Ward and Yorta Yorta
Prescribed Bodies Corporate
Good leadership and governance

Plenary speakers include Geoff Clark, Dr Mick Dodson, Justice Robert French, Prof Marcia Langton, Graeme Neate, Noel Pearson (tbc), Darryl Williams QC, and Hal Wootten AC QC.

For a copy of the brochure and registration form see the native title research unit's webpage at www.aiatsis.gov.au, telephone 02 6246 1161, or email ntru@aiatsis.gov.au.

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Murdoch University is hosting a three day conference entitled *Treaty – Advancing Reconciliation – A National Conference in a Global Context Concerning Racism, Land and Reconciliation* from 26 -28 June 2002. Day one will be devoted to Treaty relations between British colonials and Indigenous Peoples in North America and New Zealand, day two to historical roots to the 'Treaty Question' and day three will ask whether Australia should seek to negotiate a treaty/agreement, and if so what should it seek to accomplish. See further www.treaty.murdoch.edu.au.

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Native title essay competition

Australian tertiary students are invited to participate in an essay competition by submitting an original essay on any theme of the law, history, economics, anthropology, or public policy of native title. The winner will receive an airfare from their nearest Australian capital city to Geraldton WA, to attend the *Native Title Conference 2002: outcomes and possibilities*, 3-5 September 2002. In addition, the essay will be published by AIATSIS in the issues paper series *Land, Rights, Laws: Issues of Native Title*. See flyer at the back of this Newsletter for more information, or check our website.

Two new Issues Papers

The unit has published issues paper number 14 titled '"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 practise' by Susan Phillips.

Issues paper number 15 is also out, by Greg McIntyre and Geoffrey Bagshaw 'Preserving Culture in Federal Court Proceedings: Gender Restrictions and Anthropological Experts'.

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Something new

NGIYA– *Talk the Law*, National Institute of Indigenous Law, Policy and Practice.

Ngiya is a newly established unit and is part of Jumbunna Indigenous House of Learning, University of Technology, Sydney and has partnership status with the Australian Institute of Aboriginal and Torres Strait Islander Studies.

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Useful web resources

The Department of the Parliamentary Library have posted a website of the state of play and chronology of native title since the 1992 *Mabo* decision, useful for anyone inter-

ested in how the history of native title informs current practise. The site is listed at www.aph.gov.au/library/intguide/SP/mabo.htm. The site includes direct links to: caselaw on the internet (such as the *Croker Island* decision); native title publications; media releases; and, native title institutions.

The National Native Title Tribunal have compiled the *10 years of native title* information kit. The information kit, available at www.nntt.gov.au, lists current statistics on native title agreements and determinations, and also has a chronology of caselaw and other key developments in native title. If you would like to receive a hard copy of this kit, contact the NNTT media unit at 08 9268 7315.

New staff member

Sarah Arkley has joined the NTRU as the new administrative assistant, and will be helping out on this Newsletter.

FEATURES

An update on the British Columbia Treaty Process

By Mark McMillan*

Is the treaty process that exists in the Canadian province of British Columbia in a state of flux? Has this flux has been caused by the recently elected "Liberal" government, including the Premier of British Columbia Mr Gordon Campbell who has a history of "disagreements" of views that run against the interests and rights of First Nations in Canada? This paper will give a brief overview of the history of British Columbia, the Treaty Commission, and will look at the current referendum before the people of British Columbia. The referendum relates to how the provincial government should negotiate treaties with First Nations within the borders of British Columbia.

History

Canada was not only colonized by the United Kingdom. France has had a major influence in the colonizing process of what is today – Canada. Both colonizing countries actively sought treaties between themselves and the Indigenous nations in what is now eastern Canada. One reason as to why the colonizing powers undertook to enter into treaties with Indigenous nations of eastern Canada may be attributable to the disproportionate number of Indigenous Canadians to the British and French settlers.

Brand sets outs his reasons why this was the case when he said, "Initially given superior numbers, relative equality of power and military necessity, British and French colonial authorities treated Canadian native societies as roughly equal. Only later did the first nation's "succumb to the growing power of the settler communities."'[1]

In the province of British Columbia both the provincial and Federal governments took a very different view of their respective relationships with the First Nations of British Columbia.

In 1763 the Royal Proclamation[2] decreed that only the Crown could acquire land from

* Mark McMillan is an Aboriginal Lawyer currently undertaking research with *Ngiya – Talk the Law*, National Institute of Indigenous Law, Policy and Practice.

[1] Brant R 'British Columbia's approach to Treaty Settlement' in Meyers D ed. *The Way Forward Collaboration and Cooperation 'In Country'* NNTT 1995 at 131

[2] The Royal Proclamation signed by the King was the cornerstone of modern treaties. However this method of treaty making would appear to be unfair in that it requires Aboriginal nations to cede all their undefined Aboriginal rights for more defined treaty rights. This has been proved to deceptive as the 'undefined' rights are interpreted by non-Aboriginal people. The concept of Aboriginal groups "ceeding,

the First Nations and this could only be done by treaty. However, as the colony of British Columbia was not established until 1849 some argue that the Royal Proclamation did not apply as British Columbia was not in existence at the time of the Royal Proclamation. Upon the establishment of the colony in 1849, the colony was granted to the Hudson's Bay Company by royal charter.[3]

