



AIATSIS

AUSTRALIAN INSTITUTE OF ABORIGINAL  
AND TORRES STRAIT ISLANDER STUDIES

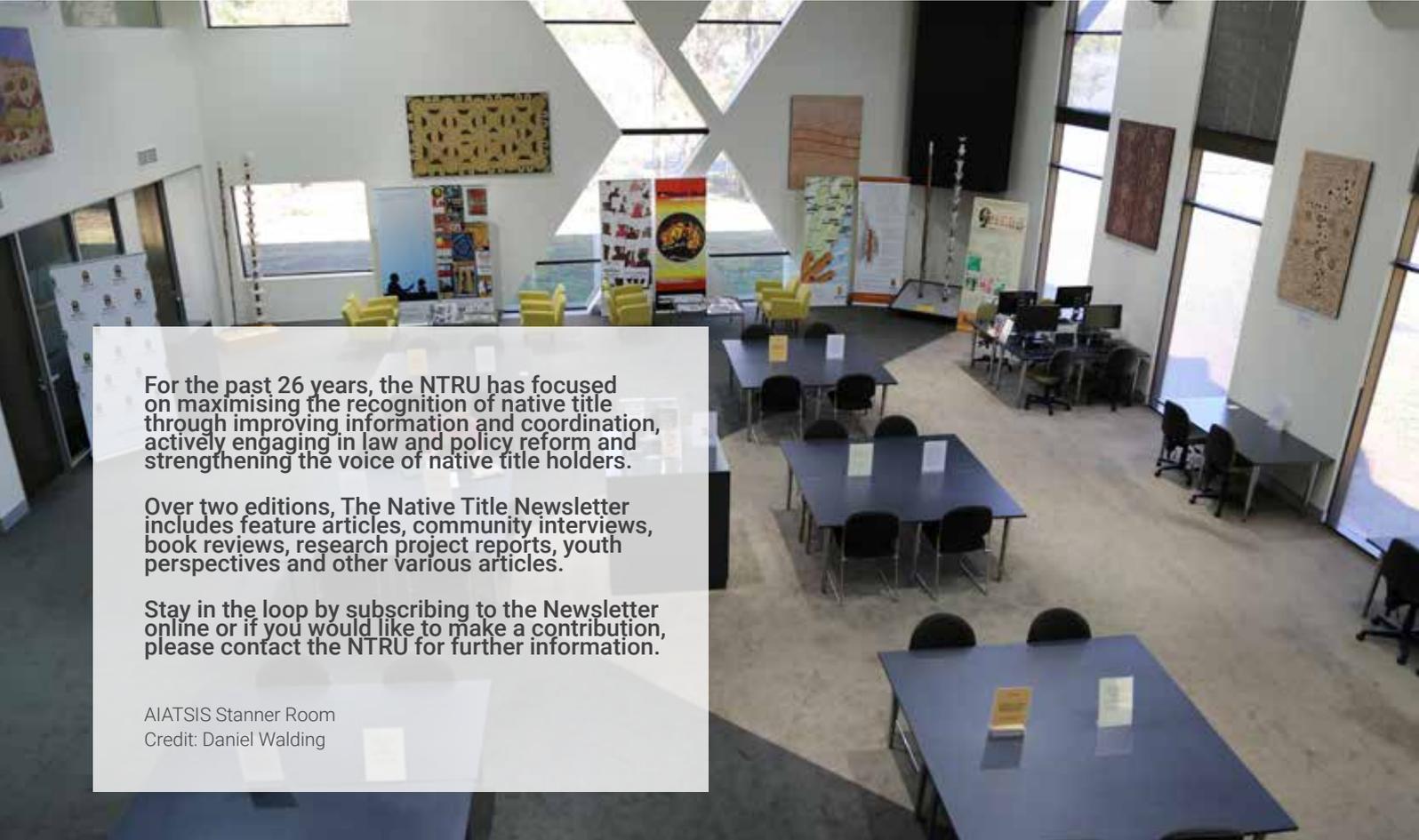
Issue 2 | 2019

Native Title

newsletter

# Welcome!

## to the Native Title Newsletter 2019



For the past 26 years, the NTRU has focused on maximising the recognition of native title through improving information and coordination, actively engaging in law and policy reform and strengthening the voice of native title holders.

Over two editions, The Native Title Newsletter includes feature articles, community interviews, book reviews, research project reports, youth perspectives and other various articles.

Stay in the loop by subscribing to the Newsletter online or if you would like to make a contribution, please contact the NTRU for further information.

AIATSIS Stanner Room  
Credit: Daniel Walding

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Cover: Mangrove seedlings on the Minjungbal Aboriginal Cultural Centre 'Walk on water trail', Tweed Heads, NSW; Credit: Karen Nicholson

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RECORDS AND MEMORIES



BY KAREN NICHOLSON, **AIATSI**S

**A**fter only five short years, the Indigenous Desert Alliance can point to some impressive milestones. Rangers across the desert are frequently coming together at well attended events to share information with each other and raise the profile of their work looking after desert country. That work covers a wide range of activities, from protecting endangered desert species, to using fire to restore desert ecosystems, and combining western and Indigenous knowledge to enhance environmental outcomes for the desert. What started as a small meeting of desert rangers in 2014 has, five years later, blossomed into a representative organisation with 17 Indigenous member organisations from across the Australian desert.

IDA was an idea born from the World Parks Congress, which was held in Sydney in 2014. This internationally significant gathering of world rangers and park managers inspired a group of Indigenous land managers to look for opportunities

to work together to care for country, specifically Australia's ten deserts. An important goal of IDA is to facilitate this work while nurturing the various desert communities' social, cultural, environmental and economic aspirations.

The ten deserts included in the scheme span around 35% of the total land mass of Australia. About 40% of the ten deserts area of operation is covered by lands trusts or native title.

While the group has been around since 2014, it has only recently become a company, and is approaching its first annual general meeting. The IDA is divided into four wards that roughly align around the South Australian/Northern Territory/Western Australian borders. The board consists of eight Aboriginal directors, being one female and one male from each of the four wards and up to two independent directors.






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*'This is where I belong: looking after country. It's about building yourself up, building your career.'*

---

The current chairperson is Benjamin Thomas Kenny, a Western Arrernte man from Ntaria (Hermannsburg). Benjamin's skin name is Jakamara. His clan is Jirramba (the honey ant) people and his totem is the wild dog, or *Ngoilya*. His current employment is as the Central Land Council's Tjuwanpa ranger coordinator working in a team of nine rangers to protect country in Central Australia.

Benjamin started out as a stockman in 2003, but discovered his passion for ranger work after joining the Northern Territory Parks and Wildlife flexible employment program in 2010.

His first ranger job, at Docker River, was on 5 million hectares: and he was at Docker River when Mutijulu Rangers started around 3 years ago.

But Benjamin doesn't see the rangers as a new idea. He feels it is carrying on traditions that are many tens of thousands of years old.

*'Our ancestors were rangers, moving waterhole to waterhole, place to place. We're doing the same thing.'*

The training for a ranger can be quite diverse, with many certificates in operating vehicles and heavy machinery, along with IT and other skills development. Benjamin sees the skills learnt as a ranger as a great start, setting young people up with training and experience that can be used across a variety of jobs available in the remote regions. He's also keen for the young rangers to be given opportunities to become spokespeople for their country.

For Benjamin, the IDA is empowering the communities in the desert to develop their own ranger projects. He sees the IDA's role as bringing forward those projects to government and other stakeholders, and to bring the sector together to come up with innovative programs and projects.

