

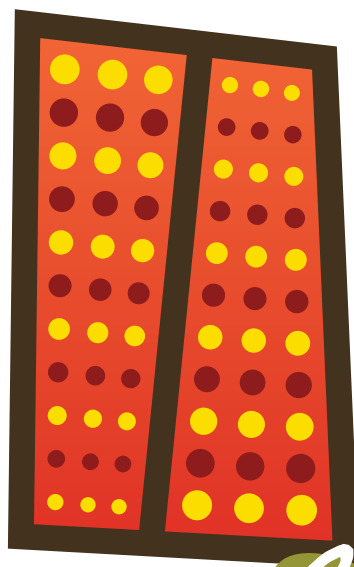
# Native Title *newsletter*

April 2016



**AIATSIS**

AUSTRALIAN INSTITUTE OF ABORIGINAL  
AND TORRES STRAIT ISLANDER STUDIES



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# Welcome! to the Native Title Newsletter

The Native Title Newsletter is produced three times a year and includes feature articles, traditional owner comments, book reviews, NTRU project reports and other various articles. The Newsletter is distributed to subscribers via email or mail and is also available at [www.aiatsis.gov.au/ntru/newsletter.html](http://www.aiatsis.gov.au/ntru/newsletter.html). We welcome your feedback and contributions.

For more information, please contact:  
[ntru@aiatsis.gov.au](mailto:ntru@aiatsis.gov.au)

Native Title Research Unit (NTRU) also produces monthly electronic publications to keep you informed of the latest developments in native title throughout Australia.

You can subscribe to NTRU publications online, follow @NTRU\_AIATSIS on Twitter or 'Like' NTRU on Facebook.



Subscribe



Cover: Tallow Beach looking from the Cape Byron Headland.

Photographer: Norm Graham

Aboriginal and Torres Strait Islander people are respectfully advised that this publication may contain names and images of deceased persons, and culturally sensitive material. AIATSIS apologises for any distress this may cause.

Editors: NTRU Information Services Team, AIATSIS

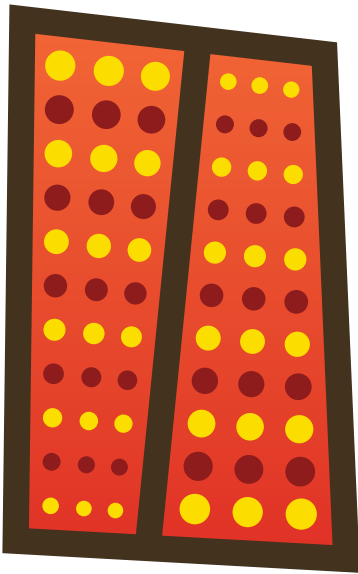
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# NATIONAL NATIVE TITLE CONFERENCE 2016 ●●●●

strong **culture**, strong **country**, strong **future**

*Registrations now open*

SHIANE LOVELL Conference Manager AIATSIS

**T**HE ANNUAL NATIONAL NATIVE TITLE CONFERENCE 2016 WILL BE CO-convended by AIATSIS and the Northern Land Council (NLC), on the traditional lands of the Larrakia people in Darwin, Northern Territory. The conference will be held at The Darwin Convention Centre from Wednesday 1 to Friday 3 June 2016.

The conference is a significant event for the native title sector in Australia and remains a key forum for discussion of native title policy and practice. At the 2015 conference in Port Douglas, Queensland, 830 delegates attended over three days, including over 180 speakers.

The conference brings together people affected by the *Native Title Act 1993* (Cth) either as native title claimants and holders, their Prescribed Bodies Corporate (PBCs), State and Commonwealth government agencies, native title representative bodies and service providers (NTRB/NTSPs), politicians, academics and the Courts. As it enters the post-determination era of native title, the conference also attracts practitioners, policy makers and researchers engaged in managing Indigenous lands and seas for a range of social, cultural, economic and environmental outcomes.

The conference promotes public debate about native title and Indigenous peoples' interests in land and waters; fosters knowledge acquisition in this dynamic area of native title law, agreement making and natural resource management, and provides an opportunity for Indigenous and non-Indigenous peoples to share information and experiences.

## CONFERENCE PROGRAM

This year's title '**strong country, strong culture, strong future**' is reflected in the following themes:

- Being on country
- Practising and learning culture
- Holding title; being sovereign
- Community and commerce
- Just recognition; just settlement

*Pre conference  
National PBC meeting*

A National PBC Meeting will be held on Tuesday 31st May (the day before the conference) at the Darwin Convention Centre. This meeting is open to PBC directors, members and staff only.

*DAY 1:  
NTRB & PBC PROGRAM*

The conference begins with the NTRB and PBC Program on Wednesday 1 June. This program is for NTRB/NTSP and PBC staff, native title claimants and holders and Indigenous people only.

*DAY 2 & 3:  
PUBLIC PROGRAM*

The public program is open to all delegates. This program includes keynote speeches, dialogue forums, workshops and papers.

AIATSIS and the NLC would like to thank everyone who submitted a proposal.

## MABO LECTURE



We are pleased to announce that Melissa George, Chief Executive Officer of the North Australian Indigenous Land & Sea Management Alliance Ltd (NAILSMA) will present this year's Mabo Lecture.

Melissa George is a Wulgurukaba Traditional Owner with traditional connections to Magnetic Island and the greater Townsville region, Far North Queensland.

Melissa has a background in Cultural Heritage and Protected Area Management and as a saltwater woman is passionate about the environment, particularly focusing on critical issues relating to sea country and its management. She is actively involved in protecting and managing land and sea through the empowerment of traditional owners cultural lore and obligations to care for country.

The Mabo Lecture is a dedication to the late Eddie 'Koiki' Mabo, and the historic legacy of the Mabo case that established native title under Australian Law. The Mabo Lecture

aims to provide a contemporary commentary of native title issues in the context of Indigenous peoples' struggles for recognition and control over their country and their lives.

The inaugural Mabo Lecture was delivered by Noel Pearson at the 2001 National Native Title Conference which was held in Townsville. Since the 2003 National Native Title Conference, the Mabo Lecture has become an annual event. Past presenters of the Mabo Lecture are Noel Pearson (2001 and 2003), John Borrows (2004), Aden Ridgeway (2005), Galarrwuy Yunupingu (2006), Mick Dodson (2007), Joe Williams CJ (2008), Les Malezer (2009), Marcia Langton (2010), Kerry Arabena (2011), Neil Sterrit (2012), Professor Robert A Williams, JR (2013) Dr Wen-Chi Kung (2014) and Mick Gooda (2015).