Questions still exist regarding the legitimacy of the mode of acquisition and the appropriation of First Nations' lands. The result of this confusion – and way that British Columbia has progressed – is that only small areas of British Columbia have been subject to treaties. These include small areas on Vancouver Island and a small portion of northeastern British Columbia that is covered by Treaty 8.[4]

The relationship between the provincial government and the government of Canada has also led to some of the uncertainty of the land issues relating to the First Nations. British Columbia did not join Canada until 1871 some twenty years after the colony was established and run by business, namely the Hudson's Bay Company. The British Columbia Claims Task Force Report stated:

> When British Columbia joined Canada in 1871, aboriginal people, who were the majority of the population in British Columbia, had no recognized role in political decision-making. The Terms of the Union made no mention of aboriginal title, but ensured provincial control over the creation of further Indian reserves. Canada assumed responsibility for "Indians and Lands reserved for Indians"[5]….with confederation, the First Nations of British Columbia were subjected to federal control, notably the Indian Act. The "band" system of administration was imposed on First Nations and bands were made subject to detailed supervision by federal officials. The governments outlawed the great, traditional potlatches which were the heart of the First Nations' social and political system. Throughout the province, the authorities removed children from their families and communities, and placed them in residential schools. [6]

Since the establishment of the colony in 1849 and confederation in 1871, First Nations in British Columbia have resisted much of the imposed structures and ideologies. Over time First Nations have developed political organizations, mounted court challenges, conducted blockades and held negotiations with federal governments.' This agitation over time and use of institutionalized recognition of 'rights' led to the three parties coming together in 1990 to try and forge a new way forward with respect to rights issues. This culminated in what is now known as the British Columbia Treaty Process.

BC Treaty Commission

In 1990[7] the three parties to the British Columbia Treaty process were the First Nations, the Government of British Columbia and the Government of Canada. The parties set up a task force that would advise and make recommendations that allow for the advancement of relationships between the

releasing and surrendering" is tantamount to extinguishment of Aboriginal rights, including title. The language used by governments for justifying such concepts is for the sake of "certainty".

[3] The report of the British Columbia Claims Task force that was required to report on how the three parties to a treaty process – namely First Nations, The Federal Crown and Provincial Crown- could not explain why the policies of the Royal Proclamation was not extended to areas west of the Rocky Mountains.

[4] The "numbered" treaties cover the bulk of the Canadian land mass. The numbered treaties cannot be discussed here because of space limitations; they will be discussed in a forthcoming paper. .

[5] This relates to section 91(24) of the British North America Act - the first Canadian constitution, this was later replaced by 91(24) of the Constitution Act of 1982.

[6] British Columbia Claims Task Force Report at http://www.aaf.bc.ca/aaf/pubs/bcctf/intro.htm accessed 12/05/2002

[7] The British Columbia Claims Task Force was created on 3 December 1990.

parties on issues relating to land and resources. This British Columbia Claims Task Force made 19 recommendations, one of which was to establish the British Columbia Treaty Commission[8] (the Commission). The three main roles of the Commission are:

- facilitation;
- public information; and
- funding.[9]

A formal agreement was signed creating the Commission in September 1992.[10] Importantly, from the formal agreement that created the Commission, Canada and British Columbia were required to legislate to establish the Commission.[11] The First Nations Summit passed a resolution agreeing to the establishment the Commission.

The task force report that led to the formal agreement covered many issues. The report dealt with among others:

- making recommendations;[12]
- discussion of natural resources;
- financial matters;
- how the negotiations should proceed; and
- how the BC Treaty Commission should operate.

Funding of the Commission and the process

One of the more important yet seemingly innocuous aspects of the role of the Treaty Commission is that of funding the First Nations to be in the process. This question raises serious implications for all the parties involved. The funding arrangements are contained in the formal agreement. From the agreement it is Canada's responsibility to fund the Commission "subject to appropriations by Parliament and approval by the federal Treasury Board."[13] Similarly the provincial government funds the Commission subject to legislative appropriations and "approval by the provincial Treasury Board."[14] The First Nations would appear to be in an unenviable position with respect to how they maintain, financially, their involvement within the treaty process.

The funding arrangements appear that the federal government contributes 80 percent and the provincial government 20 percent. The federal government funds their contribution by way of a combination of loans (88 percent of funding) and grants (12 percent) to the First Nations. In contrast the provincial government funds their contribution by way of a grant to the First Nations.

The way that the federal government funds First Nations to be active in the treaty process, that is through a loan system, could be challenged on philosophical, moral and legal grounds.

The federal government has authority under the Constitution to have exclusive power with respect to Indians and land reserved for Indians. What this has meant in relation to a "loan" for involvement in the treaty process underscores the true relationship between Canada and First Nations. As one of the most valuable assets that are held by First Nations is the land itself, usually land held as a reserve. If the First Nations have to use the only asset they have – the land – to be involved in the process then this makes a mockery of the federal governments obligations under the constitution. A hypothetical situation may arise where the

[8] This was Recommendation 3 of the Task Force. The other Recommendations can be found at http://www.aaf.gov.bc.ca/aaf/pubs/bcctf/conclsn.htm at pp5-6.
[9] BC Treaty Commission *FACT SHEET – Negotiation Support Funding* dated June 1, 2001. http://bctreaty.net/files/funding%20fact%20sheet.html accessed 12/05/2002.
[10] The Agreement was dated 21 September 1992. The Agreement was signed by the First Nations Summit (a coalition of many, but not all, First Nations of British Columbia), the Government of British Columbia and the Government of Canada.
[11] 2.1 (a) and (b) of the formal agreement dates 21 September 1992 states: "Canada shall introduce legislation to Parliament to establish the Commission as a legal entity to carry out the purposes of the agreement." and "The Minister of Aboriginal Affairs shall introduce legislation to British Columbia Legislature to establish the Commission as a legal entity to carry out the purposes of this agreement".
[12] There were a total of 19 recommendations.
[13] Article 5.2 of the formal agreement.
[14] Article 5.2 of the formal agreement

