Native Title Newsletter

August 2015

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 (April, August and December). The Newsletter includes feature articles, traditional owner comments, articles explaining native title reforms and significant developments, book reviews and NTRU project reports. The Newsletter is distributed to subscribers via email or mail and is also available at www.aiatsis.gov.au/ntru/newsletter.html. We welcome your feedback and contributions. For more information, please contact: alexandra.andriolo@aiatsis.gov.au or ntru@aiatsis.gov.au.

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

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Cover: Kuku Yalanji Dancers, National Native Title Conference
Photo credit: Bryce Gray, AIATSIS

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The views and opinions expressed in these articles do not constitute legal advice.

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AIATSIS

LEADERSHIP LEGACY and Opportunity 2015

NATIONAL NATIVE TITLE CONFERENCE Port Douglas, Qld | 16-18 June

SHIANE LOVELL Conference Manager AIATSIS

The 15th National Native Title Conference was co-convened by AIATSIS and the Cape York Land Council (CYLC) in Port Douglas, QLD from 16 – 18 June 2015.

The gathering attracted over 830 delegates and stakeholders - over half of which were Aboriginal and Torres Strait Islander peoples. The National Native Title Conference is the largest Indigenous Policy conference in Australia. For many delegates the National Native Title Conference each year is the leading annual professional development event for staff of native title representative bodies/ service providers and relevant government agencies, as well as independent native title practitioners and academics.

The Conference program included keynotes and plenary speeches, dialogue forums, technical workshops, topical workshops and Indigenous talking circles.

Under the theme of *Leadership, Legacy and Opportunity,* NNTC 2015 featured some 190 presenters across diverse topics as; access to cultural materials, agreements, building relationships, carbon farming, caring for country, climate change, community development, comprehensive agreements, constitution, cultural materials and values, demographics, economic development, governance, Indigenous Protected Areas, heritage, land management, land and sea, land and tenure, law and policy, leadership, nation building, native title law and recognition, opportunities, PBCs, policy development, regional agreements and claims, repatriation, research, resource extraction and empowerment, resource mining , social impact, traditional ownership and youth engagement.

Above: Kuku Yalanji Dancers
Photo credit: Bryce Gray

The Conference featured four keynote addresses and presentations. Mary-Anne Port and Jim Turnour, Chairperson and Chief Executive Office of Jabalbina Yalanji Aboriginal Corporation gave the keynote address for the NTRB and PBC Program. Their keynote 'Jabalbina Yalanji Aboriginal Corporation: our experiences of native title' explored Indigenous Land Use Agreements implementation, and the challenges traditional owners face, the progress that has been made in country based planning, ranger programs, governance and the limitations it imposes.

Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda presented this year's Mabo Lecture. 'A new conversation regarding Indigenous land and economic development' outlined some of the feedback that was received from the recent roundtable meeting, convened by the Commission with Indigenous leaders of leaders on economic development and economic rights.

Federal Minister of Indigenous Affairs, the Hon. Nigel Scullion addressed delegates about new funding for PBCs 'native title support to boost development'. Minister Scullion also used the Conference to announce $20 million in additional funding to better support native title

Below: Kuku Yalanji Cultural Habitat Tour
Photo credit: Andrew Turner

holders to effectively engage with potential investors.

Noel Pearson, the Founder and Director of Strategy of Cape York Partnerships presented Public Program Day 2 keynote address 'in pursuit of a regional, reciprocal responsibility, settlement for Cape York: what is the right package of reforms for Indigenous social, political, economic and cultural development?' Mr Pearson outlined how Indigenous people want to take charge of their own affairs and develop their own agendas.

A *Dangerous Ideas* Panel saw five prominent identities pitching a challenging, controversial ground breaking concept to conference delegates. They included Australian Human Rights Commissioner, Tim Wilson; Regional Development Corporation Managing Director, Bruce Martin; Kimberley Region Economic Development CEO, Wayne Bergmann; Indigenous Advisory Committee Member, Ricky Archer; and AIATSIS Director of Research Strategy, Dr Lisa Strelein.

The conference hosted three Indigenous Talking Circles; Women's, Men's and the Trials and Terrors of the Indigenous Advancement Scheme. These sessions were for Indigenous delegates only, and provided a space to discuss important issues in a closed session.

Presentations are available to view on the AIATSIS website: www.aiatsis.gov.au

(From top left to bottom):
Mabo Movie
Photo credit: Marni Pilgrim

PBC Meeting
Photo credit: Andrew Turner

Youth Forum
Photo credit: Andrew Turner

Mary-Anne Port, Jim Turnour
Photo credit: Andrew Turner

Support from sponsors this year enabled over 80 Indigenous people to attend the conference as speakers, facilitators or delegates.

With significant assistance and planning from the Cape York Land Council, this year's NNTC featured a stunning welcome reception with over 40 dancers and performers representing the four corners of the Cape; including the Kuku Yalanji, Wik, Lockhart and Torres Strait Islander dancers.

Each year, the Conference also includes an exciting cultural program that offers an opportunity for delegates to engage with local traditional owners, experience local cultural activities and learn more about economic or business initiatives on traditional country.

In 2015, over 150 delegates attended two very significant offsite cultural events. One group went to the Mossman Gorge Voyages Centre - an Indigenous eco- tourism development within the southern part of the World Heritage Listed, Daintree National Park Mossman Gorge. Delegates met with traditional owners, before heading off on a personal tour through the rainforest.