## INTERNATIONAL KEYNOTE



The conference hosts international speakers who deliver keynote addresses relating to the international experience of native title, land rights and Indigenous justice issues. This year, Professor Taiaiake Alfred will deliver the international keynote.

Professor Taiaiake Alfred is Professor of Indigenous Governance

and Director of the IGov program at the University of Victoria, British Columbia. He specialises in studies of traditional governance, restoration of land-based cultural practices, and decolonisation strategies.

Taiaiake's current research examines the effects of environmental contamination on Indigenous cultural practices, with a focus on the Mohawk community of Akwesasne. He works with Indigenous communities to assess cultural injury due to contamination of the natural environment, and to design land-based cultural restoration plans.

The conference has seen many inspiration international speakers, including Dr Wen-Chi Kung (2014), Robert A. Williams, Jr (2013), Neil Sterrit (2012), Andrew Leach (2011), Lars-Anders Baer, Chief Judge Joe Williams (2008) and Professor Dr Erica Irene Daes (2004),

To register or for further information on the conference please visit our website:

[www.aiatsis.gov.au/nntc2016](http://www.aiatsis.gov.au/nntc2016)

### Contact us

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## Co-CONVENORS



**AIATSIS**

AUSTRALIAN INSTITUTE OF ABORIGINAL  
AND TORRES STRAIT ISLANDER STUDIES



**Northern Land Council**

# An interview with

## YVONNE STEWART

Member of the Arakwal Bundjalung,  
Byron Bay country,  
Far Northern NSW



Yvonne Stewart is a traditional owner and applicant in an ongoing native title claim by the Arakwal Bundjalung people of Byron Bay, in far northern NSW. She spent 12 years as coordinator/CEO at the Bundjalung of Byron Bay Aboriginal Corporation (Arakwal), and recently talked to us about the Arakwal Bundjalung people's work towards gaining recognition of their native title.

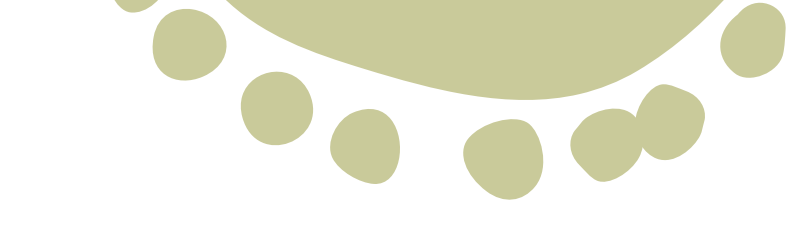
**W**E LODGED OUR FIRST NATIVE title claim in 1992, and it was registered in 1994, so we've been working on this for a long time. One reason I think it has taken so long is because of where our country is. No one wants to deal with the determination because of the value of the land. I feel like we're a bit isolated and discriminated against because of this, compared to some other native title claimants. At the same time, the value of the land is why it's so important for us to get our native title recognised soon; Byron Bay is growing fast, and we need to be able to protect our cultural sites and have a full say in developments on our land and in the management of our country.

When he was the Attorney-General, Robert McClelland came to meet with us. It was great that he did, but I remember he asked us, "How are you going to deal with the backlash from the white community?" because there was some high value Crown land that was going to be handed back to us in an ILUA. I said that it's our land, and we'll deal with that when we get it back. We just want to be treated as landowners, like any other landowner.

We also haven't withdrawn the claim to our waters, which always makes native title claims in New South Wales more difficult. A lot of the time the State Government wants you to take water off of the claim, and once you have recognised native title over the land, they say you can put in a second claim to coastal waters. Our claim includes part of the Brunswick River and coastal waters up to 3.5 miles out to sea.

Because we are registered native title claimants, we are afforded some cultural fishing rights. We want to be recognised as the traditional owners of our land and water, though, and we want exclusive rights to our traditional resources, like our fish, pipis, oysters, and crabs, because being able to manage our own resources is essential to our culture and our livelihoods. We told the solicitors to fight to get our water rights recognised in the determination.

We're hoping we'll get our determination soon. In order for that to happen, we need to finish negotiations with a few of the interested parties. The time it's taking to get a determination is



frustrating. Our claim has been registered for years, and everyone acknowledges we are the traditional owners of the area. When we put it together we worked with elders from the 14 other Bundjalung groups to make sure they endorsed our claim and its boundaries.

But, even without a determination for this claim yet, native title has opened a lot of doors for us. Once our first claim was registered we were treated differently. Before 1994 no one ever asked for our say; now we're important stakeholders. In 1998 we signed a memorandum of understanding with the Byron Shire Council to set up an Aboriginal consultative committee. Many of the councillors and the mayor have backed us, and it's helped us with organising zoning changes and planning permissions for future projects.

Since our first claim was registered we've also signed two Indigenous Land Use Agreements with the State Government. The first was signed in 2001, and the Corporation was given freehold over two parcels of land in

Byron Bay. Last year we finalised the development application for four new homes for some of our mob on the land, in honour of the four elders who started the claim. The main outcome from the first ILUA, though, was setting up Arakwal National Park, and we have joint management of it with the National Parks and Wildlife Service. Our arrangement with National Parks has been great, they're willing to work with us and we negotiated for seven permanent positions in the park that are reserved for Arakwal people. The park won an IUCN Packard Award in 2003, and in 2014 it was one of the first parks in

Australia to be placed on the IUCN Green List of Protected Areas. We're working at the moment to provide a model that other Indigenous communities can use to set up their own joint-managed parks.

The second ILUA granted the Corporation four more parcels of freehold land, including the Broken Heads Caravan Park. We inherited 11 non-Indigenous permanent tenants when the Corporation took over the caravan park, so we had to manage that; running a business was a whole new game. Indigenous Business Australia helped us draw

“ *We want to be recognised as the traditional owners of our land and water, though, and we want exclusive rights to our traditional resources, like our fish, pipis, oysters, and crabs, because being able to manage our own resources is essential to our culture and our livelihoods.* ”





“ We’ll keep working to make sure our people have a place to call home and belong to, and to secure housing, economic development and good health.”



up business plans, and we had a lot of work to do upgrading the caravan park. Another part of the land we got back we earmarked for a cultural centre. That land used to be a rifle range and a tip, so we’re working with the State Government now to get it cleaned up. Mob are still doing a lot of work just getting the management of the Corporation sorted, so the cultural centre isn’t a priority at the moment, but it’s an important longer-term goal. The main thing is now the Corporation is financially self-sufficient, and that allows us to run different programs for our people.