*'We're not here to take over the country but to talk for the traditional owners. The desert – there are voices that need to be heard.'*

The strength of the IDA and the thing that makes it work, for Benjamin, is in its communication with stakeholders and the

---

*'When you put on that uniform, you are a leader in your community.'*

---

networking that happens at the various ranger conferences, forums and exchanges. He is looking forward to this year's annual conference at Uluru from 4-8 November as a great showcase for the IDA's achievements so far.

But Benjamin comes back often to his main point: the pride he takes in being a ranger, in the rangers that have gone before, in his peers, and in the young rangers who are now emerging. He feels it is a very special profession, because for a ranger 'Body and soul, you are connected to this country'.

For more information about the Indigenous Desert Alliance you can go to: <https://www.indigenoussdesertalliance.com/>. You can also read about the Ten Deserts Project, an exciting initiative to which the IDA is a partner here: <https://10deserts.org/>



The Indigenous Desert Alliance plays a vital role in securing the future health of the desert and its people by strengthening the existing *connections* between desert people, empowering desert people to look after their country and by *connecting* the desert story with the story of our country. <https://www.indigenoussdesertalliance.com/>

# Project update:



By DR BELINDA BURBIDGE, AIATSIS

## WIN A NATIVE TITLE CONFERENCE 2020 PACKAGE FOR YOUR PBC!

All PBCs that complete the PBC Survey 2019 will go into the draw to win one of two National Native Title Conference 2020 packages

Each package includes transport, accommodation and full conference registration for two people to attend next year's National Native Title Conference on Minjungbal Bundjalung Country in Tweed Heads, NSW

## THE PBC SURVEY 2019 IS NOW OPEN UNTIL 1 DECEMBER

We've extended the survey so more PBCs get the chance to share their stories

AIATSIS has drawn the first winner of the first Native Title Conference package from participants so far – congratulations to Mithaka Aboriginal Corporation RNTBC. The second draw will take place early in the new year, so make sure you get your PBC's response in asap!

## WAYS TO DO THE SURVEY:

Fill it out online at: [www.nativetitle.org.au/form/pbc-survey-2019](http://www.nativetitle.org.au/form/pbc-survey-2019)

Or print a hard copy from the link above and scan and email it to: [pbcsurvey@aiatsis.gov.au](mailto:pbcsurvey@aiatsis.gov.au)

Or contact Tahn, Emily or Belinda and arrange a time to do it over the phone

Are there a number of PBCs in your region that want to do the survey in person? Get in touch and we might be able to come to you!

## ABOUT THE PBC SURVEY 2019

This year AIATSIS, the National Native Title Council and the CSIRO have been conducting a survey of native title Prescribed Bodies Corporate (PBCs).

The aim of the PBC Survey 2019 is to gather information about the work PBCs do, their plans and visions for the future, the challenges they face and what will help them achieve their goals.

The survey only has 20 questions and doesn't ask for any sensitive or private information. This is a chance to make sure your PBC's voice is heard and to help everyone in the native title sector understand how PBCs are going and what they need.

We suggest that chairs, directors or CEOs are good people to have do the survey on behalf of their PBCs, but some PBCs have gotten a PBC support officer from their NTRB, one of their employees, or even their whole board of directors to complete it. It's up to each PBC who they think is the best person or group of people to complete the survey on its behalf.

We will publish a report on the survey findings next year. You will be able to read the report online on the AIATSIS, NNTC and CSIRO websites. The report on the survey will be an important piece of evidence to help governments make sure their policies work for PBCs, and to help PBCs and others in the sector make their own cases for better support for PBCs.

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# AIATSIS NATIVE TITLE CONFERENCE 2020

*change of date*



There has been a change of date and the National Native Title Conference, being co-convened by AIATSIS, NTSCorp and the Minjungbal Bundjalung Elders will now take place between

**25-27 May 2020**

**Tweed Heads, NSW**

Above some of Minjungbal traditional owners who are working towards the conference. L to R Leweena Williams, Tweed/Byron Local Aboriginal Land Council; Aunty Desrae Rotumah, Minjungbal Bundjalung Elder; Nicole Rotumah, Tweed Aboriginal Co-op Society Ltd.

AIATSIS CEO Craig Ritchie praised NTSCORP's contribution to native title and is looking forward to teaming up for a successful event on Minjungbal Bundjalung Country at Tweed Heads, NSW.

*'Our organisations both have long proud histories in improving outcomes in the native title sector and I am excited to continue that legacy by co-convening this nationally significant event with NTSCORP,'*  
*Mr Ritchie said.*

The last AIATSIS National Native Title Conference in 2018 attracted over 900

delegates to Broome, WA, to celebrate milestones and accomplishments, and address ongoing challenges in the sector. I'm sure this conference will be worth the wait and I thank the Minjungbal Bundjalung People and their Elders for hosting us all on their Country.'

The AIATSIS National Native Title Conference, which began in 2001, is now run on a biennial basis (every two years) and has built a reputation for being one of the most significant national gatherings of Aboriginal and Torres Strait Islander peoples.

NTSCORP CEO Natalie Rotumah welcomed the opportunity to co-host the conference on her traditional country. 'As a proud Minjungbal Bundjalung woman, it is an honour and privilege to bring the conference to my ancestral home. I look forward

to working with AIATSIS and my Elders over the coming months to organise an event that will showcase our culture and provide a respectful forum for mobs to come together and yarn about native title business,' Mrs Rotumah said.

NTSCORP Chairperson Michael Bell, a proud Ngunnawal and Gomeroi man, expressed his delight at the announcement. 'We have successfully co-convened the conference twice before with AIATSIS in 2005 and 2014 at Coffs Harbour and I am confident that the 2020 conference on Minjungbal Bundjalung lands will be a success,' Mr Bell said. 'It is inspiring to see communities from across Australia come together to share ideas and discuss ways to build a better future for our people.'



## ABORIGINAL LAND RIGHTS IN THE NORTHERN TERRITORY:

# Documenting and Preserving the Records and Memories

By TONI BAUMAN AND JASMINE TEARLE, AIATSIS

**W**hat do you do with a garage full of files, notes, photographs, slides, negatives, videos, cassette tapes and other materials when you are a researcher or lawyer who has collected them working on land claims under the *Aboriginal Land Rights Act Northern Territory 1976 (Cth)* (particularly in the early years around the 1980s and 1990s)? You are getting old, the documents are under threat, and you need to deal with the pile of 'stuff' in your garage. You know the records are precious not only as Indigenous heritage but also our national heritage.

The first thing you have to do is to document the materials and provenance them: without this they are meaningless.

A joint project between AIATSIS and La Trobe University, *Aboriginal Land Rights in the Northern Territory: Documenting and Preserving the Records and Memories* (the Project) has been considering issues of documentation, ownership, value, preservation, and storage of these land claim materials with the ultimate aim of providing Indigenous access to them. Realising the rights of Indigenous peoples to their knowledge, culture and heritage is the end game.

As part of Stage 1 of the Project, on 1 and 2 October 2019, AIATSIS and La Trobe convened a focus group in Canberra at University House at the Australian National University. The meeting was an historic occasion bringing together for the first time a group of lawyers, researchers and archivists to discuss these issues.

The meeting was chaired by ANU's Emeritus Professor Mick Dodson, also Chair of the Project's Advisory Committee, and facilitated by AIATSIS Visiting Research Fellow, Toni Bauman, with SC Adjunct Professor David Parsons from La Trobe. La Trobe was also represented by its Professor Pro Vice Chancellor Indigenous, Dennis McDermott.