First Nation having agreed to be in the process – by having a loan under the auspices of the BC Treaty Commission – may have their reserve seized by the federal government in settlement of monies owed under the 'loan'.
How the above situation would play out under the current arrangements poses very vexing situations for all parties concerned. Under the current First Nations and Canadian government arrangements that exist, for a loan to be called in would require a decision of the Band Council and then the decision can only be made to dispose of the land back to the federal crown. This situation would seem to be untenable given that the federal government has social programs that are funded on the basis of the reserves. Therefore if the government is using 'loans' to coerce First Nations to be in the process then there is a risk that the underlying foundations of entering the process is flawed.

Another way that the loans may be called in is by way of with holding grant funding. Instead of Band Councils and First Nations receiving funding to implement essential programs, those funds may be diverted to repay the loans. The result is equally untenable for the First Nations involved.

Similarly, the Treaty Commission – as part of its role to control the funding to the First Nations – must turn its attention to the fact the even on a rudimentary level the onus of the First Nations to take out such 'loans' makes the power imbalance between the parties very undesirable. As funding the process is critical in any practical sense, the funding arrangements that are in place and controlled by the Treaty Commission makes it a very influential and overly powerful with respect to the First Nations' participation. How the loans and grants are structured seem to be glossed over by the literature.

Since the creation of the Treaty Commission in 1992 the total amount spent by the federal and provincial governments has been in $180 million Canadian dollars. The amount of that has been contributed by the provincial government is $36 million Canadian dollars. This money has been contributed by way of a grant to the First Nations with obviously some funds being utilised to keep the Treaty Commission functioning for salaries and other administrative costs. The federal government has contributed the remainder of the funds. As mentioned earlier the federal government provides the monies to the First Nations by a combination of grants and loans. As with the provincial government's contribution to the administrative costs of the Commission, some of the contribution of the federal government also goes to the administrative costs of the Commission.

British Columbia Referendum

When the Liberal party was elected to office in British Columbia in 2001, one of its election promises was to put a referendum to the people of British Columbia relating to how the province would proceed with negotiations in the BC Treaty Process.

The Government of British Columbia has kept its promise of a referendum. The questions that have ultimately been put to the people effectively extinguish any rights that First Nations may have within British Columbia. The questions are:

1. Private property should not be expropriated for treaty settlements.

2. The terms and conditions of leases and licences should be respected; fair compensation for unavoidable disruption of commercial interests should be ensured.

3. Hunting, fishing and recreational opportunities on Crown land should be ensured for all British Columbians.

4. Parks and protected areas should be maintained for the use and benefit of all British Columbians.

5. Province-wide standards of resource management and environmental protection should continue to apply.

6. Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia.

7. Treaties should include mechanisms for harmonizing land use planning between Aboriginal governments and neighbouring local governments.

8. The existing tax exemptions for Aboriginal people should be phased out.

It is important to note that the referendum results will be binding on the Province. Even more frightening for onlookers of the process is that the decision will be made on the basis of the majority or 51 percent of the returned votes. So in contrast to Australian referendums where it requires a majority of the voters (as voting is compulsory in Australia) – effectively a result that could have serious effects on the treaty process, governmental relations with First Nations and inter-governmental relations – could be achieved with a relatively low return. As voting is not compulsory in British Columbia, this process is attracting a considerable amount of interest. As at 10 May 2002 there had been over 683,000 returned votes.[15] The referendum process was to be conducted over a six week period with votes being required to be returned by 15 May 2002.[16]

The referendum has caused, and if accepted by the people voting, will further cause, a serious erosion in the relationship that exists between the government of British Columbia, the people of British Columbia and First Nations.'

If the referendum questions are answered in the affirmative, this will have a serious impact on the treaty process itself. One of the philosophies that underpin the treaty process is for the parties to act in good faith. The question that must be asked is, can the BC Government, with a negotiating position of denial of Aboriginal rights and title, negotiate treaties in good faith?

The referendum has placed the treaty process in a state of flux. The only way that this situation can be rectified is to see a restoration of the previous positions of the three parties – including all the First Nations - to the process. That is to negotiate in good faith.

Yorta Yorta – Court Report

By Dr Lisa Strelein, NTRU

History of the case

In February 1994, the Yorta Yorta Nations began their case in the Federal Court for a determination that native title exists in relation to land and waters along the Murray River in northern Victoria and southern New South Wales.

While the traditional boundaries of the Yorta Yorta claim appear quite large, the public land where native title may still exist within those boundaries, that is, where no extinguishing acts have taken place, remains quite limited (more recent maps produced by the National Native Title Tribunal reflect this smaller area). The Yorta Yorta people have maintained a presence in the area through continuous occupation of the former settlement at Cumeragunja, and constant use of areas within the Barmah forest and along the Murray River.