The time and effort put into all these different native title processes takes its toll. I was working seven days a week at one point, it nearly killed me. That’s by far the worst part; all the work that needs doing, and how long it takes. You’re forever representing to government departments and stakeholders, and our mob too, because it’s hard for a lot of them to interpret the process and who all the different players are. The government comes to the table and says ‘We need this and that ready,’ but when they have to do something they take their time mucking around between all the

different departments. We’ve only got one elder left in the claimant group. I always worry, ‘Can we get this finished before she goes?’

If we get a determination, of course we’ll celebrate! But it will be a moment for reflection, too. We’ve lost a lot of people along the way. We want to dedicate a new campsite to all our elders who didn’t get to see the decision. We’ll keep working to make sure our people have a place to call home and belong to, and to secure housing, economic development and good health.

Opposite: Tallow Beach, Bryon Bay looking north to Cape Bryon; top: Tallow Beach waters, Byron Bay; above: Tallow Beach looking south from the Cape Bryon Headland. Photographer: Norm Graham.

# Native title SNAPSHOT

LUKE SMYTH RESEARCH OFFICER NTRU  
BELINDA BURBIDGE RESEARCH FELLOW NTRU

**T**HE DECISION IN *MABO V QUEENSLAND (No 2)* [1992] HCA 23; [1992] 175 CLR 1 (*Mabo*) overturned the doctrine that Australia was *terra nullius* - a land belonging to no one - and recognised native title through the common law in Australia. In response, the Federal Government developed the national *Native Title Act 1993 (Cth) (NTA)*, which came into force in 1994. The NTA established a statutory regime for claiming and recognising native title land in Australia.

In its first 8 years the native title system saw many changes and developments; however, there were few native title determinations prior to June 2001. Figure 1 from the National Native Title Tribunal (NNTT) 2000-01 Annual Report shows the slow growth in the number of native title determinations across Australia between 1992 and 2001.

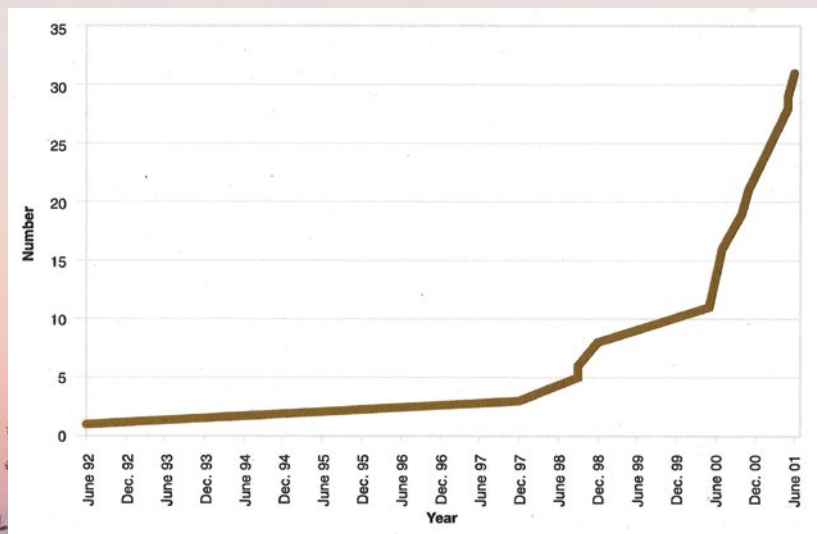
According to the NNTT registers, although there were over 1000 claimant applications lodged across Australia and the Torres Strait Islands during this period, only 13 of these claims resulted in a consent determination prior to the year 2000. The clear majority, 10 of the 13 claims, were determined

in Queensland (QLD), although 7 were Torres Strait Island claims, following on from *Mabo*. The only claim determined in New South Wales (NSW) during this period, *Dunghutti People v State of New South Wales* [1997] FCA 1624, was also the first consent determination under the NTA. There were only 2 cases finalised in Western Australia (WA) prior to 2000. Competing legislation, the *Land (Titles and Traditional Usage) Act 1993 (WA)* (repealed in 1995) which sought to extinguish native title in WA and replace it with a form of statutory title, and after, the

*Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA)* ('TNTA') which could extinguish native title rights via the validation of past acts, resulted in a slow start for native title in WA. The land rights regimes (included below) impacted on the lack of early native title claims in the Northern Territory (NT) and South Australia (SA).

Due to a number of reasons around changes to legislation, state policy and native title practice, the number of native title determinations rose sharply after June 2000.

Figure 1: Growth in number of native title determinations (claimant and non-claimant) including proposed, draft and/or conditional determinations to 30 June 2001



## HOW MUCH (%) OF EACH STATE & TERRITORY WAS UNDER NATIVE TITLE?

	2000	2005	2010	2015
ACT	-	-	-	-
New South Wales	-	-	0.1	0.3
Northern Territory	-	0.6	1.4	17.6
Queensland	0.1	1.2	2.0	25.3
South Australia	-	0.2	7.0	52.7
Tasmania	-	-	-	-
Victoria	-	-	0.8	6.6
Western Australia	-	22.7	32.8	44.2
Australia	-	7.9	12.6	30.3