The discussion was a free flowing conversation between researchers, lawyers and archivists, the latter representing institutions such as AIATSIS, National Archives of Australia (NAA), Central Land Council (CLC), Northern Land Council (NLC), the NT Aboriginal Areas Protection Authority and the Office of the Northern Territory Aboriginal Land Commissioner (ALC).

Above: Participants sharing ideas via 'talking paper'.  
Credit: Helen Wright



In opening the meeting Professor Dodson noted the value of the records and commented that 'the memories and documents are more valuable while we are alive than after we are gone...adding a narrative makes them much more valuable than if someone looks at them without the narrative...'. Professor Dodson also noted the leverage of the participants as a group in making land claim materials accessible and garnering resources, provided the group can identify 'this is who we are, what we are, what we want to do'.

The meeting discussed the legislative context in which the records are located including whether they constitute a Commonwealth Record for the purposes of the *Archives Act 1983* (Cth). Records which form part of the exhibits in land claims are clearly Commonwealth records and the ALC is gradually processing these and depositing them in the NAA in consultation with the Land Councils.

However, the records referred to in the meeting were often not submitted formally to land claim hearings, but rather provide the back story to those exhibits. They include things like legal briefing notes, drafts of maps and genealogies, photographs, and cassette tapes of songs, interviews and Indigenous land owners speaking in traditional languages.

Researchers thus hold mixed archives in that their collections may contain materials that informed their land claim work but were not produced during a contracted period or specifically for a land claim. Some of these materials may have been gathered well before there were any suggestions of a land claim or for different purposes including cultural heritage and linguistic research, and may not have been deposited with either Land Council. While the Land Councils hold a number of these records, they do not necessarily have the technical expertise to preserve slides and negatives and outdated cassette and video tapes.



The possibility of a distributed archive was discussed given that documents are already stored in a number of places. There was also some discussion about the need to avoid duplication of records already held by archives, though archivists varied in their opinions, with some preferring to keep an archive in its entirety. Digitisation as an enabler was discussed. There was a view, however, that originals should still be archived for their intrinsic spiritual value in the relationships between those who created the records, the subjects and locations of these records, and the records themselves, making it almost morally impossible to get rid of the records. Sound and visual recordings are in a different category since the record is the digitised recording itself.

The idea of a pilot was discussed where a group of researchers would document and provenance records for a single claim working alongside an archivist; with the Land Councils and other archives providing lists of materials already held. Researchers could video their recollections of the context at the same time. These memories and anecdotes are critical in describing a unique time in history and there was some discussion about publications already in train and the possibility of applying for research funding for others.

Participants valued the opportunity to share researcher and archival perspectives, processes and practices, to identify the issues and of course, to catch up with old friends.

The general consensus was that these issues are a matter of urgency. Priorities need to be established including identifying the materials most sought after by traditional owners, particularly photographs, videos and sound recordings. Finding the funds for archival assistance was of major concern, as was the time required to complete what can be lengthy and arduous work.

As Professor Dodson commented

*'We, as a generation, were privileged to hear stories from people who hadn't written stories down for 60,000 years...In 5-10 years they won't be available, [because] we [may not] be here'.*

A detailed report on the meeting is in process and will be published on the AIATSIS website when finalised.

If you have any questions or comments please contact:

[ntru@aiatsis.gov.au](mailto:ntru@aiatsis.gov.au)



## BY JAYLEE MARTIN, AIATSIS

The *AIATSIS Act* (1989) mandates that AIATSIS provide leadership in the field of ethics and protocols for research related to Aboriginal and Torres Strait Islander peoples and collections. Since its development in 1999, the *AIATSIS Guidelines for Ethical Research in Australian Indigenous Studies* (GERAIS) has represented the highest standards for ethical research. To mark twenty years since the release of the GERAIS, AIATSIS recently undertook a substantial review of the guidelines. On 1st July 2019, AIATSIS CEO Craig Ritchie announced the release of the Consultation Draft of the proposed new *Code for Ethical Conduct in Aboriginal and Torres Strait Islander Research* (AIATSIS Code) which will replace the Guidelines. This revision reflects AIATSIS's ongoing

commitment to providing national and international leadership in the ethical practice of Aboriginal and Torres Strait Islander research.

The consultation period has now closed and the final release of the AIATSIS Code is expected to be announced on the AIATSIS website in the near future (<https://aiatsis.gov.au/research/ethical-research>).

The AIATSIS Code forms part of the Australian framework for ethical and responsible conduct of research, which includes the *National Statement on Ethical Conduct in Human Research* (the National Statement) and the *Australian Code for Responsible Conduct of Research* (the Code of Conduct). The Australian research ethics framework is one of the strongest in the world.

The AIATSIS Code reflects a new era of research that empowers Aboriginal and Torres Strait Islander people to engage with research, not just as participants, but as rights holders with knowledge and skills that contribute to research outcomes — genuine partners in the research rather than subjects or informants of research. Like GERAIS, the AIATSIS Code is founded on recognition and respect for the rights of Indigenous peoples, as articulated in the *United Nations Declaration on the Rights of Indigenous Peoples*. The AIATSIS Code also embodies Aboriginal and Torres Strait Islander values and world views.

When announcing the review of the AIATSIS guidelines, then AIATSIS Council Chairperson, Professor Michael McDaniel, said that engaging

Above: As part of the consultation process for the new Code, and recognising the importance of Indigenous leadership to the project, AIATSIS convened a Pro Vice Chancellor (Indigenous) roundtable on 5 June 2019 to review and provide strategic advice.

Pictured are Dr Lisa Strelein, Prof Colleen Hayward, Mr Braden Hill, Mr Craig Ritchie, Prof Jacinta Elston, Prof Bronwyn Fredericks, Prof Lisa Jackson-Pulver and Mr Kenny Bedford

Credit: Colin MacDougall, AIATSIS

ethically means many things but ultimately it is about respect and honour:

*'For me, it is yindyamarra, a Wiradjuri concept which means to act with honour and respect, wisdom, to go slowly and act responsibly, be gentle and polite and honest with each other, be careful of the words and actions you put out to the world and understand the impact they have.'*

The Code is underpinned by the AIATSIS research ethics framework, which builds on four key principles drawn from the principles in GERAIS.

*At the centre of ethical research practice is Integrity.*

*Who does the AIATSIS code apply to?*

The AIATSIS Code is intended for use by:

- Any person conducting Aboriginal and Torres Strait Islander research
- Human Research Ethics Committees and other review bodies
- Sponsors of Aboriginal and Torres Strait Islander research
- Aboriginal and Torres Strait Islander peoples and communities engaged in research.

Research includes not only academic research carried out in and by universities and publicly funded

research agencies, but also other activities such as archival research, evaluation, quality assurance, social marketing, government policy and program design, and re-use of data for public policy and clinical trials.

*When is ethics approval required?*

All research projects involving Aboriginal and Torres Strait Islander peoples require ethical approval from a qualified Human Research Ethics Committee (HREC) before the project begins. Ethics approval provides Australian Indigenous communities involved with research, an assurance that their rights, culture and heritage are respected, that there is an understanding of the aims and methods of the research, and there is a guarantee they will share in the results of the work.