The judge at first instance, Justice Olney, found that despite the ongoing presence in the area, the Yorta Yorta Nations had ceased to occupy the land 'in the relevant sense', that is, they had ceased to observe the traditional laws and customs observed by their ancestors. He found therefore, that native title could not be determined because the foundation of the claim had been 'washed away'.

The appeals

15 www.gov.bc.ca.tno

16 *ibid*

The Yorta Yorta appealed this decision to the Full Federal Court where a majority (2-1) upheld the trial judge's decision. Although they were critical of the approach the judge took to the inquiry, they considered that the findings of fact in relation to the abandonment of traditional law and custom were open to the judge to make, regardless of the approach he had taken.

The Yorta Yorta received leave to appeal to the High Court in December 2001. The case was argued in Canberra on 23-24 May 2002.

The issues argued before the High Court were:
1. The proper construction and operation of section 223(1) of the Native Title Act;
2. Whether 'abandonment' is a part of the common law of native title; and
3. The concept of tradition and the treatment of oral evidence.

The parties and interveners

The Yorta Yorta appeal to the High Court was opposed by New South Wales and Victoria and a raft of other respondents. Victoria had held off joining the litigation until very late. They made some suggestion after joining as a party that they were still interested in negotiations, however, for the Yorta Yorta a negotiated settlement outside the Court could not result in a determination of native title. If the appeal had not continued, the determination against them would stand and they would have to find a solution outside of the native title context.

The main interveners were the Human Rights and Equal Opportunity Commission and the Commonwealth.

s223(1)

The impact of the definition of native title in the *Native Title Act* was central to the arguments in the High Court. The Court has been keen in a number of recent cases to emphasise that the Act is the appropriate starting point for an inquiry into the existence of native title. The Act directs the inquiry to the present, through section 223(1)(a) and (b), emphasising the laws and customs now acknowledged and observed.

Justice Olney had taken note of s223 but moved quickly to establishing the existence of native title according to the common law. Under this approach, Olney J began with the pre-contact traditional laws and customs, most clearly articulated, his Honour felt, in the writings of Edmund Curr. Olney J was criticised for attempting to trace activities identified by Curr through to the present and highlighting the discontinuities in their observance and the importance placed on different practices by the current Yorta Yorta community that were not highlighted in Curr's writings.

The Yorta Yorta argued that because of this approach Justice Olney had not paid sufficient regard to the contemporary laws and customs of the Yorta Yorta as required by the Act.

However, even having established s223 as the starting point for the inquiry, the Court had to consider the construction of the section to determine if the judge's approach was so erroneous as to infect his assessment of the facts. There are two references in the statutory definition of importance in this regard. The first is the incorporation of 'common law recognition' into the statutory definition at subsection (c) and the second is the concept of 'traditional' in relation to laws and customs.

'recognised by the common law'

The Solicitor-General for the Commonwealth argued that though the inquiry may correctly start with the Act this does not mean that the Act has created a new right. Section 233(1)(c) incorporates reference to the common law as part of the statutory definition. This unusual construction caused a great deal of discussion before the Court as to how much of the common law was brought in by the reference.

In the Full Federal Court the majority had taken the view that (c) incorporated a series of common law requirements including:

1. the native title holders are members of an identifiable community identified by one another as members living under its laws and customs;
2. that the community has continuously possessed interests in the relevant land under its traditional laws and customs;
3. the refusal of the common law to recognise rights and interest that are -
   (i) fundamentally inconsistent with the principles of natural justice, equity and good conscience (repugnancy)
   (ii) extinguished, whether by -
      - positive exercise of sovereign power; or
      - expiry, either by cessation of acknowledgment and observance of traditional laws and customs that form the foundation of native title; or the native title holders as a community, group, or as individuals, cease to have a connection to the land.

The respondents supported the majority's view, arguing that if repugnancy, inconsistency and extinguishment by sovereign act were incorporated under (c) why not other bases identified in *Mabo* – 'one in all in'. Apart from McHugh J, most judges seemed to be of the view that to suggest that once (a) and (b) had been dealt with a full inquiry as to the common law requirements was then necessary under (c) would effectively make (a) and (b) redundant. They impressed upon Counsel that the common law of native title did not begin and end with Justice Brennan's judgement in *Mabo.* Any reference in (c) must therefore be to the common law as amended by the Act and developed through recent case law.

The appellants and interveners argued that (c) incorporated only the concepts of repugnancy, inconsistency with a fundamental principle as in *Yarmirr,* and the concept of extinguishment by sovereign act. Some of the judges were concerned about the concept of abandonment as a basis for extinguishment, they noted that while so much of the Act is devoted to extinguishment, no reference is made in the legislation to any concept of abandonment. Indeed, as Justice Gaudron noted, the Act stipulates that native title is not able to be extinguished contrary to the Act.

Many of the judges drew a distinction between observance and acknowledgment – the failure to exercise rights or observe laws did not necessarily equate with the cessation of acknowledgment. Separating out concepts of observance from existence of laws, the judges (including Callinan J who would not necessarily be expected to be sympathetic to the appellants' case) were concerned with the implications of this argument in circumstances where laws and customs have been suppressed by colonial administrators. Gaudron J appeared to prefer that the inquiry focus on whether the laws and customs were traditional under (a) and (b). Gummow J also suggested that a case may fail on questions of proof under (a) without any inquiry as to abandonment.

