Native Title Newsletter

AIATSIS Native Title Research Unit

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The Native Title Newsletter is published every second month. The Newsletter includes a summary of native title as reported in the press. Although the summary canvasses media from around Australia, it is not intended to be an exhaustive review of developments.

The Native Title Newsletter also includes contributions from people involved in native title research and processes. Views expressed in the contributions are those of the authors and do not necessarily reflect the views of the Australian Institute of Aboriginal and Torres Strait Islander Studies.

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

New Visiting Research Fellow

Stuart Bradfield has joined the Native Title Research Unit as a Visiting Research Fellow.

Stuart spent the last two years teaching in the politics department at Macquarie University. Before that he was a visiting PhD student with the Indigenous Governance program at the University of Victoria, British Columbia, researching the British Columbian treaty process. Stuart's thesis, which will be submitted in January, looked at the establishment of a treaty relationship as a means of resolving the question of Aboriginal status in this country, with some comparison with contemporary developments in Canada.

While at the NTRU, Stuart will investigate the emerging culture of agreement making surrounding the native title process. In particular, he is interested in the possibility of agreement/treaty making as a vehicle for expanding native title outcomes for claimants, particularly with reference to issues of self-government, and the recognition of other inherent Aboriginal rights.

De Rose Hill appeal

The Yankunytjatjara people will lodge an appeal with the full bench of the Federal Court over their native title claim over the De Rose Hill cattle station. Appeal papers will be lodged with the court before the deadline of November 22. Dr Lisa Strelein has written commentary about the decision in the Features section, below.

New Issues Paper

The NTRU has published Issues Paper volume 2 number 18, 'Diaspora, Materialism, Tradition: Anthropological Issues in the Recent High Court Appeal of the Yorta Yorta', by James F Weiner. Dr Weiner inspects some of the appeals made to tradition and continuity of tradition in the High Court appeal of the Yorta Yorta native title case.

Current and previous Issues Papers from the *Land, Rights, Laws: Issues of Native Title* series are posted on the NTRU webpage. You can also subscribe to the Issues Paper mailing list through the form on our website or by contacting the Native Title Administration Officer on 02 6246 1161.

FEATURES

De Rose v South Australia [2002] FCA 1342 (1 November 2002)

by Lisa Strelein, NTRU

The decision in the *De Rose Hill case* concerned a pastoral property in the far north-west of South Australia. A group of Aboriginal people asserted native title over the lease area as Nguraritja, or traditional owners, for the land. The case was heard by a single Judge of the Federal Court.

Justice O'Loughlin determined that any physical or spiritual connection to the land by the applicants had been abandoned and this had led to a break down in the observance of traditional customs that was fatal to their application.

The decision is alarming because of the applicants' presence on the property up until relatively recently when access became more problematic, and their strong acknowledgment of law, customs and language of the Western Desert. However, the Judge seemed to take a unique view of the legal concept of 'connection' and the threshold for abandonment that sets a dangerous precedent for native title cases throughout Australia.

The applicants

The applicants sought a determination of native title based on their status as Nguraritja. Many applicants referred to themselves as Yunkunytjatjara others referred to themselves, or their parents as Pitjantjatajra, or Antikirinya. The evidence of the Aboriginal witnesses was accepted that the claimed area fell within Yunkunytjatjara country.[1] The claimant group are part of the Western Desert society and follow the laws and customs of the broader community. The evidence of movements of Pitjantjatjara people into the region was accepted as part of the traditional population movement throughout the Western Desert region.

The claim was not made as a communal claim, on behalf of a particular 'people', in the sense of a discrete system of laws. Nor did the applicants claim individual rights and interests. The Judge therefore approached the claim as one asserting some form of group rights.[320] This led the Judge into a number of errors.

Connection to land

The applicants explained that the boundaries of the station were not the limits of their country, as the relationships and bases from which to assert connection under Western Desert Law allow personal connections to extend throughout the region. The Judge agreed that the arbitrary fixing of boundaries for the purpose of defining a claim area should not be an impediment. However, the Judge seemed to remain confused as to why the claimants had chosen De Rose Hill as the boundaries for the claim.[203] In trying to attach some particular significance to the station, his Honour experienced some difficulty determining the relationship to the land apart from the attachment to particular sites.[331] This is despite the Judge's acceptance of the evidence that these sites comprise part of a larger totemic geography of which De Rose Hill is but one part.