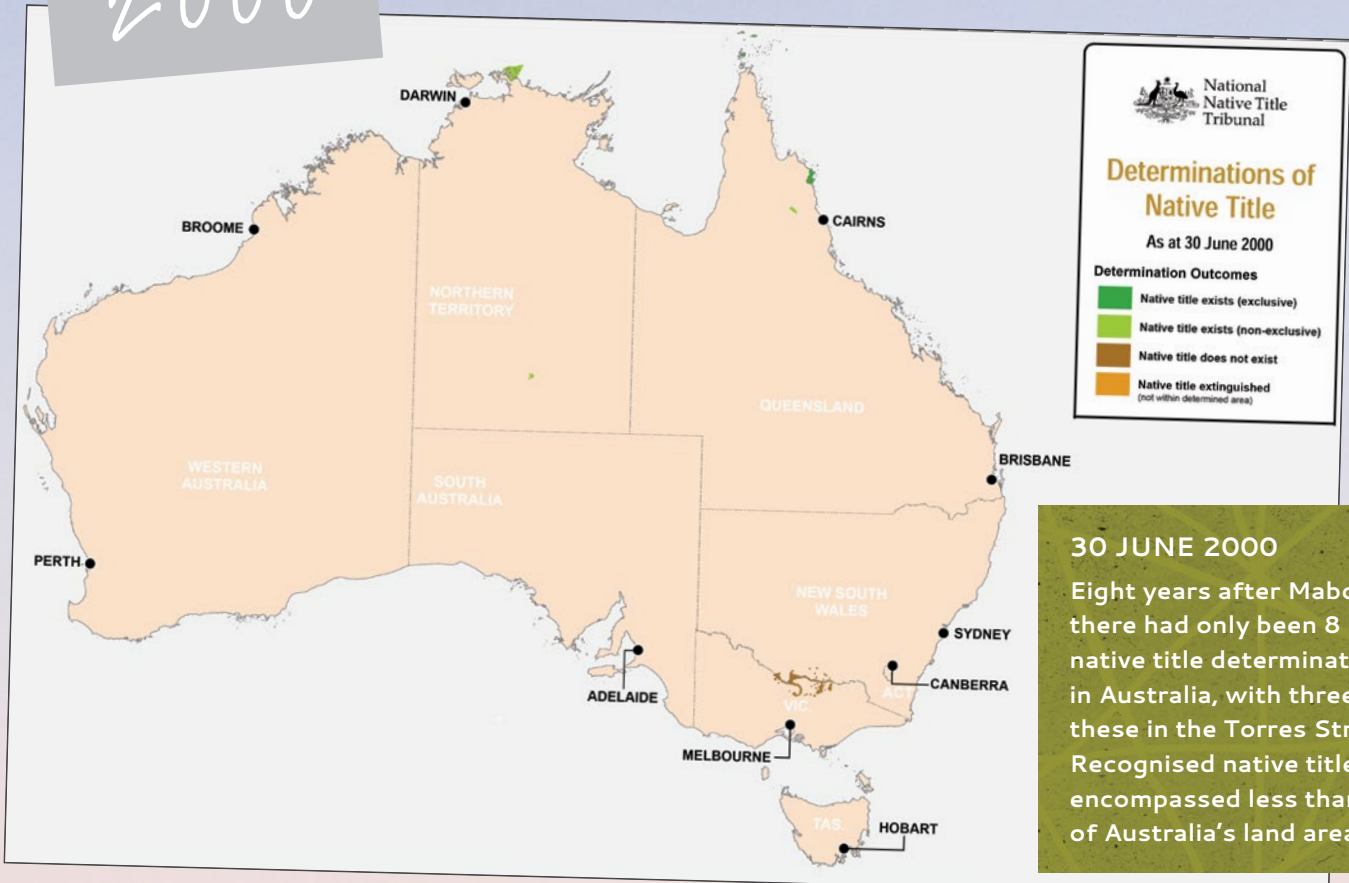
## HOW HAS THE DISTRIBUTION OF NATIVE TITLE LAND CHANGED OVER TIME?

	2000	2005	2010	2015
ACT	-	-	-	-
New South Wales	-	-	0.1	0.1
Northern Territory	7.7	1.3	1.9	10.2
Queensland	92.3	3.5	3.6	18.8
South Australia	-	0.3	7.1	22.2
Tasmania	-	-	-	-
Victoria	-	-	0.2	0.6
Western Australia	-	94.9	85.9	48.0

Each figure is the percentage of all native title land which was located in that state at the time; e.g. in 2010, 85.9% of land under native title in Australia was in WA.