*AIATSIS ethics products and services*

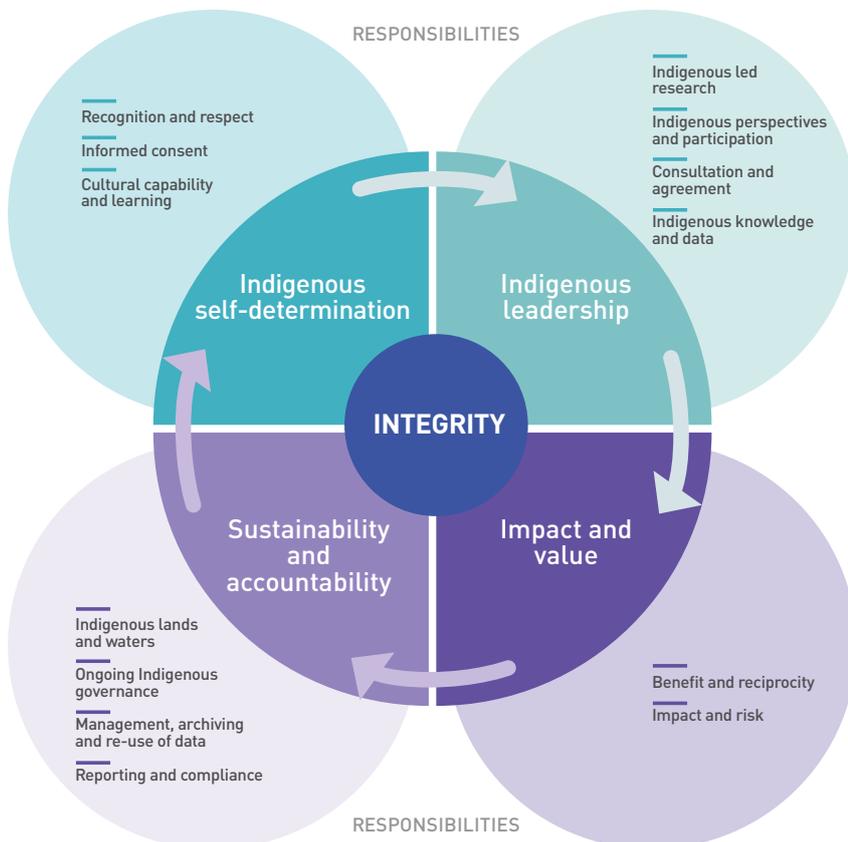
AIATSIS has a registered HREC that specialises in Aboriginal and Torres Strait Islander research. The AIATSIS HREC is responsible for reviewing projects involving Aboriginal and Torres Strait Islander research to ensure the appropriate ethical standards have been met in accordance with the National Statement and the AIATSIS Code.

AIATSIS also provides resources, training, coaching and group workshops for researchers, PhD students, Human Research Ethics Committees, Indigenous communities and anyone else involved in Aboriginal and Torres Strait Islander research.

For more information about the AIATSIS code and ethics services, please contact the AIATSIS Ethics Committee Secretariat

**[Ethics@aiatsis.gov.au](mailto:Ethics@aiatsis.gov.au)**

THE AIATSIS RESEARCH ETHICS FRAMEWORK



# NATIVE TITLE SNAPSHOT 2019

BY KAREN NICHOLSON, AIATSIS

Each year there have been many milestones on the journey to native title.

2019 marks 37 years since, in 1982, a group of Meriam people brought an action against the State of Queensland and the Commonwealth of Australia in the High Court, claiming 'native title' to Mer and the other islands of the Murray Group. It is 30 years since the Court sat on Mer and Waiben in 1989 to hear testimony in the case. That was a first for the High Court. Of course, it was 27 years ago in 1992 that the High Court recognised the continued existence of native title, overturning the doctrine of terra nullius.

*Under the Native Title Act 1993 (Cth) and its regulations, title is administered or held in trust by a Registered Native*

Title Body Corporate, also known as a Prescribed Body Corporate (PBC). Their numbers have grown with the number of determinations, with 204 PBCs registered by September 2019. Some PBCs have achieved more than one determination, and some claims groups are yet to nominate their PBC to the NNTT.

## Native title at a glance

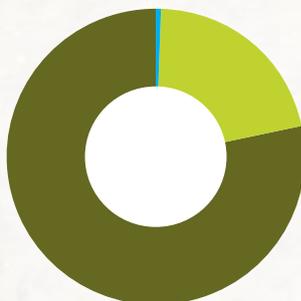
Each year we compile native title determination information from the National Native Title Tribunal's register and native title vision, available at <http://www.nntt.gov.au/>. This information provides you with a snapshot of how many native title determinations and PBCs there are to

### NORTHERN TERRITORY

In the Northern Territory (NT) there have been 105 positive determinations of native title over 310,796km<sup>2</sup> of land and waters.

	Land and waters (km <sup>2</sup> )	Land and waters (%)
<b>Total land and waters</b>	<b>1,419,630</b>	<b>100</b>
Land/waters under native title	310,796	22 <sup>1</sup>
Land/waters not under native title	1,116,048	78
Exclusive native title	8,278	0.6
Non-exclusive native title	302,518	21.3

How much of the NT is under native title?



■ Exclusive native title  
■ Non-exclusive native title  
■ Land not under native title

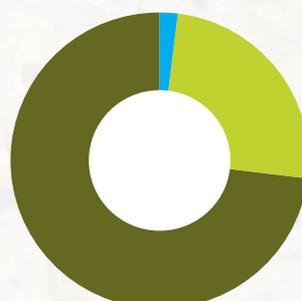
	Total PBCs	Small	Medium	Large
<b>NT</b>	<b>30</b>	28	2	0

### QUEENSLAND

In Queensland (QLD) there have been 141 positive determinations of native title over 496,530km<sup>2</sup> of land and waters.

	Land and waters(km <sup>2</sup> )	Land and waters (%)
<b>Total land and waters</b>	<b>1,851,736</b>	<b>100</b>
Land/waters under native title	496,530	27
Land/waters not under native title	1,355,206	73
Exclusive native title	41,617	2
Non-exclusive native title	454,913	25

How much of QLD is under native title?



■ Exclusive native title  
■ Non-exclusive native title  
■ Land not under native title

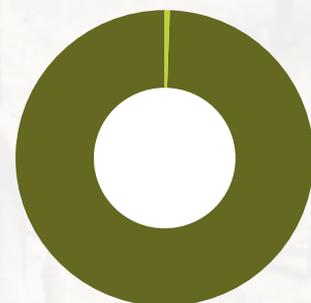
	Total PBCs	Small	Medium	Large
<b>QLD</b>	<b>85</b>	65	19	1

### NEW SOUTH WALES

In New South Wales (NSW) there have been 14 positive determinations of native title over 4,845km<sup>2</sup> of land and waters.

	Land and waters(km <sup>2</sup> )	Land and waters (%)
<b>Total land and waters</b>	<b>809,592</b>	<b>100</b>
Land/waters under native title	4,845	0.6
Land/waters not under native title	804,747	99.4
Exclusive native title	685	0.08
Non-exclusive native title	4160	0.52

How much of NSW is under native title?



■ Exclusive native title  
■ Non-exclusive native title  
■ Land not under native title

	Total PBCs	Small	Medium	Large
<b>NSW</b>	<b>9</b>	6	3	0

<sup>1</sup> The 2019 figures for state and territory area include land AND waters, so the percentage of land and waters under native title may appear reduced from previous years.

date and how much of Australia's land and waters have been successfully determined to be native title land.

*\*Note that the land mass of claims cannot be sorted from total amount of land and waters within claim boundaries – this information is not included in native title vision. The calculations in this article should be read as an approximate percentage of native title land and waters to Australia's total area.*

This data is current as at 6 September 2019. Land and water data is from Geoscience Australia: <https://www.ga.gov.au/scientific-topics/national-location-information/dimensions/area-of-australia-states-and-territories>

### NATIONAL

Nationally there have been 396 positive determinations of native title over 2,983,063km<sup>2</sup> of land and waters.