Other delegates also visited Cooya Beach for a Kuku Yalanji Cultural Habitat Tour. The unique tour is run by Linc and Brandon Walker who educate visitors about their Kuku Yalanji culture through a guided tour of Cooya Beach (Kuyu Kuyu) - which is a special place and traditional fishing ground of the Kuku Yalanji.

Delegates and guests were invited to attend the special screening of 'Mabo' the movie on the evening prior to the NTRB and PBC Program. The 'Mabo' movie was introduced by Gail Mabo, the daughter of the late Eddie 'Koiki' Mabo and Rachel Perkins, the Director of the 'Mabo' movie who shared their stories about making this very significant movie.

Based on recommendations from PBCs at previous conferences, this year's conference hosted the National PBC Meeting for the third consecutive year. The meeting provided a space for PBC Chairs, Members and Staff to discuss PBC business in a closed session. Representatives shared information and knowledge from their experiences around the country. The meeting attracted over 90 people, representing 51 PBCs from NSW, QLD, SA, TSI, VIC and WA, and three Traditional Owner Group Organisations. Delegates had the opportunity to hear briefly from the Department of the Prime Minister and Cabinet.

Building on the working groups that had been established since 2009, the meeting formally established an inaugural PBC National Council and elected Co-Chairs.

This year the conference hosted a Youth Forum. The forum attracted around 30 Indigenous and non-Indigenous youth delegates, aged between 18 – 35 to engage in discussions with other young people about the native title sector, leadership and how to contribute towards the future wellbeing of communities.

As well as participating in the wider conference session, youth delegates spent a day at the Mossman Gorge Voyages Centre speaking with traditional owners and custodians.

The Youth Forum was supported by the Indigenous Land Corporation and included presentations from young Indigenous leaders within the native title, education and leadership sectors.

Conference feedback from delegates, speakers and sponsors rated this year's Conference as one of the best ever native title conferences.

Importantly, for many, this year's conference had a high representation of Indigenous people throughout the conference, including the program and cultural program.

In his closing address, AIATSIS Principal Russ Taylor AM acknowledged the dedication and hard work from the Cape York Land Council and the Kuku Yalanji people for making this year's conference another inspiring conference.

"Your staff and your advice has been critical for us to organise this year's Conference."

Mr Taylor also acknowledged the contributions of the North Queensland Land Council and Carpentaria Land Council and the generous support and commitment from the Conference Sponsors in 2015.

"The growing numbers of delegates each year are a sign of the strength of this conference and how it has become an essential part of the native title sector," he concluded.

Above left: Mick Gooda
Photo credit: Andrew Turner

Above middle: The Hon. Nigel Scullion
Photo credit: Andrew Turner

Above right: Noel Pearson
Photo credit: John Paul Janke

Below: Dangerous Ideas keynote
Photo credit: Bryce Gray

AN INTERVIEW WITH GAIL REYNOLDS-ADAMSON AND ANNIE DABB

Esperance Tjaltjraak Native Title Aboriginal Corporation

ALEXANDRA ANDRIOLO, NATIVE TITLE ACCESS AND INFORMATION OFFICER, NTRU

GAIL REYNOLDS-ADAMSON AND Annie Dabb are Esperance Nyungar native title holders from the south east coast of Western Australia. They are the Co-chairpersons of the Esperance Tjaltjraak Native Title Aboriginal Corporation; the PBC set up to manage their native title rights and interests.

Their journey to achieve their native title rights and interests was a long and drawn out process. Their native title claim was first filed in 1996 and took 18 years to achieve a consent determination. The Esperance Nyungar People were awarded native title in March 2014 over approximately 28,900 square kilometres. Sadly, a lot of the elders who had begun the native title process had passed away by the time their native title was recognised. Annie Dabb said "It was a long process...and the saddest thing is they [the elders who began the process] never got to be with us on the day of getting native title, of the handing over of our country".

For the Esperance Nyungar People, getting their native title was not about money, it was about their land, their culture and their heritage. Gail Reynolds-Adamson said "it is about getting our land and protecting our land. It is taking our children out [on country] and continuing our culture into future generations and you can't do that if you don't have your land".

> *It is about getting our land and protecting our land. It is taking our children out [on country] and continuing our culture into future generations and you can't do that if you don't have your land.*
>
> Gail Reynolds-Adamson

The Esperance Tjaltjraak Native Title Aboriginal Corporation is planning to implement a number of community and economic development programs to help the wellbeing of the community and to provide employment opportunities. The aim is also to empower the young people in the community to be leaders and to provide positive employment and business pathways for the community. The entities that they are planning to set up are wholly owned by the PBC but will still support individuals wanting to become entrepreneurs and run their own businesses.

Above: Gail Reynolds-Adamson and Annie Dabb at the Native Title Conference 2015.

Photo credit: John Paul Janke

Esperance is an absolutely beautiful area of Western Australia with some of the best beaches in the world. The PBC has identified that Esperance does not have any 5 star resorts and believes that such a development may be an opportunity for the native title holders and they plan to look at the possibilities of engaging with an investor to develop on the land. Such an investment will enable local Aboriginal people to be trained in a range of areas to run a resort, such as customer service, domestic services, hospitality and much more.

The PBC Board is concerned that there isn't a lot in Esperance for kids to be inspired to stay and work. As a result they leave to go to other places to work, or those that stay and don't have a job to go into often get caught up in the cycle of drugs and alcohol and often at a young age start making their own families. So by having these businesses up and running, the PBC Board hopes that there will be opportunities for employment for the young.