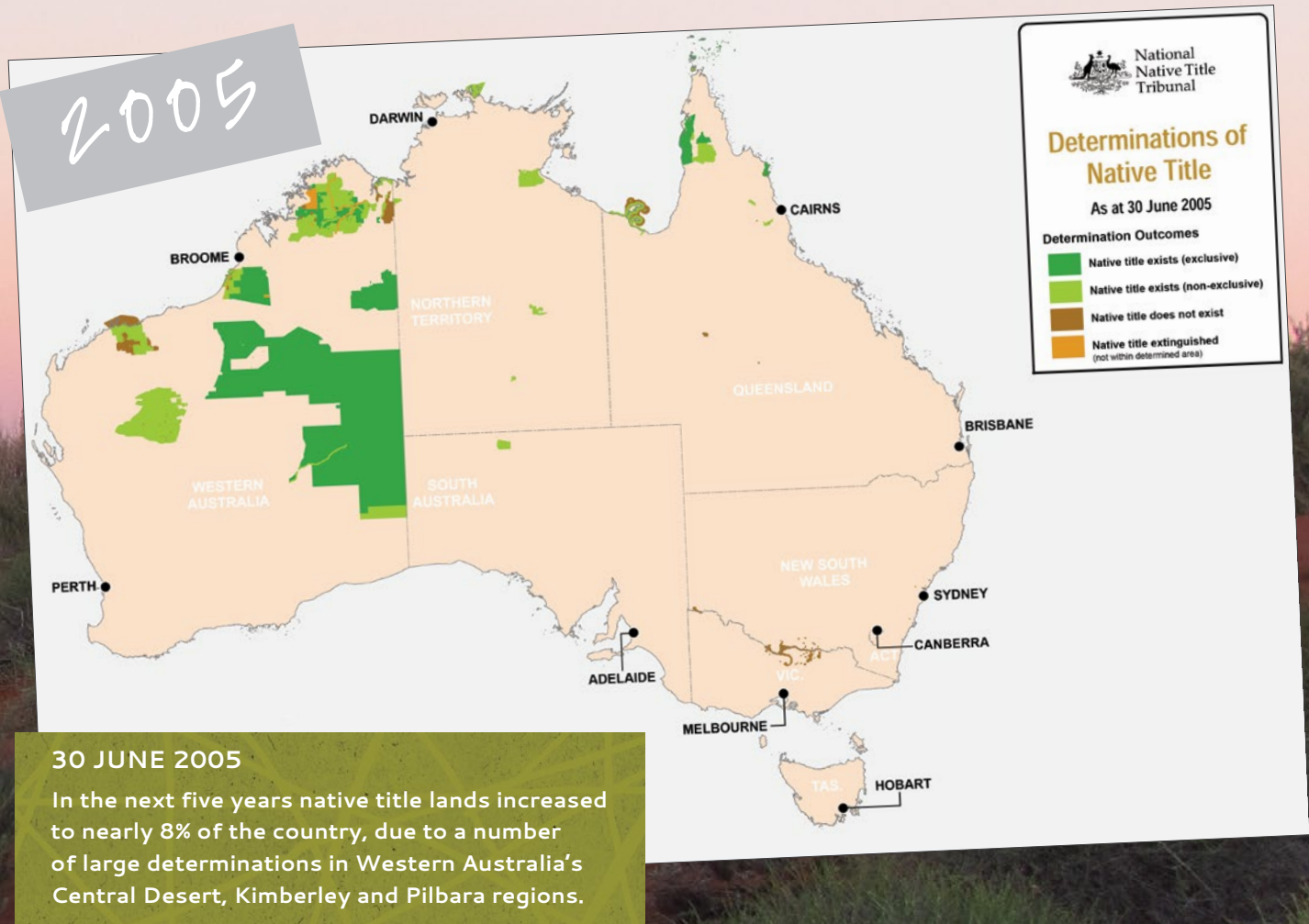
2000



30 JUNE 2000

Eight years after Mabo, there had only been 8 native title determinations in Australia, with three of these in the Torres Strait. Recognised native title encompassed less than 1% of Australia's land area.

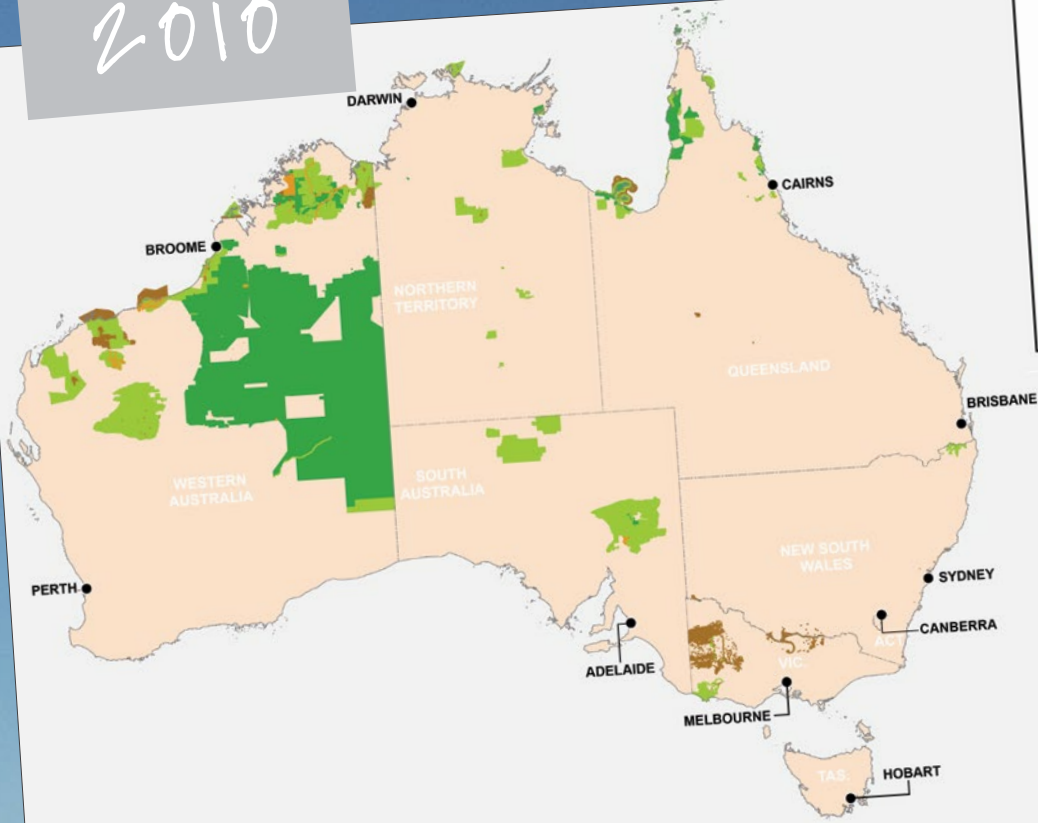
2005



30 JUNE 2005

In the next five years native title lands increased to nearly 8% of the country, due to a number of large determinations in Western Australia's Central Desert, Kimberley and Pilbara regions.

2010



National Native Title Tribunal

### Determinations of Native Title

As at 30 June 2010

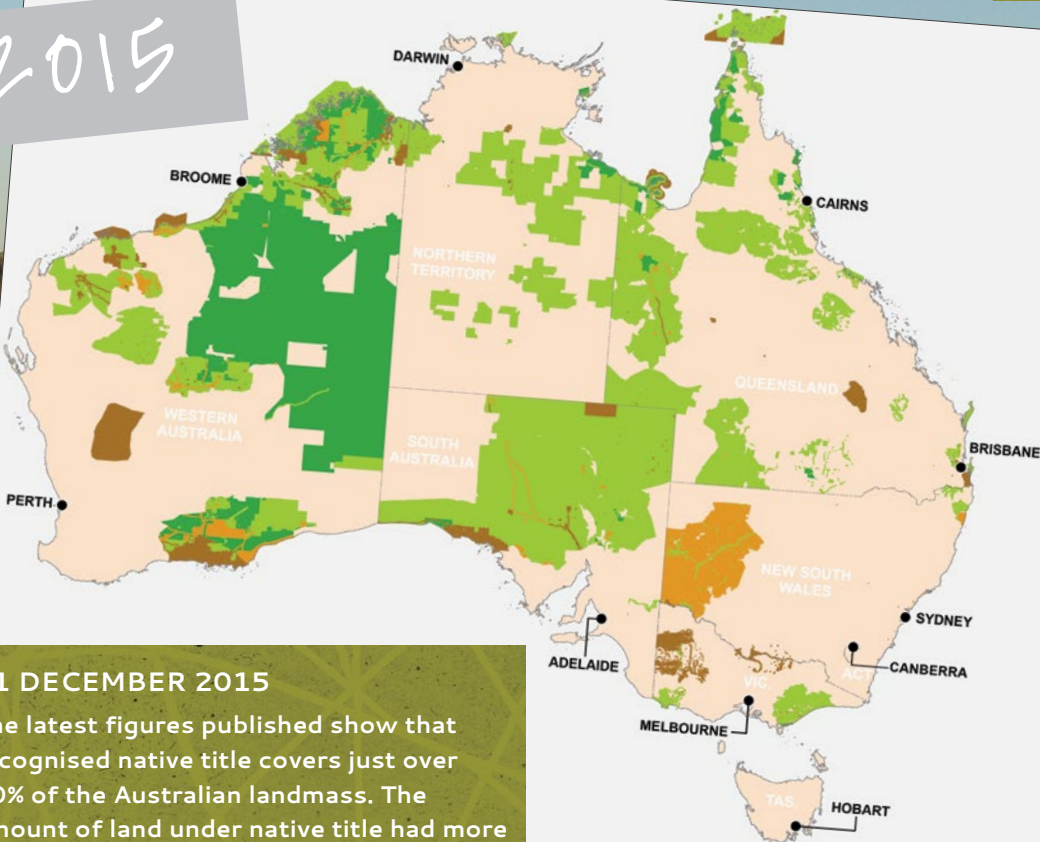
Determination Outcomes

- Native title exists (exclusive)
- Native title exists (non-exclusive)
- Native title does not exist
- Native title extinguished (not within determined area)

**30 JUNE 2010**

By this point native title was recognised across a little over 12% of the country. Large determinations in South Australia and Western Australia made up the bulk of the increase since 2005.