	Land and waters(km <sup>2</sup> )	Land and waters (%)
<b>Total land and waters</b>	<b>8,099,264</b>	<b>100</b>
Land/waters under native title	2,983,063	37
Land/waters not under native title	5,116,201	63
Exclusive native title	996,730	12
Non-exclusive native title	1,986,333	25

	Total PBCs	Small	Medium	Large
<b>National</b>	<b>204</b>	140	56	8

Year	Percentage of Australia under Native Title
2000	-
2005	7.9%
2010	12.6%
2018	35%
2019	37%

### AUSTRALIAN CAPITAL TERRITORY AND TASMANIA

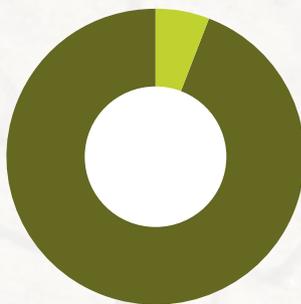
To date, there have not been any successful native title determinations in the ACT or Tasmania. Both the ACT and Tasmania do, however, have land co-management plans with Aboriginal representative organisations.

### VICTORIA

In Victoria (VIC) there have been 4 positive determinations of native title over 15,171km<sup>2</sup> of land and waters.

	Land and waters(km <sup>2</sup> )	Land and waters (%)
<b>Total land and waters</b>	<b>237,657</b>	<b>100</b>
Land/waters under native title	15,171	6
Land/waters not under native title	212,245	94
Exclusive native title	0	0
Non-exclusive native title	15,171	6

How much of VIC is under native title?



- Exclusive native title
- Non-exclusive native title
- Land not under native title

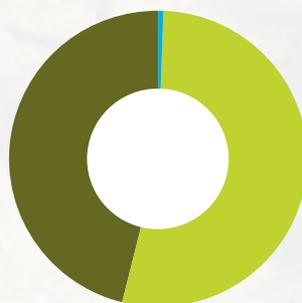
	Total PBCs	Small	Medium	Large
<b>VIC</b>	<b>4</b>	0	3	1

### SOUTH AUSTRALIA

In South Australia (SA) there have been 31 positive determinations of native title over 562,739km<sup>2</sup> of land and waters.

	Land and waters(km <sup>2</sup> )	Land and waters (%)
<b>Total land and waters</b>	<b>1,044,353</b>	<b>100</b>
Land/waters under native title	562,739	54
Land/waters not under native title	481,614	46
Exclusive native title	6,084	0.6
Non-exclusive native title	556,655	53.4

How much of SA is under native title?



- Exclusive native title
- Non-exclusive native title
- Land not under native title

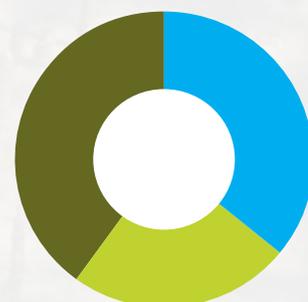
	Total PBCs	Small	Medium	Large
<b>SA</b>	<b>19</b>	7	11	1

### WESTERN AUSTRALIA

In Western Australia (WA) there have been 92 positive determinations of native title over 1,592,982km<sup>2</sup> of land and waters.

	Land and waters(km <sup>2</sup> )	Land and waters (%)
<b>Total land and waters</b>	<b>2,642,753</b>	<b>100</b>
Land/waters under native title	1,592,982	60
Land/waters not under native title	1,049,771	40
Exclusive native title	940,066	36
Non-exclusive native title	652,916	24

How much of WA is under native title?



- Exclusive native title
- Non-exclusive native title
- Land not under native title

	Total PBCs	Small	Medium	Large
<b>WA</b>	<b>57</b>	34	18	5



BY CAROLYN BETTS, **NNTC**

### *Chief Executive Appointment*

The National Native Title Council (NNTC) has appointed Jamie Lowe as its new Chief Executive Officer to lead the organisation through a significant period of growth in the native title sector. Jamie is a Djabwurrung man and a former CEO of the Eastern Maar Aboriginal Corporation in the South West region of Victoria. Jamie is also a director of the Federation of Victorian Traditional Owner Corporations and advocates for the rights of traditional owners within the State of Victoria. Jamie believes that creating economic independence and maintaining and growing cultural identity are key to creating a self-determining nation of Aboriginal people.

Jamie has worked with his local PBC for a number of years and with the significant growth in PBC numbers the focus of the native title sector will shift towards the needs and support required to assist PNCs in achieving and improving the economic, social and cultural participation of indigenous people.

Members of the NNTC have welcomed the appointment and are excited to work with Jamie to build strong representation for the native title sector across the country.

The NNTC is the peak body for the native title sector, having a membership made up of Native Title Representative Bodies, Service Providers, Prescribed Bodies Corporate and Traditional Owner Corporations from across all jurisdictions.

The Indigenous native title sector has been developing rapidly in recent times, and with more native title claims being resolved every day, it is time to ensure all parts of the sector are able to become properly involved in national dialogues, discussions and debates on the issues that affect Traditional Owners.

With the growth of the native title system, so too is the increasing number of organisations, whose responsibility it is to care for country and protect heritage and culture. All Prescribed Bodies Corporate (PBC's) and Traditional Owner Corporations

have an opportunity to join the NNTC and participate in the national Council of our membership so that every voice can be heard. Check out the NNTC website at [nntc.com.au](http://nntc.com.au) for information on how to become a member.

### *Launch of Strategic Vision*

Before opening the Native Title Conference 2019, the National Native Title Council launched its Strategic Vision and Objectives 2019-2022. Workshopped with members from across the country, the document sets out the vision, purpose and values of the organisation.

With a vision to work together for evermore to maximise all rights and interests derived from native title as the Traditional Owners and custodians of the land, waters and resources.

The key purpose of the organisation is to maximise the potential of native title to achieve and improve the economic, social and cultural well-being of Aboriginal and Torres Strait Islander peoples.





Eucalypt bark, Pilbara

The core values of the organisation are cultural strength and integrity, the protection of country, self-determination, and economic and social prosperity.

For the next three years the work of the NNTC will focus on four key strategic objectives:

- Advocacy – advocating the rights associated with native title to key stakeholders and the broader community;
- Ensuring that the economic opportunities of the Indigenous estate in relation to land, water and resources are considered strategically;
- Actively facilitate the inclusion of all native title organisations in the NNTC to ensure their needs and aspirations are met; and
- Ensure the NNTC maintains a governance regime of the highest corporate standards and supports its members.

The NNTC will now start work on its operational plan to implement its strategic objectives with the



Travelling the Kimberley

purpose of maximising the potential of native title to achieve and improve the economic, social and cultural well-being of Aboriginal and Torres Strait Islander peoples.

The NNTC would like to thank PwC Indigenous Consulting for their assistance in developing the strategic objectives for the organisation.



Contact:  
Jamie Lowe, CEO  
0423 959 022





# Treaty and sovereignty IN AUSTRALIA

DR LISA STRELEIN AND DR BELINDA BURBIDGE, AIATSIS

## What is a treaty?

A treaty can mean various things in different contexts but for Australia at this time, it means a political agreement between the Indigenous peoples and Australian governments that has a legally binding effect.