As well as getting the young people involved in the process, the biggest challenge for the Esperance Tjaltjraak PBC is funding. They want to move forward with their business ideas, but they don't have the money to do it. As Annie Dabb stated "We have all these great ideas about what we want to do, but we just can't take that next step". They want to become economically independent from Government, but that is where their struggle lies, how to approach or access other sources of funding. This is a challenge that many PBCs face.

As part of the native title settlement, the State Government and the Esperance Nyungar People also negotiated an Indigenous Land Use Agreement (ENILUA) as a component of the consent determination package. The ENILUA provides a financial benefits package to assist the native title holders in setting up the PBC, and land holdings for economic, cultural, residential and/or social purposes. The other concern, however, is being able to pay for the taxes and rates on the land that they are entitled to under the ENILUA, especially given they have no income at present to support them. As Gail Reynolds-Adamson revealed:

> *...as far as the land is concerned, the biggest challenge we have is being able to look at it to see what the viability of keeping that land and developing it for either cultural reasons or commercial reasons. If we view that land and we find that it is not going to be a viable piece of land, we are obviously not going to take it on. Because when we take on any land that's been given to us by the State, we have to pay rates and taxes and all of those things, but we don't have any income stream to pay for it. So for us the sad part about it is, that we don't want to say no to the land that has been given to us, but if we say yes to all of it, the day we do that, we may go into liquidation, because we have no way, at this particular to pay for it.*

The Esperance Nyungar People therefore hope that the return of land does not become a double-edged sword – they get the land back, but they might not be able to support it and so they are worried it will be taken off them again.

Gail Reynolds-Adamson and Annie Dabb co-presented a paper at the AIATSIS Native Title Conference in Port Douglas in June 2015. They presented on the Esperance Nyungar ILUA. It was their first time at the conference and it opened their eyes to the experiences of other native title groups. When asked to comment on their experience at the conference they said:

> *I see a lot of things that other people have done that I think 'ooh, that's good, we can take that back home and try that.' Or 'we can go through that avenue to try and get some money'. They have good ideas here and I have really enjoyed it. For me, being over in such an area as we are, sort of isolated, I come here and say that we thought we were all alone with this one problem, and yet we find here that there are a lot of people that have the same problem that we are going through.*

Annie Dabb, Native Title Conference Interview 2015

> *The AIATSIS conference for us has also been an eye opener for the challenges that other Aboriginal groups faced which are very similar to our challenges. And in saying that, if we had the ability to be sent to these conferences during our negotiation phase and the committee that was chosen was chosen to come here and listen to these talks, I think our negotiations would have taken a completely different path to what it is/ had been in the past.*

Gail Reynolds-Adamson,
Native Title Conference Interview 2015

Far left: Lucky Bay, Cape Legrand National Park.

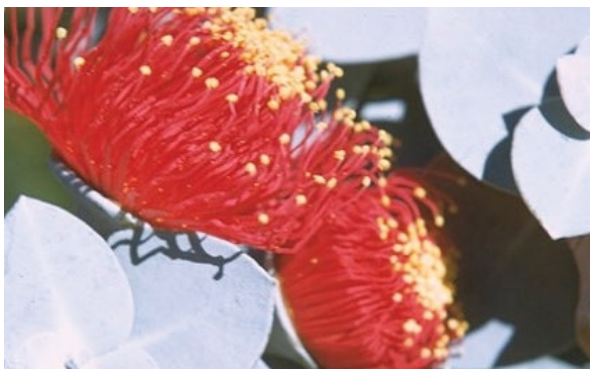
Photo credit: Dan Paris.

Below: Gentle Creek, Merivale.

Photo credit: Dan Paris.

Bottom: The Tjaltjraak tree – pronounced Dulurak; and is the aboriginal name of the bluegum tree native to the area and means 'glow in the dark'.

Photo credit: Dan Paris.



NATIVE TITLE RIGHTS AND INTERESTS IN INDIGENOUS PROTECTED AREA MANAGEMENT:

THE MARTU AND NYANGUMARTA EXPERIENCE

DR TRAN TRAN, Research Fellow, NTRU and
ALEXANDRA ANDRIOLO, Native Title Access and Information Officer, NTRU

Indigenous Protected Area's

An Indigenous Protected Area (IPA) is an agreement with Traditional Owners and the State Government regarding an area of indigenous-owned land or sea, which promotes biodiversity and cultural research conservation. IPAs are declared under the International Union for the Conservation of Nature and Natural Resources (IUCN) categories. They constitute 40 per cent of Australia's National Reserve System and there are currently 69 declared IPAs throughout Australia.

On 3 July 2015, the Wiluna traditional owners – the Martu – declared an Indigenous Protected Area over 5968 square kilometre of exclusive possession native title land in Matuwa and Kurrara Kurrara, two former pastoral properties, located 164 km northwest of Wiluna. The IPA will be managed based on Martu 'country types' in recognition of the different natural and cultural management needs of the area. The IPA management plan was developed in collaboration with the Wiluna native title holders, AIATSIS and Central Desert Native Title Services.

A lot of our mob have worked hard to get here and it's been a really long journey... We don't want to be consulted anymore we want to be able to sit down with our partners and say "this is what we want and this is what is important to us". Country is important to us, country is important to our families, our communities and our society as a whole. We want to take our cultural values and be able to say this is our agenda and this is the way we are going to go...