2015



National Native Title Tribunal

### Determinations of Native Title

As at 31 December 2015

Determination Outcomes

- Native title exists (exclusive)
- Native title exists (non-exclusive)
- Native title does not exist
- Native title extinguished

**31 DECEMBER 2015**

The latest figures published show that recognised native title covers just over 30% of the Australian landmass. The amount of land under native title had more than doubled since 2010, mostly due to determinations in the Northern Territory, Queensland and South Australia.

Above: Determinations of Native Title 2010 and 2015 maps, source: National Native Title Tribunal, [www.nntt.gov.au](http://www.nntt.gov.au). Maps have been modified by NTRU for readability.

# Native title across the states and territories

## WA

Almost half of recognised native title land can be found in Western Australia, and over 70% is exclusive possession, by far the largest proportion of any state or territory. By 2015, there had been 47 native title determinations within WA, all of which are claimant determinations, and 35 PBCs established.

## SA

More than half of South Australia's land area is under native title, although 99.9% of it is non-exclusive. By December 2015, there were 26 native title determinations in South Australia, comprising 25 claimant determinations and one compensation determination that was resolved in a settlement. To date, 15 PBCs have been established.

A significant area of the state is also covered by three different land rights regimes.

## QLD

By December 2015, there had been 123 native title determinations within Queensland, comprising 117 claimant determinations and six non-claimant determinations, with 70 PBCs established – the most set up in any state.

## ACT & Tasmania

To date, there have not been any successful native title determinations in the ACT or Tasmania. Both the ACT and Tasmania, do, however, have land co-management plans with Aboriginal representative organisations.

## NT

In the Northern Territory, native title coexists with the land rights regime established by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), under which 50% of the NT has been returned to traditional owners. In December 2015, native title had been recognised in 78 of the 79 consent claimant determinations and 8 of the 9 litigated claimant determinations, with a further 86 claims awaiting finalisation. At that time, 19 PBCs were set up on behalf of the native title holders.

## VIC

All of the determined native title lands in Victoria are non-exclusive with 4 PBCs set up on behalf of the native title holders. In December 2015 there had been seven native title determinations in Victoria, all of which are claimant determinations.

Other Indigenous land has been claimed under the *Traditional Owner Settlement Act 2010* (Vic).

## NSW

Of all the states which have seen successful native title determinations, New South Wales has the smallest area of land covered by native title. In December 2015, native title had been recognised in 8 of the 9 consent determinations to date, not recognised in 2 litigated determinations and a further 18 claims are awaiting determination. By 2015, 6 PBCs had been established. The relatively small area of native title coverage in the State is in part due to the land rights regime in place: The *Aboriginal Land Rights Act 1983* (NSW) (ALRA).

# BRINGING THE *Von Brandenstein* MATERIALS BACK TO AUSTRALIA

DOUG MARMION RESEARCH FELLOW AIATSIS RESEARCH

IN JULY 1964 CARL GEORG VON Brandenstein and his wife Carola headed west from Melbourne, driving their Volkswagen Beetle across to Western Australia and from there up to the Pilbara. This was the beginning of a ten-year period in which Carl Georg collected information on many of the Aboriginal languages of WA. The materials he collected have gradually been located and brought to AIATSIS where they are now available for return to the communities from where they came.<sup>1</sup>

Born in Hannover, Germany in 1909, Carl Georg received a PhD in 1940 for his work on Hittite language and culture. With the outbreak of World War II he wound up in the German military as a corporal, eventually being captured by the British in Basra, Iraq in 1941. He was interned in Australia for several years as a prisoner of war and after his release he chose to stay on rather than return to his native Germany.<sup>2</sup> After some years as an artist and then as a high school teacher Carl Georg happened to visit Arnhem Land in the late 1950s where he became interested in Aboriginal languages, drawing him back to his earlier interest in language and culture. After a few years investigating Aboriginal languages of Central Australia in his spare-time, he applied for and received funding from the then very new Australian Institute of Aboriginal Studies (AIAS, now AIATSIS) to carry out work on the Aboriginal languages of Western Australia. Over the following ten-year period he received ongoing support from AIAS that allowed him to travel the length and breadth of Western Australia (apart from the Kimberley and the deep desert) recording language speakers.

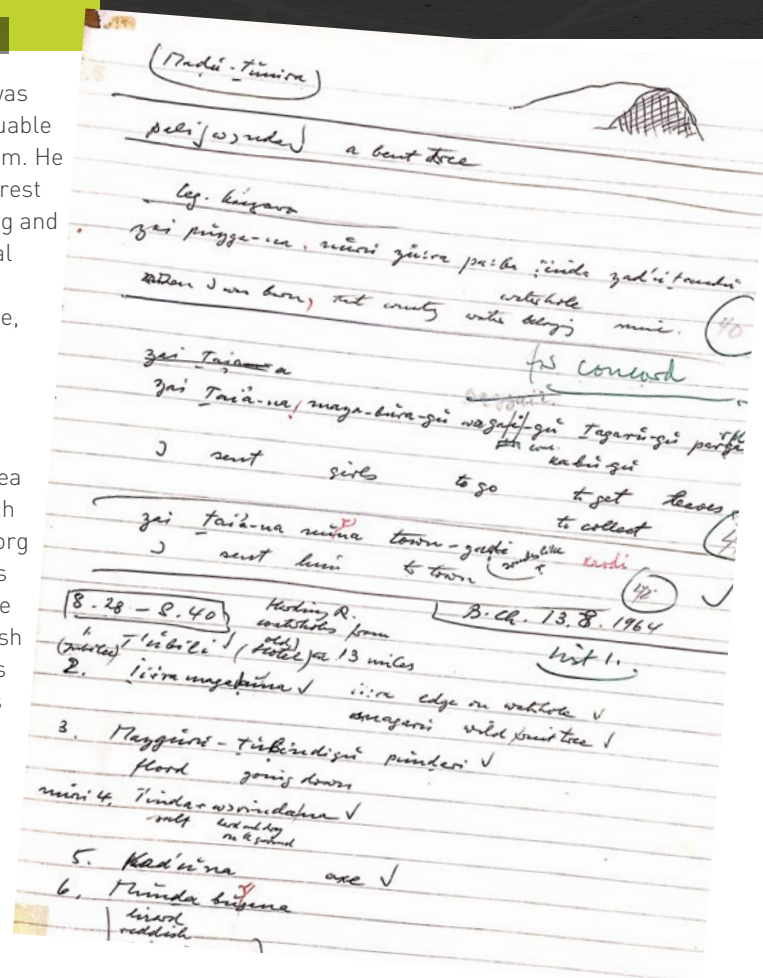
In the 1960s there were still many speakers of most WA languages