Throughout history there have been three types of treaties typically used in the context of Indigenous colonisation:

1. Treaties of cession: where territories are ceded and result in the creation of reserves and protection of some rights
2. Peace and friendship treaties: which build military alliances, prevent war and facilitate trade
3. Recognition and self-government agreements: co-existence agreements that create parallel governance arrangements in the same territory

It is the third group of treaty that best reflect contemporary arguments in Australia. Historically, these treaties, such as *Tiriti o Waitangi*, have often been interpreted differently by government and Indigenous parties, and have often, as the saying goes, been honoured more in their breach than their observance.<sup>1</sup> However, in contemporary times such treaties have been reinvigorated and reclaimed by Indigenous peoples as a source of strength in relations with government and similar modern treaties and settlements are sought after by Indigenous peoples to redefine Indigenous-government relationships.

Treaty making is based on a relationship between self-determining peoples, or we sometimes refer to sovereign-to-sovereign agreements. Negotiations and agreement making can occur at a local, regional, state or national level and different Indigenous

groups have their own preference about which level is right for them. Treaty making can occur at multiple levels, for example a national treaty could establish a framework that offers regional or local agreements greater legal protection.<sup>2</sup>

## What could a treaty deliver?

Indigenous peoples around Australia will decide what they want a treaty to contain when entering into treaty negotiations, but co-existence rather than cession is key. No treaty should seek to undermine or curtail Indigenous peoples' rights under international law and indeed should strengthen the recognition and enjoyment of these rights. There are some key concessions to avoid:

- No agreement should cede or surrender inherent rights, sovereignty, or territory
- No reconciliation should be offered without reparation (compensation)
- No agreement creates a 'full and final settlement' of the colonial relationship for all time
- No transfer of authority should occur without clear financial arrangements

The kind of things we might expect to see in a modern treaty might include:

- Statement of recognition and co-existence
- Supporting framework and resourcing for negotiation
- Principles and values for an ongoing relationship
- Land and economic settlements
- Jurisdiction, authority and Indigenous governance or self-government
- Implementation framework and ongoing financial arrangements
- Legal protections<sup>iii</sup>

All treaties between Indigenous peoples and colonial governments involve inherent risk for Indigenous peoples because the negotiation processes require some compromise even if this is just recognising the power of the state to enter into an agreement.

Dr Irene Watson has argued that movement away from colonialism can only occur where the state and non-Indigenous participants in the debate are prepared to question their own institutions and ways of thinking in order to listen to Indigenous peoples' claims.<sup>iv</sup> There is a risk that any treaty or settlement process will be limited by imagination more than anything else, if both sides cannot envisage a different institutional arrangement. It is here that the risk lies – not that an agreement will undermine the inherent sovereignty of Indigenous peoples and their rights under international law, but simply that it will not go far enough in recognising those rights.

### *can Australia (and its states) enter into a treaty?*

Questions have arisen about the legal status of 'internal' treaties in international law, particularly in contrast to the *Vienna Convention on the Law of Treaties 1969*. For the purposes of this convention treaties are defined as 'an international agreement concluded between States in written form and governed by international law'. But this definition is only for the purpose of the Treaty Convention itself, which only applies to treaties between signatory member states of the United Nations. Importantly, the convention notes that it does not apply to treaties or agreements entered into by states with other 'subjects of international law' which would include Indigenous peoples. Moreover, the preamble to the Treaty Convention encourages treaties as a form of peacekeeping and recognises the international customary law of treaties and agreements upon which the conventions is based.<sup>v</sup>

Since the inception of the United Nations Indigenous peoples have argued that their treaties are international instruments and should be subject to international recognition and oversight. However this was resisted by member states and international recognition of Indigenous

and non-Indigenous treaties were excluded from international law until the development of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, Article 37.<sup>vi</sup>

### *What is the relationship between treaty and sovereignty?*

Currently some states and territories in Australia, such as Victoria and the Northern Territory, are looking at negotiating state based treaties. This has raised the question of what power states and territories have to enter into treaties. In modern times, sovereignty is rarely vested in one person or entity, for example, since Federation, 'Australian sovereignty' has been divisible between the Crown, the Commonwealth and the States and Territories.<sup>vii</sup> In law, we often hear the phrase '*the Crown in right of*' the state or the commonwealth. State governments in Australia are representatives of the Crown and have particular jurisdiction, including over lands and local government. While there are many reasons why it may be preferable for Indigenous peoples to enter into a treaty with all levels of government, state or territory governments may be able to offer Indigenous peoples some of what they seek from a treaty process.



Gunai country, Cape Conran Victoria  
Credit: Dr Belinda Burbidge





The sacred fire for peace and justice, Aboriginal Tent Embassy, Parkes, ACT

There are some First Nations people who fear that engaging with governments and entering into agreements means risking or undermining their claims to sovereignty. That is, by recognising the authority of the State to enter into an agreement, Indigenous people are ceding sovereignty or falsely recognising non-Indigenous sovereignty and it's true that a treaty with the Australian government requires some recognition of the power of the state. Although, reaching agreement with the Australian state should not exclude recognising the colonial history of violent invasion and dispossession, of frontier wars and resistance, of Indigenous cultural strength and resurgence.

Michael Dodson has said 'the sovereign pillars of the Australian state are arguably, at the very least, a little legally shaky.'<sup>viii</sup> In entering into treaties, Indigenous peoples are in fact offering some level of legitimacy to the state that is often underestimated.

Some non-Indigenous people see the notion of sovereignty as a barrier

to treaty making – arguing that we cannot have competing claims of sovereignty.

Sovereignty is often linked to self-determination and both form part of the ongoing revision of the political settlement between Australia and its first peoples. Self-determination is a recognised right of all peoples and particularly Indigenous peoples. Part of self-determination is the autonomy to decide one's political status, and freely pursue their economic, social and cultural development, which may also include the right to self-govern. Although the two concepts are similar and have many links in law and political theory, self-determination sits more comfortably with the Australian public, perhaps because sovereignty is often linked to territory and complete independence.

The right to self-determination and self-rule through negotiated self-government arrangements may provide the foundations of a negotiated state-structure that is representative of both Indigenous and non-Indigenous sovereignties.

- <sup>i</sup> Dodson, 2002, 'Sovereignty', *Balayi: Culture, Law and Colonisation* 4, p.16.
- <sup>ii</sup> Brennan, S., Behrendt, L., Strelein, L. and G. Williams, 2005. *Treaty*. New South Wales: The Federation Press, pp.11-12.
- <sup>iii</sup> Brennan et al, 2005, p.132-34.
- <sup>iv</sup> Irene Watson, 'Indigenous Peoples' law-ways: Survival against the colonial state', *Australian Feminist Law Journal*, vol. 8, 1997, p. 58.
- <sup>v</sup> 23.1 The Vienna Convention on the Law of Treaties 23 May 1969, < [https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch\\_XXIII\\_01.pdf](https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf)>, accessed 5 August 2019.
- <sup>vi</sup> Article 37 of UNDRIP specifically recognises treaties, agreements and other constructive agreements with their states or their successors, See < [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf)>, accessed 5 August 2019.
- <sup>vii</sup> Dodson, M., 2002, p. 19.
- <sup>viii</sup> Dodson, M., 2002. *Sovereignty, Balayi: Culture, Law and Colonisation* 4, p. 18.

# case note:

## ROBERTS ON BEHALF OF THE WIDJABUL WIA-BAL V ATTORNEY-GENERAL OF NEW SOUTH WALES [2019] FCA 1158

ROSS MACKAY, SOLE PRACTITIONER

This judgment of Rangiah J addresses separate questions arising out of the Widjabul Wia-bal claim on the North Coast of NSW. The separate questions involve the application of s 47B of the *Native Title Act 1993* (Cth) (NTA) to different types of tenure within the claim area.