Darren Farmer, Martu traditional owner

Today we have more input where [partners] have to sit down and listen to us. Now that we have our native title and IPA we have more leverage and power to make decisions.

Victor Ashwin, Chairperson, Tarlka Matuwa Piarku RNTBC

Far left: Matuwa and Kurrara Kurrara Management team including, Frankie, Zareth, Ben, Milton, Clifton, Chris, Kaye Grant, Roxanne and Chrisa.

Above left to right: Muuki Tayor, Lena Long, Paul Morgan, Rita Cutter, Frankie Wongawol and Roxanne Anderson with the signed declaration following the ceremony.

Inset above: Signage for the dedication ceremony designed by Roxanne Anderson

Below: Sunset over Matuwa

Photo credits: Shiane Lovell

The Martu Experience

The Nyangumarta Experience

This page: Nyangumarta country.

Inset top: the unveiled Nyangumarta IPA sign.

Inset bottom: Nyangumarta people at a research meeting following the IPA declaration ceremony. Back row (standing): Lisa Toby; Lynette (nee Hunter); Nathan Hunter; Lindsay Hunter. Middle row (seated): Janet Stewart; Martina Badal; Susie Gilbert. Front: Nick Smith; Teddy Hunter; Diane Stewart; Jane Wright; Winnie Coppin; Nyaparu (Margaret) Rose; Lorna Glen Homestead.

Top right: Eighty Mile Beach

Below right: signing of the IPA.

Photo credits: Alexandra Andriolo.

On 15 July 2015, the Nyangumarta people have declared an Indigenous Protected Area over more than 28,420 square kilometres of land in the Pilbara which will be managed by the Nyangumarta Rangers. After what they describe as a 'long walk' in achieving their native title, the community welcomed the agreement and are excited to work on the conservation of their land.

> *Today is a day for celebration. Our aim was to get people on country and to care for our own country through the Nyangumarta Rangers. It was a long journey, or as we say in the Nyangumarta language "kaja karti marnti", from where we began to where we are today. The IPA was a joint effort. We had to work with others to achieve this. We hold the cultural knowledge but have to work with others who have other types of knowledge 'the paper' to achieve it. Our relationships with others have been so successful. This is what made the IPA happen. The Nyangumarta people couldn't have done this on our own*

Nyaparu Rose, CEO of Nyangumarta Warrarn Aboriginal Corporation

> *The Nyangumarta people won their battle to get native title in 2009, which was obviously important for recognition. But having resources to employ their own people, to actually work on their own country, to improve their country, to ensure that future generations will have quality access to their country, really is a fundamental step in the right direction for self-determination. Country is such a fundamental part of their culture so by being able to nurture their country and participate in it, it keeps their culture alive.*

Simon Hawkins, CEO of Yamatji Marlpa Aboriginal Corporation

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- name and geographical boundaries of your claim/research
- any personal names for whom you would like information
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Above right: A collection of rare books in the AIATSIS library.

Below: Carefully handling photo slides.

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We can provide you with a list of organisations that can be helpful in preparing your claim/research, such as:

- Native Title Representative Bodies (NTRBs)
- National Native Title Tribunal (NNTT).

Staff members at AIATSIS have expertise in many areas, and although we cannot provide advice on specific claims, you may wish to speak to someone about an area of interest. We will be happy to help you establish contact with a relevant staff member.

CONTACT INFORMATION

To contact the Native Title Research & Access Service:
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CLOSING 'COMMUNITIES' UNDERMINES THE HUMANITY OF ABORIGINAL LIVES

SANDY TOUSSAINT, Associate Director, BERNDT MUSEUM, UNIVERSITY OF WESTERN AUSTRALIA

Article first published in the Conversation, 28 April 2015
(https://theconversation.com/closing-communities-undermines-the-humanity-of-aboriginal-lives-40226)

"I WISH I WAS HOME, NEAR THE RIVER, sitting under a tree, sewing ...". Wistfully talking with me during a visit to Perth, this snatch of dialogue eloquently, poignantly and clearly constituted what home meant to Nyappurru, a senior Gooniyandi woman and Traditional Owner.

Nyappurru had been taken 4,000 kilometres south via road and flight transport from her Kimberley home in Western Australia to a Perth Hospital for medical treatment not otherwise available to her.

Now deceased and greatly missed by loved ones, the sentiment, emphasis and longing evident in the seeming simplicity of her words are not uncommon among countless Indigenous Australians whose homes lie in locations vastly distant in time, knowledge and sociality from government centres and regional infrastructure services in Canberra and Perth.

The disjuncture between the two – regional homelands and government centres – is obvious, and much has already been written about the evident and inequitable social and economic problems that are likely to ensue if state premiers and federal government ministers continue with a misguided ideological and short-sighted economic approach to close "up to 150 communities ..." in Western Australia.

Introduced decades ago through government agencies to describe Indigenous living areas, the co-opting of the word "communities" seems harmless enough, especially when applied in an everyday, shorthand and policy sense. But it also tends to mask the fact that communities are places that generations of Aboriginal women, men and children call home.

If the wording driving the closures is changed, for instance, and the gloss of "communities" is replaced by words such as "people's homes" or "homelands", bringing with it recognition that these house family groups numbering between three families in smaller locations to approximately 20 interconnected families in larger locations, the statement would be that the closure threatens (at least) 2,000 homes.

Expanding an estimated figure further, the numbers could increase to reveal that more than several thousand Aboriginal men, women and children are currently threatened with homeland eviction and relocation.