and Carl Georg was able to make valuable recordings of them. He had a strong interest in poetry and song and collected material of these types wherever possible, something done by few Australian linguists at the time. The Pilbara region was an area of particularly rich finds for Carl Georg and the materials he collected there lead him to publish a number of texts on the languages of that part of WA, among them Narratives from the North-West of Western Australia<sup>3</sup>, a collection of Ngarluma and Yinjibarndi texts and Taruru<sup>4</sup>, a compilation of songs with appealingly poetic translations.

AIAS funding for this work ceased in 1973 and so Carl Georg's period of travel and intense collection came to an end. However over the next twenty years he continued to work on his collection and produced a series of publications. In the late 1990s Carl Georg fell ill, eventually being hospitalised and passing away in 2005. Although he had deposited part of his collection with AIATSIS it had been noted for some years that there seemed to be many items missing. Various researchers continued to search for the missing documents but without any luck until a German researcher happened to visit the Anthropos Institute (AI) in Sankt Augustin, just outside Cologne, and noticed a pile

of materials labelled 'Dr Von Brandenstein'. Although the motivation was never clear, it turned out that a close friend of Carl Georg, who somewhat mysteriously came to be in possession of a large part of his collection, chose to deposit it with the AI, an ethnographic organisation founded and run by the Divine Word Missionaries at their main seminary in Sankt Augustin. Researchers in Australia were alerted to the presence of this material in Germany. AIATSIS undertook the task of travelling to Sankt Augustin to inventory the collection.

I'm very grateful to the AI staff who kindly gave me 24/7 access to the collection as this allowed me to quickly complete my main task, a full inventory of the collection and then move on to copying it. As the



instructions from the depositor were solely to keep the materials safe, they were not willing to allow it to leave the AI however they were happy for me to digitise it, enabling me to bring copies back to Australia. The collection included Carl Georg's audio recordings on their original tape reels as well as dubbed on to cassettes. I was not able to copy these audio recordings but there was no need as a search of the AIATSIS catalogue Mura showed that they had been deposited. An extremely important part of the collection is the nineteen diaries that record Carl Georg's work over the period 1964–71 and contain a vast amount of language and cultural information. Although photocopies of all but one of these diaries were already held in the AIATSIS Collections they are only in black and white, whereas I was able to scan them in full colour, making the writing much easier to read as well as making it possible to distinguish the original notes from later edits, these being in different colours. Over the days I spent in the AI with Von Brandenstein collection I was able to digitise all of the text items relevant to Australia. Interestingly there were several items in the collection that showed Carl Georg had continued with his early interest in Assyriology, the study of the ancient 'Near East', the main one being a volume of hundreds of pages of handwritten analysis of hieroglyphics and Hittite texts.

All in all, I digitised around 3,000 pages of text, mostly handwritten but also some unpublished typescripts. The great advantage of digital materials is the ease of transport and sharing... within a short time I was able to send copies of the materials to communities and language centres in Western Australia. And of course the digital copies were also deposited in the AIATSIS Collections, the world's premier archive of materials relating to Indigenous Australia, where they will be preserved for perpetuity and available for return to Indigenous communities.



- 1 This article draws heavily on Thieberger, N., 2006. 'Language is like a carpet. Carl Georg von Brandenstein and Australian languages'. In W. M. McGregor (Ed.), *Encountering Aboriginal languages: studies in the history of Australian linguistics* (pp. 321–335). Canberra: Pacific Linguistics.
- 2 This may seem surprising today, but after WWII all POWs of British or European descent were allowed to stay on in Australia if they wished.
- 3 Brandenstein, Carl Georg von, 1970, *Narratives from the North-West of Western Australia in the Ngarluma and Jindjiparndi languages*. (Volumes 1–3 + audio-disc.) Canberra: AIAS.
- 4 Brandenstein, Carl Georg von & Anthony P. Thomas, 1974, *Taruru: Aboriginal song poetry from the Pilbara*. Adelaide: Rigby.

The rich information found in the Carl Georg von Brandenstein materials is often used as supporting evidence in native title claims.

Should you wish to search the von Brandenstein materials held in the AIATSIS collection for use in a native title claim, please contact the Native Title Research and Access Officer, [NTSS@aiatsis.gov.au](mailto:NTSS@aiatsis.gov.au) or 02 6261 4223.

Opposite: A page from Carl Georg von Brandenstein's diary.  
Credit: Dr Doug Marmion

Top: Dr Doug Marmion working with the Carl Georg von Brandenstein materials at the Anthropos Institute in Sankt Augustin. Credit: Dr Doug Marmion

Above: Boxes of von Brandenstein material held at the Anthropos Institute in Sankt Augustin. Credit: Dr Doug Marmion

# Timber Creek

## A FIRST STEP TOWARDS NATIVE TITLE COMPENSATION

REBECCA HUGHES **LAWYER** NORTHERN LAND COUNCIL  
STACEY LITTLE **SENIOR RESEARCH OFFICER** NTRU

**I**N FEBRUARY 2016, A FEDERAL Court hearing commenced in relation to the compensation application made by the Ngaliwurru and Nungali people for the loss of their native title rights and interests over parts of the township of Timber Creek, located in the north-west of the Northern Territory. The case is the first in Australia in which a judge, in this case Justice Mansfield, will deliver a judgment on the principles for determining the quantum of compensation for the extinguishment and impairment of native title rights and interests.