The concept of 'tradition'

If the Court accepts that the inquiry cannot start with the pre-sovereignty position and attempt to trace each right along an unbroken chain of acknowledgment and observance, and that there is no concept of abandonment incorporated by (c) there remains the reference in 223(1) (a) and (b) to the laws and customs being 'traditional'.

The Solicitor-General for Victoria pursued the approach of Olney J that it is not a matter of being on the land but being present 'in the relevant sense'. He argued that Olney had found a complete break in traditional law and custom because those customs relied on in the application for native title did not relate to anything that emerged in the history up to 1880. 'Traditional' he said, must be derived from pre-settlement. While he admitted that a law or practice may be modified or adapted, it must be maintained by a 'thread continuous from pre-settlement'.

The respondent parties adhered to the concept of a bundle of rights where the evolution of native title would be limited to the same class of rights from 1788 to the present. This 'spear to a gun' mentality freezes the content of native title under the guise of evolution of methods of exercise. This understanding of a 'traditional' Aboriginal society was criticised by the appellants as requiring a particular way of life or a certain character of occupation. The debate still awaiting the outcome in *Ward* as to whether native title reflects a bundle of distinct rights or a system of laws, is again central to the approaches on both sides.

Kirby J also raised concern about the impossible burden of proof that may be placed on native title applicants by a pre-settlement test, considering that the oral history of a group may only extend three, perhaps four generations. There was reference by a number of judges to a possible presumption of continuity, by which current laws and customs based on the oral history of the group would be presumed to extend back to the assertion of sovereignty. The discussion around non-observance and acknowledgment will also impact on the meaning attributed to the concept of 'tradition'.

In some comments there were echoes of the decisions of Deane and Gaudron JJ and Toohey J in *Mabo*, where there was almost a presumption of continuity in the situations where the applicants have maintained occupation. This is a development in Canadian jurisprudence which may be a useful way to reduce the burden of proof currently required.

Gleeson CJ made the comment that the meaning of the word 'traditional' should be taken, in part, from that which it is describing – that is, by reference to the nature of native title. While His Honour did not pursue this question, it is an important point because the concept of 'traditional' when used by colonial parliaments could be argued to be simply a way to describe distinctively 'Indigenous' rights.

On the weight to be given to oral evidence, reference was made to Canadian cases that have dealt directly with the issue. However, it did not receive a great deal of attention in argument but was dealt with in the written submissions.

The challenges for the appellants case

Despite the respectful and often impassioned response from the Bench in the hearing, there are considerable obstacles confronting the Yorta Yorta Nations' case.

'the finding of fact'

The High Court was not interested in rehearing the evidence. The role of the High Court in an appeal is only to hear questions of law. The appellants were confronted by the fundamental problem, as Justice McHugh pointed out when they sought leave for this appeal in December, that Justice Olney had made findings of fact in relation to the evidence. Counsel for the Yorta Yorta, Neil Young, argued that the Judge's assessment of the facts could not be separated from his approach to the inquiry. The Court may however, accept that the trial judge found that the current laws customs are not 'traditional' and therefore fail the test under (a). Any misdirection by his Honour in relation to (c) would therefore be immaterial to the outcome of the case for the Yorta Yorta.

Procedural fairness

The respondents argued that the way in which the applicants had presented the case invited the judge to conduct the inquiry in the manner he did. They could not then take the opportunity presented by an appeal to effectively put a new case. Their Honours were concerned about sending the case back for re-trial – the initial hearing took 114 days with 201 witnesses over 11,664 pages of transcript. However, Victoria argued that it would be unfair to have the case sent back without new evidence as the State had responded to the case as put.

Kirby J and Gleeson CJ suggested that perhaps it was equally unfair to keep the Yorta Yorta to a standard of proof that is too high.

Conclusion

It is difficult to read the outcome of the case. Gummow J and Gleeson CJ remained very quite during arguments. It is likely that the court will confirm a number of approaches that they have been foreshadowed. The are also likely to make some strong comments in relation to what constitutes 'tradition'. The fundamental question remains whether the Yorta Yorta will receive a positive outcome for their particular case. The Court is still faced with the dilemma of overturning findings of fact by a trial judge, something they will be loathe to do. They need to be confident that the test applied by Olney was so erroneous that it infected the assessment of the facts.

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NATIVE TITLE IN THE NEWS

New South Wales

Wyong Council is seeking confirmation from Darkinjing Land Council that the native title claim around Norah Head includes the historic buildings. Darkinjing has made a claim over the site including the historic lighthouse, and according to the Council the claim is for the whole site including the buildings. Both Wyong Council and Darkinjing Land Council are hoping to clarify this confusion. *Central Coast Express* 10 April 2002

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Victoria

A Federal Court in Melbourne has deferred the Wotjobaluk native title claim until the 17 June 2002. The Wotjobaluk claim has been in mediation since September 1999 and the Federal Court hearing was designed to decide whether mediation has run its course. The Federal Court has allowed until the next hearing in June to continue the mediation. The claim area is for 10,000 square kilometers of mostly Crown land and waterways. *Wimmera Mail Times* 22 March 2002

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South Australia

The NNTT is going to begin mediating in a claim for 95,869 square kilometers of land north of Lake Eyre National Park. The Wangkangurru/Yarluyandi people are seeking recognition of their native title rights over the area. They are not seeking exclusive rights or interests. The other parties involved in the mediation include representatives from pastoral, mining, telecommunications, apiarists and state and

local government groups. *Adelaide Advertiser* 3 April 2002

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In the Cooper Basin, the balance achieved between Indigenous land holders and mining interests has been a result of the future act regime or CO98 Agreements. Seven petroleum companies and three native title parties, namely the Edward Landers Dieri People, the Yandruwandha/ Yawarrawarka Peoples and the Wangkangurru/Yarluyandi Peoples, reached consensus in agreeing to petroleum exploration and royalties. *Oil and Gas Australia* 1 February 2002