Section 47B was introduced into the NTA in 1998<sup>1</sup> to allow for historical extinguishment of native title to be disregarded in land that is currently vacant Crown land. In other words, it allows for native title to be recognised in vacant Crown land, even if that land has been subject to an extinguishing act at some time in the past.<sup>2</sup> It is a critically important provision for native title claimants in NSW and the south-east of Australia generally, given the extensive historical dispossession of traditional owners and formalization of non-Indigenous interests in land.

The separate questions before the Court involved five parcels of land, covering three tenure types:

- Reserves set aside from sale, pending determination of the portion to be set aside for public recreation, created under s 101 of the *Crown Lands Act 1884* (NSW) (Reservations Pending Determination);<sup>3</sup>
- Reserves for future public requirements created under s 87 of the *Crown Lands Act 1989* (NSW) (Reserves for Future Public Requirements);<sup>4</sup> and
- Permissive occupancies for grazing under s 136K of the *Crown Lands Consolidation Act 1913* (NSW) (Permissive Occupancies for Grazing).<sup>5</sup>

There are a number of preconditions within s 47B that must be satisfied for it to apply to a particular parcel of land. Relevant to this judgment was the requirement of s 47B(1)(b)(ii) that a parcel not currently be subject to a reservation (or similar) by the Crown for use for public purposes or for a particular purpose.<sup>6</sup>

In relation to the three tenure types in question, the Court found as follows:

- Section 47B does not apply to Reservations Pending Determination;<sup>7</sup>
- Section 47B does apply to Reserves for Future Public Requirements;<sup>8</sup> and
- Section 47B does not apply to Permissive Occupancies for Grazing.<sup>9</sup>

The potential ramifications of the second of these conclusions are significant for NSW. Although, as with all questions of tenure and extinguishment, each parcel needs to be considered on its own facts, the precedent from this judgment is that s 47B is capable of being applied to Reserves for Future Public Requirements. Given there are a significant number of such Reserves across the Eastern and Central divisions of NSW, the likely result is that native title rights and interests will now be able to be recognised across a large number of Reserves throughout NSW. It may also set a precedent for similar types of tenure in other jurisdictions.

The other findings of the Court are being appealed by the Applicants, with a hearing expected early in 2020.

Further consideration of the precedent implications for Reservations Pending Determination and Permissive Occupancies for Grazing (the latter of which are also numerous in NSW) will be able to be made once the appeal has been determined.

<sup>1</sup> By the *Native Title Amendment Act 1998* (Cth).

<sup>2</sup> See discussion at [3] of the judgment.

<sup>3</sup> See [54]-[58] and [80] of the judgment for a discussion of this tenure type.

<sup>4</sup> See [84]-[91] and [122] of the judgment for a discussion of this tenure type.

<sup>5</sup> See [120]-[125] and [133]-[136] of the judgment for a discussion of this tenure type.

<sup>6</sup> See [11]-[13] of the judgment. A detailed analysis of the provision is carried out at [14]-[53].

<sup>7</sup> At [72] and [81] of the judgment. The reasoning for this finding is at [64]-[71].

<sup>8</sup> At [119] and [123] of the judgment. The reasoning for this finding is at [92]-[118].

<sup>9</sup> At [132] and [137] of the judgment. The reasoning for this finding is at [126]-[131].

**Author:** Ross Mackay. Ross is a sole practitioner, specializing in native title and cultural heritage protection. The author acknowledges the assistance of Dylan Orsborn, senior solicitor at NTSCORP, in preparing this case note.



# Native Title Law DATABASE

BY CLARE BARCHAM, AIATSIIS

The Native Title Law Database launched in December 2018, is the most comprehensive collection of publicly accessible native title case and legislation summaries in Australia. Content previously published in *What's New in Native Title* is now included in the online database and has become a key resource for traditional owners, practitioners and researchers.

The database currently contains a summary of every native title decision handed down by the Federal Court, the High Court, and includes selected decisions handed down by State and Territory Supreme Courts dating from 2013, as well as significant cases handed down before 2013. Earlier decisions as well as newly delivered cases will become available on a rolling basis. Each Court decision is

analysed and a summary identifying the main issues published to the database.

The database also contains a summary of all State, Territory and Federal Bills and Acts which may relate to native title holders. This includes the *Native Title Act*, planning and environment acts, conservation and land management acts, and marine and fisheries management acts. Each piece of legislation is analysed, presenting to readers the possible implications for native title holders, and the relevant sections of the bills and acts are extracted on the database.

The database is fully searchable, making the database an accessible and valuable information and research tool. The database uses catchwords for the issues identified in each case

so that a user may search for cases that consider particular issues. A similar function is also available for legislation considered in cases.

Below is an extract from a summary published on the database in December 2018. The case deals with whether a native title determination can recognise the public's access to and enjoyment of beaches. The High Court will soon hear an appeal of this decision.

**Manado on behalf of the Bindunbur Native Title Claim Group v State of Western Australia [2018] FCAFC 238**

On 2 May 2018, North J (the primary judge) made two determinations of native title – one recognising the Bindunbur native title holders and the other recognising the Jabirr Jabirr/ Ngumbarl native title holders.



The issue for consideration in this matter was whether the primary judge erred in including in the determinations a clause regarding existing public access and enjoyment of beaches and other places as 'other interests' for the purpose of s 225(c) of the *Native Title Act 1993* (Cth) (NTA).

The primary judge concluded that the confirmation of public access to and enjoyment of waterways, beds and banks or foreshores of waterways, coastal waters, beaches, stock routes or certain public places referred to in s 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) is likely to have been intended to fall within the definition of 'other interests' in s 253 of the NTA and directed the parties to attempt a greater degree of identification of public access locations. The primary judge held that public access to

beaches and other places was a 'privilege' and thus an 'interest' under s 253 of the NTA, which arises in the absence of any prohibition on such access and enjoyment. Section 212 of the NTA enables the States to enact confirmatory laws regarding existing public access to and enjoyment of beaches etc., as the State did under s 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA). Barker, Perry and Charlesworth JJ in this case disagreed with the primary judge's finding, noting that s 212 of the NTA, when properly constructed, has the capacity to confirm only 'existing' rights and not create new ones. At paragraph [149] their Honours explain that whilst the common law 'recognises public rights to fish and to navigate above the high water mark... there appears no basis upon which it can be said that the law recognises...

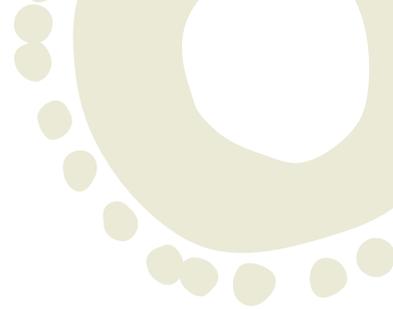
any right, entitlement or interest to roam across, let alone enjoy, unallocated Crown land', whether above or below the high water mark. This means that there is no right, entitlement or interest to roam across or enjoy beaches. Their Honours found that such ability or expectation of access could not be characterised as a 'privilege' for the purpose of the relevant section. For the Court to find such an interest, a clear and plain parliamentary intent would need to be demonstrated, as it would constrain the exercise of existing native title rights and interests.

Their Honours did note two possible ways in which s 212 of the NTA may give rise to public access and enjoyment of places as an 'other interest': where a demonstrated common law or statutory right of access was identified, or where evidence was provided to prove that public access to and enjoyment of such places existed as a matter of fact at the time of the enactment of s 212 of the NTA. However these were not present in the current case.