The Ngaliwurru and Nungali people are familiar with litigation, having first lodged a claim for native title over Timber Creek in 1999 (**NTD 6016 of 1999**), in response to notices issued by the Northern Territory Government (NT Government) outlining its intention to compulsorily acquire seven lots of vacant Crown land within the town. The NT Government sought to convert the lots into private land that could be leased or granted as freehold to tourism and agricultural operators. The Ngaliwurru and Nungali people lodged a further claim to land subject to a proposed acquisition in 2000

(**NTD 6008 of 2000**), along with a claim in the same year covering the entire township (**NTD 6012 of 2000**). The filing of those claims secured future act rights under s 24MD of the *Native Title Act 1993* (Cth) (NTA) for the Ngaliwurru and Nungali people allowing them to object to the proposed compulsory acquisitions. These claims were heard together as the Timber Creek Matters.

The objections to the compulsory acquisitions proposed under s 43(1) of the *Lands Acquisition Act 1978* (NT) were lodged in the Lands and Mining Tribunal on behalf of the native title claimants, and were appealed ultimately to the High Court of Australia, which found in favour of the NT Government in the 2008 decision of *Griffiths and Gulwin OBO the Ngaliwurru and Nungali Peoples v Minister for Lands Planning and Environment* [2008] 235 CLR 232; [2008] HCA 20. Despite being successful in the High Court appeal, the NT Government did not pursue the acquisitions.

In parallel, the Ngaliwurru and Nungali peoples received a determination of non-exclusive native title over certain lots in the Timber

Creek township in 2006 (*Griffiths v Northern Territory* [2006] FCA 903). The claimants then appealed to the Full Court of the Federal Court in 2007 (*Griffiths v Northern Territory* [2007] FCAFC 178) and the determination was amended to provide for exclusive native title in land declared to be a town site because of the applicability of section 47B of the NTA, which operates to disregard any extinguishment of native title rights and interests on the vacant crown land that where it is occupied by the native title claimants.

With the determination of native title setting out the areas within the township that were subject to the native title rights of the Ngaliwurru and Nungali people, in 2011, the Ngaliwurru and Nungali lodged a new and separate claim for compensation (**NTD 18 of 2011**) under s 61 of the NTA, pursuant to s 50(2) of the Act. Compensation is claimed in the areas in which native title rights and interests were impaired and over areas where they were extinguished. The claim for compensation includes a variety of tenures, including freehold, special purpose and crown leases.



The liability of governments to pay compensation for extinguishing native title arises for acts done after 1975 when the *Racial Discrimination Act 1975* (Cth) was enacted. Under section 10 of that Act, persons of a particular race must enjoy the same rights to the same extent as other people. As a result, governments are liable to pay compensation for acts that impair or extinguish the native title rights of Aboriginal and Torres Strait Islander people.

The significance of this litigation as a test case lies in the Court's decision around how to quantify the loss of native title rights and interests in monetary terms. The question has not yet been considered by the courts, after the compensation application made on behalf of the traditional owners of the Gibson Desert Nature Reserve (WAD 86 of 2012) was discontinued last year before submissions were made on the principles around calculating quantum. The Attorney-Generals of South Australia and Queensland are interveners to the Timber Creek proceedings, having recognised that their jurisdictions have an interest in how the case is decided. The principles established

in this case will potentially impact all Australian jurisdictions, and may see an increase in the number of compensation applications filed on behalf of traditional owners.<sup>1</sup>

The case is also significant to the Ngaliwurru and Nungali people. Chris Griffiths, son of the compensation applicant Alan Griffiths, said at the commencement of the compensation hearing that '[t]he compensation will never replace our land ... Once you build a house, it's there forever but the country is still here, the spirit is still here, our heart is still here. But it's not going to be the way it should've been. But the compensation is going to help us in getting back what they damaged.'<sup>2</sup>

The compensation application was heard in two sections: the first, in 2014, dealt with questions of liability and identified the extinguishing acts for which compensation is payable; the second commenced in February 2016 and dealt with questions of quantum — that is, how much compensation is payable.

The 2016 hearing began in Timber Creek, where the Court was able to view the town and hear directly from Ngaliwurru and Nungali witnesses about the impact of the acts that extinguished or impaired their native title rights and interests, and their relationship with country. The Court then moved to Darwin, where evidence was heard from expert valuers, economists and anthropologists. The hearing continues, with closing arguments expected to be heard in Darwin at the end of April.

- 1 Compensation has been identified as a key area of work within the native title space in the coming years: *Deloitte Access Economics, Review of the Roles and Functions of Native Title Organisations* (March 2014), p 59.
- 2 Avani Dias, 'Historic loss of native title compensation case gets underway in tiny Northern Territory town', *ABC News* (online), 8 February 2016

Opposite: overlooking the Timber Creek township

Above: Traditional owners during the trial held at Timber Creek in February.

Credits: Northern Land Council

The Native Title Research Unit (NTRU) was established through collaboration between the Aboriginal and Torres Strait Islander Commission and AIATSIS in 1993 in response to the High Court decision in *Mabo v Queensland [No 2]*, which recognises Indigenous peoples' rights to land under the legal concept of native title. The NTRU's activities are currently supported through a funding agreement with the the Department of the Prime Minister and Cabinet.

The NTRU provides high quality independent research and policy advice in order to promote the recognition and protection of the native title of Aboriginal and Torres Strait Islander peoples. We facilitate access to the Institute's records, materials and collections and publish the results of our research both as a source of public information and in academic publications.

Located within the wider AIATSIS research program, the NTRU aims to provide ongoing monitoring of outcomes and developments in native title; independent assessment of the impact of policy and legal developments; longitudinal and case study research designed to feed into policy development; ethical, community based and responsible research practice; theoretical background for policy development; recommendations for policy development; and policy advocacy designed to influence thinking and practice.

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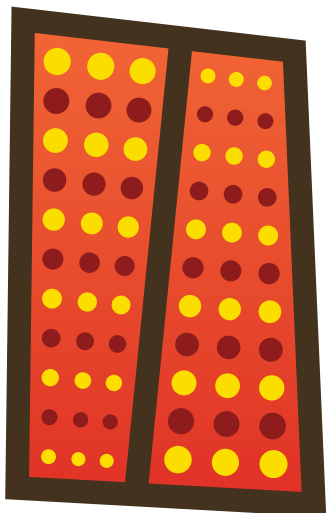
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