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Queensland

A meeting in Brisbane with Mount Isa City Council will discuss the ongoing progress of Indigenous Land Use Agreements (ILUA's) in the Mt Isa region. The Mt Isa Council recognise that the next stage will be the formation of a group of representatives from the Kalkadoon Tribal Council, one of the key claimant groups in the area, to become part of the agreement process. *North West Star (Mt Isa)* 3 April 2002

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Native title applications around Charters Towers, Hugenden and Richmond have been advertised, and the NNTT has invited people with interests in the land to register that interest. The applicants are the Woolgar People applying for 224 square kilometeres of land north-east of Richmond; the Kudjala People applying for 319 square kilometres of land south-west of Charters Towers and the Cape Holdong Group applying for an area covering 19 square kilometres of land south-west of Charters Towers. Parties have until 20 May 2002 to register their interest. *National Native Title Tribunal 7 February 2002*

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Parties are invited to negotiate the native title application around Quilpie, Bulloo, and Paroo. The Mardigan People are seeking to have their traditional rights recognised over approximately 28,580 square kilometres of south-west Queensland. Any person who thinks they may have an interest in the claim has until 20 May 2002 to apply to the District Registrar of the Federal Court. *National Native Title Tribunal 7 February 2002*

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The National Native Title Tribunal has advertised to notify people with any interests in the land under native title application near Kowanyama, north-east of Normaton on the Gulf of Carpentaria, to register with the District Registrar of the Federal Court to become a party to the application. The application by the Kowanyama People covers an area of 22,320 square kilometres. Parties have until 20 May 2002 to register their interest. *National Native Title Tribunal 7 February 2002*

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Western Australia

The second round of evidence in the first Goldfields native title claim to reach the Federal Court is likely to be heard from mid June. More than 2,000 Aboriginal people from over 50 families are involved in the Wongatha claim which covers almost 184,000 square kilometres of the North Eastern Goldfields. The Wongatha claim is the result of the amalgamation of more than 20 native title claims in the area. *Kalgoorlie Miner* 3 April 2002

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In the Wongatha native title claim, affidavits have been presented to the Federal Court about restricted evidence that will be presented to the court at sites near Leonora. Nagalia Kutjungkatja Claim applicants Dolly Walker and Kado Muir have asked that parts of their evidence be restricted due to the secret men's and women's business that will be disclosed. *Kalgoorlie Miner* 26 March 2002

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There are currently more than 11,000 applications including 5,300 mining leases for mineral tenement applications in Western Australia. *Gold Gazette*, WA 1 February 2002

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Northern Territory

Approval for a native title claim over the route that will become the pipeline carrying Timor sea gas from Darwin Harbour to the processing plant at Gunn Point is being sought in the Federal Court. The claim by Larrakia People and Tiwi People covers about 2,842 hectares and runs for 60 kilometres. *Northern Territory News* 21 March 2002

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The National Native Title Tribunal is asking people with interests in land and water that is covered by 12 native title applicants in the Northern Territory to register for talks which are aimed at reaching negotiated agreements. The applications are in the Darwin and Borroloola regions, and also in rural townships in the northern region of the Territory. The Tribunal Territory Manager Mr Ian Williams said people or organisations with interests in the area claimed may want to be involved in working out how their rights may coexist with native title

holders. They have until 2 July 2002 to apply to become a party to the applications. *National Native Title Tribunal 20 March 2002*

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The Federal Minister for Indigenous Affairs Phillip Ruddock has handed over the deeds for land to the traditional owners of Hermannsburg. The land comprises 515 hectares of former road reserves. *Mildura Independent Star* 7 April 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 March-April. The first number following the name is the NNTT Application Number, the second is that of the Federal Court. If a application has not been accepted, this does not mean that native title does not exist. The applicant 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.

Middle Arm Area A	DC01/72 D6072/01 Accepted
Mooka Traditional Owners Council	NC02/2 A6000/2002 Not Accepted
Gan Bruce	NC02/1 N6000/02 Not Accepted
Mallapunya/ Cresswell	DC02/1 D6001/02 Accepted
Mooka Traditional Owners Council #2	NC02/4 N6001/2002 Not Accepted
Wiradjuri Council of Elders	NC02/3 N6002/02 Accepted
Gunggari People	QC96/1-2 QG6019/98 Accepted
Barada Bana Kabalbara and Yetimarla	QC01/25 Q6023/01
People #4	Accepted
Gunggari People #2	QC01/28 Q6027/01 Accepted
The Nyoongar Ghurree - Bhurrah (Gubboothar) Far Western Gumilaroi Aboriginal People	NC01/4 N6017/2001 Not Accepted
Badimia People	WC96/98 WG6123/98 Accepted
Dalmore Downs South	DC02/2 D6003/02 Accepted
Welltree	DC02/3 D6004/02 Accepted
Eastern Yugambeh People	QC01/2 Q6002/01 Not Accepted
Southern Barada and Kabalbara People	QC00/4-1 Q60004/00 Accepted