Above right: Artist Mabel Juli holding a banner that reads 'I love my Country'. Photo credit: Sandy Toussaint at the Warmun Community.

Below right: Kathy Ramsey and others at the East Kimberley's Warmun Community's protest. Photo credit: Felix Kantilla, Warmun Art Centre.

With limited information available from government sources, it is hard to indicatively calculate, or to predict, a reliable figure or the impact on existing resources.

Misunderstandings

Behind the numbers, of course, is the depth and breadth of persons and the qualities of everyday and future life directly influenced by the possibility of closure and re-location. Misunderstandings about what constitutes a community arise again here.

While it is the case that Aboriginal people often identify their place of living as a particular community (for instance, when completing a government form or for hospital medical records, signing off on an art certificate, or giving directions to someone about where they currently reside), this activity is vastly different in the meanings attributed to home.

I return to Nyappurru's words here: it is not a community to which she refers (a constructed place) but to cherished associations with her home (sewing under a tree, sitting quietly near a familiar river).

In Nyappurru's case, the river she mentioned was a section of the Kimberley's Fitzroy River, a place made especially valuable to her through family and emotional ties, as well as the rights and responsibilities maintained by her and other Gooniyandi people via the requirements of Customary Law.

Again, these emphases are neither rare nor unusual in many contemporary Australian settings. Nyappurru, as with other Aboriginal people in the Kimberley and elsewhere, call a place home because that is what it is: it is not imagined, constructed, or representative of an aspirational lifestyle, but an interconnected lived and loved family place with past, present and continuing cultural, historical, social and emotional ties that guide everyday life.

Such interconnections are reproduced over time, often in conjunction with lived-in homes remaining a significant aspect of a cultural and interrelated complex of contemporary traditions and Customary Law.

A recent article in Western Australia's only state-wide newspaper adds another revealing dimension. Quoting young AFL recruit Zephaniah Skinner, a member of the Kimberley's Yungngora group, who live at the Noonkanbah Station, several hundred kilometres east of Broome, about why he had decided to leave the AFL, the living reality and qualities of home become evident:

> *"When you're over there [Brisbane, as a player training for the Western Bulldogs] it's like another place and you just want to come back home. I don't know what about this place [Noonkanbah] just keeps bringing me back here. I'm still trying to figure it out myself. I just had to come home."*

From Zephaniah Skinner's vantage point, being home is given priority over the attractions of a continuing AFL career.

The conflation of words used to describe hundreds of family homes within the nomenclature of "community" and, worse still, communities writ large, undermines not only the humanity of Aboriginal lives and what people hold dear, but also the potential of honouring, recognising and making the most of a place Aboriginal people have the culturally legal and ethical right, and the responsibility, to call home.

'Remote' is a relative term

Further descriptive conflations and linguistic traps abound, such as the uncritical use of "remote" to describe people's homelands. From the perspective of Nyappurru and Zephaniah Skinner, for instance, it is very clear that time spent in urban Perth or Brisbane away from Kimberley settings generated feelings of remoteness.

Such a potent contrast undermines a person's vantage point of what is, and what is not, regarded as geographically and culturally "remote".

It is hoped that media commentary, public debate, and government emphases, might gradually or eventually shift from unquestioning use of the all-encompassing "Indigenous communities" (and "remoteness", depending on the context) to more accurate depictions that reveal the lived realities of people's lives.

A further hope is that the potentiality and vitality of humanitarian and more nuanced understandings might guide the intellectual and practical development of policies and their successful application.

The sort of hopefulness could be likened to the conceptual qualities inspired by the political philosopher Antonio Gramsci. In Gramsci's words, in order to bring about significant change one needs to maintain pessimism of intellect and an optimism of will.

Such a cogent aspiration remains important in contemporary Aboriginal and Torres Strait Islander Australia, as much as it does in Australia's cultural, intellectual, economic and political life more broadly.

CONNECTION TO COUNTRY:
REVIEW OF THE *NATIVE TITLE ACT* 1993 (CTH)

LEE GODDEN, Australian Law Reform Commission

ALRC Inquiry and Report

On 3 August 2013, the Australian Law Reform Commission (ALRC) was asked to inquire into the *Native Title Act* 1993 (Cth) and to report on:

- connection requirements relating to the recognition and scope of native title rights and interests and
- any barriers imposed by the Act's authorisation and joinder provisions to claimants', potential claimants' and respondents' access to justice.

The ALRC conducted a comprehensive examination of native title laws, assisted by over 160 consultations and 72 submissions. The Report was tabled in Federal Parliament in Reconciliation Week, on 4 June 2015. The Inquiry is the first major review of 'connection' in native title claims.

Connection requirements

The ALRC examined the central legal tests for 'connection' found in the *Native Title Act*; how the courts have interpreted these requirements; as well as how evidence of connection is gathered—e.g. in connection reports. The requirements for Aboriginal and Torres Strait Islander peoples to establish native title are complex and technical. This is due partly to the length of time in which claimants must demonstrate that they have continued to acknowledge and observe traditional laws and customs—often a particular injustice in light of the dislocation of people from their lands and bans on the exercise of cultural practices.

Amending the definition of native title

The ALRC recommends that the definition of native title should be clarified to refocus upon the core elements in the statutory definition of native title that reflect *Mabo [No 2]*, by amending section 223 of the *Native Title Act* to provide that:

- traditional laws and customs may adapt, evolve or otherwise develop
- acknowledgment of traditional laws and customs need not have continued substantially uninterrupted since sovereignty—
  - nor is acknowledgement of traditional law and customs required by each generation
- it is not necessary that a society, united by acknowledgment of traditional laws and customs, has continued since sovereignty and
- native title rights and interests may be acquired by succession.