Their Honours allowed the appeals of the Bindunbur and the Jabirr Jabirr people and ordered that those parts of the two determinations which purported to recognise other interests on the basis of s 14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) should be removed from the determinations.

A summary of the High Court's decision will be published on the database shortly after it is handed down. The database can be accessed at <https://aiatsis.gov.au/ntld>. You can also subscribe to receive the Native Title Law Alert, a periodic snapshot of significant recent case law and legislation, at <https://aiatsis.gov.au/form/subscribe>.





# Taungurung DECISION MAKING GUIDE

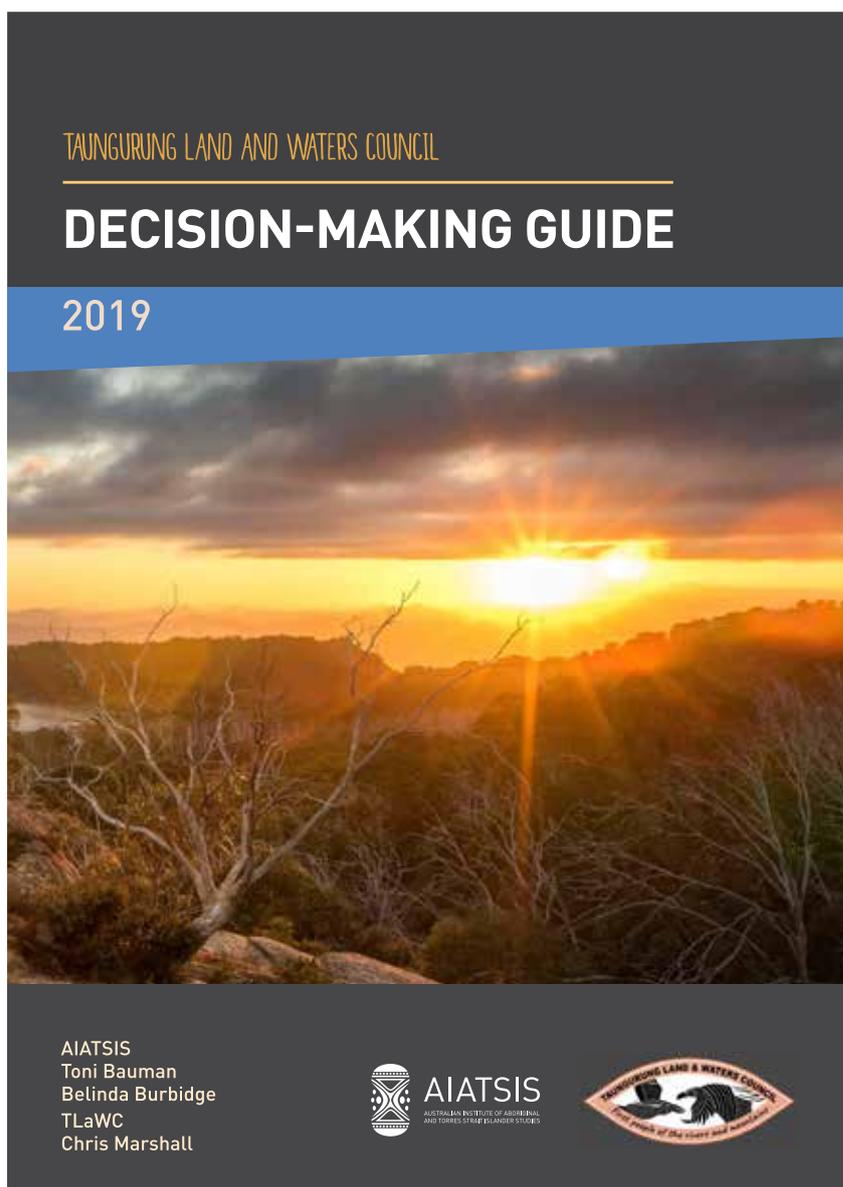
Taungurung Land and Waters Council and AIATSIS collaboratively produced a decision-making guide for Taungurung people.

The guide contains practical information to assist directors and committee members on:

- Compliance and legal requirements
- Decision-making models
- Separation of powers
- Conflicts of interest
- Subsidiarity
- Cultural governance

While developed for the Taungurung Land and Waters Council to assist in governance, the guide is of interest to PBCs and other Indigenous corporations that are working on their own decision-making structures, processes and models.

<https://aiatsis.gov.au/publications/products/taungurung-decision-making-guide/pdf>





## PBC ACCESS SERVICE

*is expanding*

BY TREA MONGTA, **AIATSIS**

The Native Title Research Unit (NTRU) is expanding its Native Title Access Service (the NTRU access service) to assist Prescribed Bodies Corporate (PBCs) with requests for materials from the AIATSIS collection post-determination.

AIATSIS holds the largest archive of Aboriginal and Torres Strait Islander materials in the country. For two decades the NTRU has been assisting traditional owners and their representatives with expedited access to the collection.

The NTRU access service was created to assist with the preparation of native title applications to be submitted to the National Native Title Tribunal

(NNTT) and the Federal Court. As the number of applications for recognition of native title slows, the NTRU is shifting its focus to assisting PBCs build and curate their own collections of historical materials.

The expansion of the access service has been influenced by conversations the NTRU has had with PBCs that are keen to do their own cultural research. Feedback to AIATSIS indicates that many PBCs are interested in using resources from the AIATSIS collection to interpret and tell their histories in a cultural way.

To use the NTRU access service, please send an email to **NTSS@aiatsis.gov.au** and one of our staff will

assist you with your request.

The NTRU also runs a program to provide access to its collection for Aboriginal and Torres Strait Islander communities and individuals not involved in native title. The Return of Native Title Materials to Indigenous Communities (ROMTIC) provides 20 free copies of cultural materials held in the AIATSIS collection for Indigenous peoples to showcase these materials to their communities. More info on ROMTIC can be found here <https://aiatsis.gov.au/collections/using-collection/return-material-indigenous-communities>



# Ngulla Wellamunagaa

TREES THAT HAVE SURVIVED AND REVIVED

5 December 2019 – 29 March 2020

First Australians Focus Gallery,  
National Museum of Australia.

*Ngulla Wellamunagaa* celebrates the survival, continuity and diversity of Aboriginal and Torres Strait Islander cultures as told through stories affirming ongoing connections to Country. These stories embody the essence of *Ngulla Wellamunagaa* – trees that have survived and revived. The exhibition includes generous contributions from the communities and materials from the extensive collections at the Australian Institute of Aboriginal and Torres Strait Islander Studies.

Regina Pilawuk Wilson, (Ngan'gikurrungurr), Wupun (Sun Mat), c. 1980,  
*Merrepen* (sand palm) and natural dyes

REMINDER:

## change of date AIATSIS NATIVE TITLE CONFERENCE 2020

There has been a change of date and the National Native Title Conference, being co-convened by AIATSIS, NTSCorp and the Minjunbal Bundjalung Edlers will now take place between

# 25-27 May 2020

Tweed Heads, NSW

#### SUBSCRIBE TO NTRU PUBLICATIONS AND RESOURCES

All NTRU publications are available in electronic format. This will provide a faster service for you, is better for the environment and allows you to use hyperlinks. If you would like to SUBSCRIBE to the Native Title Newsletter electronically, please go to:  
[www.aiatsis.gov.au/form/subscribe](http://www.aiatsis.gov.au/form/subscribe)

For previous editions of the Newsletter, go to:  
[www.aiatsis.gov.au/ntru/newsletter.html](http://www.aiatsis.gov.au/ntru/newsletter.html)

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