APPLICATIONS CURRENTLY IN NOTIFICATION

Closing date	Application no	Application name
5 June 2002	NN02/1	Minister for Land and Water Conservation NSW
2 July 2002	DC01/1	Mataranka NT
	DC01/26	Showgrounds NT
	DC01/50	Spring Creek No.4 NT
	DC01/51	Spring Creek No. 3 NT
	DC01/52	Nathan River NT
	DC01/53	Gunn Pt Gas Pipeline NT
	DC01/54	Fogg Dam NT
	DC01/55	Town of Fleming NT
	DC01/57	Pungalina NT
	DC01/56	Nutwood Downs NT
	DC98/11	Kalaluk NT
	VC99/10	Taungurung People VIC
	VC99/11	Taungurang People VIC
31 July 2002	DC01/60	Lower Reynolds Channel Point NT
	DC01/61	Lake Nash NT
	DC01/62	Roper Valley North NT
	DC01/63	Mountain Valley - Mainoru NT
	DC01/64	Chaterhoochee - Mt McMinn NT
	DC01/65	Big River Urapunga NT
	DC01/66	Goondooloo Moroak 2 NT
	DC01/67	Wongalara NT
	DC01/68	Kiana West NT
	DC01/69	Sandover River NT
	DC01/70	Wanderrie Road NT
	DC01/71	Daly Waters NT
	DC01/72	Middle Arm Area A NT
28 August 2002	QC01/29	Port Curtis Coral Coast QLD
	VC00/4	Yupagalk People VIC
	VC99/11	Taungurung 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

Pila Nguru: The Spinifex People
by Scott Cane

On 28 November 2001, Chief Justice Michael Black sat under the shade of a large blue tarpaulin and read a short determination of native title which formally recognised the native title rights and interests of the Spinifex People over their homelands in Western Australia.

So begins Scott Cane's detailed account of the Spinifex People's culture and history. This history is told through a variety of ways

including through the strikingly beautiful artwork of the Spinifex People.
The land of the Spinifex People forms part of the Great Victoria Desert in Western Australia. The history and culture that is retold in this book is specific to this particular area of country. Cane retells the important Dreaming stories about the creation of the land and these stories are accompanied by artworks depicting the stories (although the medium of oil on canvas maintains the secrecy of many parts of the story inappropriate for the uninitiated).

Cane then follows through the later history of the Spinifex People, from the Maralinga tests where the 'white men told us the soil was poisoned' to the 1992 ATSIC Regional meeting when the Spinifex representative, upon hearing about *Mabo* and native title, passionately spoke about 'land, of Dreaming and of his country'. So began the nine year journey for native title over Spinifex country.

Cane takes the native title claim as his point of departure for detailing the elaborate and culturally specific history of the Spinifex people spanning over 6,000 years. The personal stories of the Spinifex people including elders Mark Anderson, Simon Hogan, and Betty Laidlaw and many others are a constant presence in the text. Indeed it is only through these voices that Cane is able to convey the complex historical and cultural magnitude of the Spinifex People.

This is a beautiful book that adeptly introduces the reader to the profound spirituality of the land for the Spinifex People. The clarity of the text enables a full understanding of the deep significance of this land and its important return to the Spinifex People through native title.

Pila Nguru: The Spinifex People is available through Fremantle Arts Centre Press
RRP $49.95
ISBN 1863683488

Emerging Justice: Essays on Indigenous Rights in Canada and Australia
by Kent McNeil

Emerging Justice: Essays on Indigenous Rights in Canada and Australia, is the latest book by Canadian Professor Kent McNeil. This book is a collection of fifteen essays, which explore the evolution of indigenous legal rights in Canada and Australia. The collection is divided into three parts. Part one traces the colonisation of Canada, the subsequent recognition of indigenous rights, and the legal definitions and burdens of proof in relation to these rights. These inquiries are made in light of recent Canadian case law, such as the 1997 *Delgamuukw* case and its subsequent implications. Part two explores the concept of indigenous self-government in Canada, which may be considered a natural consequence of indigenous group rights. The essays in this section examine self-government in relation to the Constitution, fiduciary obligations, and the Canadian Charter of Rights and Freedoms. Part three contains three essays examining native title in Australia, which include discussions of *Mabo No.2* and the effect the *Racial Discrimination Act* in the High Court's decision, and the relevance of traditional laws and customs in native title under the common law.

McNeil's collection considers recent Canadian and Australian case law in his essays. By juxtaposing Canadian and Australian legal developments of indigenous rights in the one collection, this book is recommended reading for those interested in contemporary comparative examinations of indigenous rights.

Emerging Justice: Essays on Indigenous Rights in Canada and Australia is available from the Native Law Centre, Publications Department, University of Saskatchewan, Canada.
ISBN 0 88880 441 5

NATIVE TITLE RESEARCH UNIT PUBLICATIONS

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 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.

AIATSIS acknowledges the funding support of the ATSIC Native Title and Land Rights Centre

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

Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies
GPO Box 553 Canberra ACT 2601
Telephone 02 6246 1161
Facsimile 02 6249 1046
ntru@aiatsis.gov.au

Yamatji Land and Sea Council (YLSC) in conjunction with the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) invite you to

The Native Title Conference 2002
outcomes and possibilities

Geraldton, Western Australia
3–5 September 2002

KEYNOTE SPEAKERS INCLUDE

Geoff Clark, Chair of ATSIC
Dr Mick Dodson, Chair of AIATSIS
Justice Robert French, Federal Court of Australia
Prof Marcia Langton, University of Melbourne
Graeme Neate, President of NNTT
Noel Pearson (tbc), Cape York Partnerships
Darryl Williams QC, Attorney General
Hal Wootten AC QC

REGISTRATION

Full Registration	$495
NTRB staff	$440
Concession	$330

Registration forms and brochure are available from the Native Title Research Unit webpage at www.aiatsis.gov.au or from ntru@aiatsis.gov.au or telephone Sarah Arkley on 02 6246 1161.