The proposed amendments aim to streamline proof requirements, while providing flexibility of interpretation around 'adaptation', 'society' and 'substantially uninterrupted acknowledgment of laws and customs'. Statutory amendment accords with a 'fair, large and liberal' interpretation—appropriate to beneficial legislation. The recommendations accept the need for a link between the laws and customs that existed in the period prior to sovereignty and their modern counterpart, but acknowledge that, in practice, Aboriginal and Torres Strait Islander peoples and their relationships with land and waters can and do adapt to changing circumstances—the influence of European settlement makes it inevitable.

A presumption of continuity

Rather than recommending that there should be a presumption of continuity in relation to the proof of connection to establish native title, the ALRC concluded a more effective approach is to amend the definition, to provide that—the Court may draw inferences from contemporary evidence that the claimed rights and interests are possessed under traditional laws and customs.

Disregarding substantial interruption and evidence of physical occupation

Similarly, the ALRC preferred direct amendment of s 223 of the *Native Title Act*, rather than recommending that the courts should be empowered to disregard 'substantial interruption' to 'connection'. It was unclear what may be involved in any such 'empowerment'.

In examining whether evidence of physical occupation or continued or recent use is required to prove connection, the ALRC considers that the law is already clear—that neither is necessary. Two provisions of the *Native Title Act*—dealing with the claimant application and the registration test—refer to 'traditional physical connection' with land and waters. The ALRC recommends repeal of these provisions.

Native title rights and interests for commercial purposes?

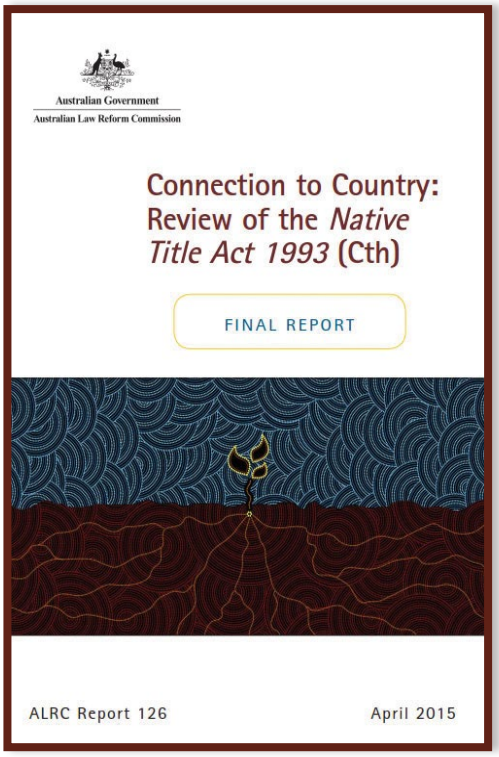
The ALRC also examined whether the *Native Title Act* should provide that native title, 'can include rights and interests of a commercial nature'. With the case law evolving, the ALRC recommends that s 223 (2) of the *Native Title Act* be amended to confirm that a broadly framed native title right may be exercised for commercial purposes, where it is found on the facts.

Secondly, the ALRC recommends the inclusion of a right to trade in a representative list of native title rights and interests in s 223 (2) (b) of the *Native Title Act* to expressly indicate that native title rights may include the right to trade. The ALRC did not recommend statutory definition of commercial purposes.

The ALRC recognises the important role that native title rights and interests 'exercised for a commercial purpose' may play in securing economic and cultural sustainability for Aboriginal and Torres Strait Islander peoples.

Authorisation

The authorisation provisions of the *Native Title Act* are working reasonably well, but proposed amendments include: the choice of a decision-making process; limits on the scope of the authority of the applicant; and the applicant's capacity to act by majority. Recommendations also address where a member of the applicant dies or is unable to act. An important recommendation is for the Act to provide that the applicant must not obtain a benefit at the expense of the group. Such recommendations are intended to support claim groups as they develop their own governance structures, work within the requirements of Australian law and negotiate with third parties.



Parties and joinder

The party and joinder provisions in the *Native Title Act* raise issues around the balance of interests in the native title system, influencing how readily a native title determination is reached and whether the proceedings are lengthy. The ALRC considers that in most instances, the Federal Court's existing discretion, in combination with robust case management, will be the most appropriate way to balance the considerations involved.

The ALRC does however recommend amendment of the Act:

- to allow respondent parties to elect to limit their involvement in proceedings to 'representing their own interests'
- to provide Aboriginal Land Councils in NSW with notice of native title proceedings
- to clarify the law regarding joinder of claimants and potential claimants; and dismissal of parties.

The ALRC recommends that the *Federal Court Act* 1976 (Cth) be amended to allow appeals from joinder and dismissal decisions in native title proceedings.

Other pathways

Finally, the ALRC acknowledges that native title is not the only path to land justice and reconciliation between Aboriginal and Torres Strait Islander people and non-Indigenous Australia. Both in Australia and in comparable jurisdictions, progress is being made via non-native title settlements that encompass land, compensation for dispossession, and economic development opportunities.

THE GIBSON DESERT NATIVE TITLE COMPENSATION CLAIM:

Ward v State of Western Australia (No 3) [2015] FCA 658

BENJAMIN TAIT, AURORA INTERN, NTRU

OBTAINING A SUCCESSFUL determination of compensation for the extinguishment of native title rights and interests under *Native Title Act 1993* (Cth) (NTA) has proven to be a difficult process. Over 38 compensation applications have been filed under the NTA with 6 active applications.[1] The *De Rose v State of South Australia* [2013] FCA 988 (*De Rose*) decision was the first successful compensation determination, with all others except for one having been withdrawn, discontinued or dismissed. The resolution of the compensation application on behalf of the traditional owners of the Gibson Desert Nature Reserve (GDNR), lodged in 2012, was consequently much anticipated.

The recent decision of *Ward v State of Western Australia (No 3)* [2015] FCA 658 (*Ward*), an interlocutory decision made in the GDNR application addressing a 'separate question' about the extinguishment of native title rights by historical tenure, has ultimately called further attention to unresolved issues surrounding compensation for extinguishment under the NTA.

The GDNR application covers 18,000 square kilometres and features rock-holes and rock formations of immense cultural and natural values.[2] The proceedings for the claim commenced in 2012 and the traditional owners argued that immediately prior to the creation of the GDNR in 1977, the claimants had exclusive possession native title rights to the claim area. This included the native title right to control use of and access to the whole of the claim area.

The Decision

The important issue in the case concerned the grant of an oil licence in 1921 and whether it extinguished any native title right to control use of and access to the claim area. If this were the case, any native title at the time of the creation of the GDNR would have been of a non-exclusive nature for the purposes of the compensation claim. The decision turned upon the question of whether the oil licence regulated native title rights and interests or whether they were wholly extinguished. The claimant's submissions characterised the oil licence as a transitory and limited right to enter the land to prospect, operating temporarily to regulate the right to control access. Their argument relied on the recent High Court decision in *Akiba v Commonwealth of Australia* (2013) 250 CLR 209 (*Akiba*). Following *Akiba*, the claimants argued that the NTA contemplates that an act may interfere with the enjoyment or exercise of native title, without extinguishing those rights and interests. On the other hand, the State and Commonwealth endorsed the application of the inconsistency of rights test as set out in *Western Australia v Ward* [2002] HCA 8 (*Ward HC*) which states;

> *Two rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency; if they are not, there will not be extinguishment*.[3]

Barker J then considered the relevant jurisprudence; in particular his Honour examined the various approaches of the bench in the High Court's decision in *Queensland v Congoo* [2015] HCA 17. His Honour ultimately decided that that the inconsistency of rights test was the applicable test. This was because the rights granted to the licensee by the oil license were no different from the grants of the pastoral leases considered in *Ward HC*. The licences did not create exclusive possession rights in the licensee, but at the very least they did extinguish the exclusive native title right to control the use of and access to the claim area.

His Honour rejected the claimant's reliance on *Akiba* to argue that the oil licence merely regulated the native title rights in question. *Akiba* was distinguished from the current

case in its application to the native title right to take resources with respect to state fishing legislation and not to the right to control access to land. In the present case, the oil licence gave the licensee the right to do things which were plainly inconsistent with the native title holders' pre-existing right to control access. Therefore his Honour declared that the oil licence was validly granted by the State in 1921, and that it had extinguished any native title right to control the use of and access to the claim area.

Accordingly, his Honour declared that the claimants' remaining (non-exclusive) native title rights were validly extinguished by the vesting of the GDNR. This meant that any native title rights extinguished by the creation of the Gibson Desert in 1977 were non-exclusive rights. Additionally, compensation for the earlier extinguishment of those exclusive rights by the 1921 oil licence was not available to the claimants.[4]

Compensation for extinguishment under the NTA

Under the NTA, compensation arises when the Commonwealth or State of Territory validates a past, intermediate period or future act which extinguishes native title. This is because the validation of these acts would otherwise be invalid by virtue of the *Racial Discrimination Act 1975* (Cth) (RDA) which protects Aboriginal and Torres Strait Islander peoples from the discriminatory impairment of their native title rights. As such, compensation is only payable for extinguishing acts that occurred after 1975 when the RDA was introduced. Interestingly, the vast majority of acts which extinguish native title occurred prior to 1975, meaning that in such instances there is no entitlement to compensation. In the *Ward* case, the initial extinguishing act took place in 1921, well before the introduction of the RDA.

In any compensation determination, the claimants must overcome the threshold test of proving they actually possessed native title rights and interests over the relevant land, subject to the extinguishing act. Indeed, the recent *Ward* decision, along with its predecessors demonstrates the obstacles faced by claimants in making a successful compensation claim. Ultimately a claimant group must prove;

- they held native title rights and interests prior to the acts of compensation occurring
- that those rights and interests have not been extinguished by non-compensable acts before the compensation acts were done
- that the compensation acts had extinguished native title rights and interests and
- the amount of compensation that they are entitled to as a result of the compensation.

A failure to establish any one of these elements will defeat the claim. In *Jango* (see AIATSIS case note in the May/June 2006 Newsletter, http://aiatsis.gov.au/sites/default/files/products/native_title_newsletter/mayjun06.pdf) the claimant's claim for compensation was rejected as it failed on the threshold issue of proving the existence of native title rights at the time the compensation acts occurred. These acts included the development of the town of Yulara, Connellan airport and other public works. The crux of the issue was whether there was continuity of the society of traditional laws and customs until the compensation acts occurred. Sackville J found that the claimants could not demonstrate the existence of a body of laws and customs relating to rights and interests in land, therefore the compensation could not be claimed.