For more information contact Natalie Barton, Conference Coordinator on 08 9964 5645 or 0414 936 058, fax 08 9964 5646, or at nbarton@yamatji.org.au**.**

The Australian Institute of Aboriginal and Torres Strait Islander Studies

YAMATJI LAND AND SEA COUNCIL
YAMATJI BARNA BABA MAAJA ABORIGINAL CORPORATION
NATIVE TITLE REPRESENTATIVE BODY

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REGISTRATION FORM *for each additional registration, photocopy this form*
***The Native Title Conference 2002* 3-5 September, 2002 Geraldton, WA**

please write clearly

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title _____ surname _____ first name _____

name as it should appear on name badge _____

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telephone/s _____

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will you be attending the conference dinner (included in the full registration cost)? .....YES/NO
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Please circle one For the majority of the time I will be attending the following break-out session:

1. Legal & Research Public Program.
2. Aboriginal field staff – restricted. Please attach a verification letter from your NTRB.
3. Executive workshop – restricted. Please attach a verification letter from your NTRB.

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		Quantity	Price
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full registration – concession***	$330	___	$
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seafood night (no concession)	$60	___	$
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conference dinner only (no concession)	$70	___	$____
			TOTAL COST $

* Full registration covers conference materials, satchel, lunch, tea, coffee, transport to and from venues, welcome drinks and conference dinner. Day rates include conference materials, satchel – subject to availability, lunch, tea, and coffee. All events are subsidised. GST included.
** NTRB includes the current staff of the native title representative bodies and counsel.
*** concession includes full time students and unwaged; proof of concession (university card, health care card, etc) required with registration payment.

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cheques should be made out to 'AIATSIS' or pay by:

Visa Mastercard Bankcard

amount _____

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Please send form and payment addressed to 'Yamatji Conference', Native Title Research Unit, AIATSIS, GPO Box 553, Canberra ACT 2601(telephone 02 6246 1161, fax 02 6249 7714, or ntru@aiatsis.gov.au). Registration will not be accepted without payment.

HOW TO ENTER

All entrants must:

(1) complete the entry form, including acceptance of the rules and conditions; and

(2) submit the paper by email to Natalie Barton, Yamatji Land & Sea Council at nbarton@yamatji.org.au.

The entry form is posted on the Native Title Research Unit webpage at www.aiatsis.gov.au.

For more information, please contact Natalie Barton on

08 9964 5645

OR

0414 936 058

THE RULES

Closing date: Friday 16 August 2002 – no late entries will be accepted.

Submissions may previously have been submitted as course work for an undergraduate degree, but must not have been submitted for publication or be published.

Submissions will be judged on the basis of their cogency and originality.

SPONSORED BY

The Australian Institute of Aboriginal and Torres Strait Islander Studies

NATIVE TITLE ESSAY COMPETITION

Organised as part of the

Yamatji Land and Sea Council

and

AIATSIS

NATIVE TITLE CONFERENCE 2002

Outcomes and Possibilities

Geraldton, WA
3-5 September

BACKGROUND TO THE AWARD

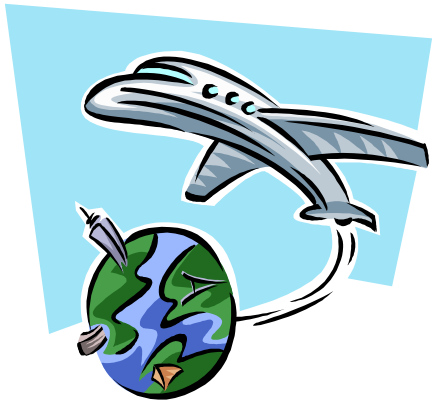
This year is the tenth anniversary of the *Mabo* decision. Acknowledging the anniversary, Australian tertiary students are invited to participate in an essay competition by submitting an original essay of between 5,000 and 10,000 words on any theme of the law, history, economics, anthropology, or public policy of native title. Native title must be a central issue of the essay.

It is anticipated that the essay competition will be an ongoing feature of the annual native title conference jointly held by NTRBs and AIATSIS.

THE PRIZE

The winner will receive an airfare from their nearest Australian capital city to Geraldton WA, to attend the *Native Title Conference 2002: outcomes and possibilities*, 3-5 September 2002. This prize also includes accommodation, meals allowance and conference registration.

In addition, the essay will be published by AIATSIS in the issues paper series *Land Rights Law: Issues of Native Title*. (Publication subject to peer review and AIATSIS reserves the rights to decide on publication).



ESSAY PANEL

Sandra Phillips, Managing Editor, Aboriginal Studies Press

David Ritter, Principal Legal Officer, Yamatji Land & Sea Counsel

Dr Lisa Strelein, Visiting Research Fellow, Manager, Native Title Research Unit, AIATSIS

The panel of judges is subject to change without notice.

For more information about the Conference
See Latest News at www.aiatsis.gov.au