The *De Rose* decision was in fact the first to make an order of compensation for the extinguishment of native title rights and interests. The Nguraritja people had previously overcome the threshold issue of proving the prior existence of native title over parcels of the De Rose Hill pastoral lease in the Western Desert region of South Australia. The determination excluded certain areas where native title had been extinguished which lead to an application for compensation. This was the first instance where the Federal Court was required to determine native title compensation. However under a Court-ordered mediation, the claimants and the state had arrived at a proposed settlement deed. As a result, the Court imported principles applied in consent determinations where a court will recognise a consensual agreement between the parties that native title exists over a certain area. This meant that the actual merits of the compensation claim were not addressed and the court merely sanctioned the proposed settlement.[5] The *De Rose* decision did not therefore elaborate on the rights to compensation under the NTA as may have been hoped.

Additionally, the value of the compensation amount was kept confidential in the *De Rose* decision. The NTA itself is also silent on the valuation of compensation of extinguishment. In most instances, the relevant legislation provides that

the amount of compensation must be on 'just terms', and must not exceed the amount that would have been payable if the extinguishing act had been the compulsory acquisition of freehold estate. Additionally, this 'freehold cap' itself is further subject to s 51(xxxi) of the Constitution which provides that Commonwealth's acquisition of property must also be on 'just terms'. How this Constitutional protection applies to native title rights and interests is uncertain although there are strong arguments for why it should. As Brennan argues;

> *There seems to be no persuasive grounds for excluding traditional rights in relation to land or waters of indigenous people from the constitutional category of 'property' and indeed a number of High Court judges have already indicated that they regard native title as property in the constitutional sense.*[6]

The National Native Title Tribunal (NNTT) however has affirmed that compensation should not necessarily be subject to the 'freehold cap' under s 53 NTA.[7] In the context of future act determinations, s 53 'just terms' principles may assist to set the maximum amount of compensation payable for a future act under s 51A(1) by reference to just terms which may exceed the freehold value.[8] Additionally, the NNTT has found that market value is an 'uncertain guide to the true value of a loss of native title rights and interest in the land, at best, the land value is a starting point, for want of a better yardstick.[9] Furthermore, considering the holistic nature of Aboriginal and Torres Strait Islander relationships to land, as well as the legacy of injustice which the NTA seeks to redeem, it is arguable that the value attributable to former native title rights and interests may well exceed the equivalent of 'just terms' valuation under s 51A.[10]

Compensation for extinguishment under legislation

Interestingly, the challenges of litigated determinations were recognised by the Western Australian state government which in 2007 introduced the *Indigenous Conservation Title (ICT) Bill in* recognition of the 'expensive and time-consuming exercise' of litigation.[11] The bill sought to acknowledge the aspirations of traditional owners in the GDNR, facilitate a transfer in the form of a unique title known as ICT and settle the state's compensation liability under the NTA. Unfortunately, the ICT Bill lapsed after the government lost office in September 2008 nullifying extensive negotiations in the lead up to the ICT Bill and leaving litigation as the only option to recognise the rights of traditional owners to manage and look after their country.

While the recent *Ward* decision does hold implications for compensation – particularly for the traditional owners affected – it is ultimately an extinguishment decision. *Ward* highlights the difficulty of getting a successful compensation application up other than by mediation or negotiation, and highlights the incredible injustice that can be perpetrated by the common law on extinguishment. Barker J essentially notes this injustice at [180] of his judgment where he identifies that the traditional owners' application was essentially undermined by a single piece of historical tenure which, on all accounts, was never accessed or used.

1. National Native Title Tribunal, 'Search native title applications, registration decisions and determinations' < http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx> accessed 10 August 2015. Given the growing number of determinations Central Desert has noted that compensation claims will continue to place pressure on the organisation in a manner similar to litigated determination applications: Central Desert Native Title Services ' Submission to the review of roles and functions of native title organisations' 2013 < http://www.deloitteaccesseconomics.com.au/uploads/File/Central%20Desert%20Native%20Title%20Services.pdf>
2. The GDNR is a class A nature reserve that is exempt from native title.
3. [82].
4. Compare this with the decisions of the majority of the Full Federal Court in *Congoo on behalf of the Bar-Barrum People #4 v State of Queensland* (2014) 218 FCR 358 [52], and discussion in *Queensland v Congoo* [2015] HCA 17 [27] which held that the native title rights had not been extinguished, and suggested that compensation may be available to the claimants for the interference with their rights under the *National Security Act 1939* (Cth).
5. [82].
6. Sean Brennan, 'Native Title and the Acquisition of Property under the Australian Constitution', (2004) 28 *Melbourne University Law* Review 29, 77 cited in Aboriginal & Torres Strait Islander Social Justice Commissioner, *Native Title Report* No 7, (2008) 170.
7. Tina Jowett and Kevin Williams, '*Jango:* Payment of Compensation for the Extinguishment of Native Title', 3 *Land, Rights, Laws: Issues of Native Title* 8 (2007), 10.
8. Ibid, citing *State of Western Australia v Leo Winston Thomas on behalf of the Waljan People* (1999) 164 FLR 12 (Honorable CJ Summer)
9. Jowett citing *Danggalaba Clan* [1998] NNTTA 11.
10. Ibid.
11. *Indigenous Conservation Title Bill 2007*, explanatory memorandum, 1.

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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