Connection to the claimed area was demonstrated through personal association, whether through birth, long term residence, knowledge or inheritance, and acceptance by the community as Nguraritja. Perhaps influenced by this, the Judge's examination of connection in the broader region throughout which the system of law and customs was acknowledged to operate was minimal, with focus instead on the personal claims of each witness to status as Nguraritja and personal links with the station over their lifetime.[206]

Two of the witnesses were born on De Rose Hill station, many worked there or lived there for part of their life, some for substantial periods. Most had left some time ago, with the last of the stockmen leaving the station in 1978. Occasional access for hunting had continued but there was substantial evidence of intimidation and discouragement of Aboriginal people accessing the property since that time.

The Judge drew the extraordinary conclusion that twenty years was a substantial period of absence which had resulted in a failure to observe the law and custom that connected the applicants to the claim area. The breakdown in law and custom identified by the Judge as a result of the lack of access was highly localised and referred primarily to the observance of laws and customs in relation to the physical landscape of the claim area.

The Judge accepted that the absence of a physical connection was not fatal to a claim, that native title could be sustained by a non-physical connection maintained through the acknowledgment and observance of traditional laws and customs.[377] However, the Judge applied an idea of non-physical connection as being a 'spiritual' one, in the sense of requiring religious observance of ceremony and responsibility for the sites of significance within the pastoral station.

The Judge acknowledged that the claimants were actively engaged in cultural activities

[1] Although early ethnographic maps show it as Antikirinya country. [297-9]

outside of the claim area. His Honour accepted that witnesses had substantial knowledge of the sites within the claim area and activities associated with those sites – they knew and were able to perform the ceremonies, stories, dances and songs of the Tjukurpa for the area. His Honour went so far as to acknowledge that such knowledge would have gone a long way toward satisfying the Court that there was a relevant connection. However, 'The physical activities that would have been tangible evidence of a spiritual connection to the claim area occurred long ago'.[904] He concluded that, 'Save for some occasional hunting trips, not one witness … has attended to any religious cultural or traditional ceremony or duty on De Rose Hill in almost twenty years.'[106][2]

The Judge was unconvinced that the laws and customs were being handed down to younger generations. Nor did his Honour appreciate that the native title process would be utilised by knowledge holders to pass on information. The Judge saw it as too late – the damage has been done, twenty years was too long.[3]

Apart from the absurdity of the time-scale applied by the Judge, his findings in relation to the absence of physical connection fly in the face of established High Court views. Failure to maintain physical connection to one part of a claim area has been held not to defeat the claim as a whole. Failure to access this area over a relatively short period in a community's history should not be treated differently merely because the claim is over a discrete part of the traditional country. The observance of law and custom in the broader region was relevant to the inquiry as to the maintenance of laws and customs which sustained the community's entitlement under traditional law to the claim area and therefore to recognition of native title.

The Judge's reasoning also appears inconsistent with the findings of the High Court in *Ward* that suggested that failure to exercise a right does not constitute an abandonment of the right.[4] These issues raise a question as to whether a different result would have been reached if the claim had been made by Yunkunytjatjara over the whole of their traditional territory as a discrete communal nationhood claim. Such a claim may have been more familiar to the Court but obviously inappropriate to the claimants. There is a danger to be avoided in native title jurisprudence of judges developing a vision of what a native title claim looks like.

Social and political life

In relation to social and political identity, his Honour found that there was no evidence of an organised community centred around the claim area. He found no evidence of a coherent social group since the departure from the station and no clear direction for plans to use the country if native title were recognised. He assessed the connection to the De Rose Hill station as focused on 'European style work practices' and that social interaction was dominated by that work.

The Judge thought the evidence in relation to customary practices was 'not impressive when compared with the information that has been collected by early ethnographers'. His Honour discussed practices in relation to body piercing and scarring, circumcision, particular magical, mystical and spiritual practices, infant betrothal, and post birth practices. None of these were rights and interests asserted or laws and customs in

[2] This assessment should be should be contrasted to documented practises of active 'off country' maintenance of country during long term absences in the Western Desert. See Tonkinson, R. and M. Tonkinson 2001 'Knowing' and 'Being' in Place in the Western Desert, in A. Anderson, I. Lilley and S. O'Connor (eds) *Histories of Old Ages: Essays in Honour of Rhys Jones*, pp.133-139. Pandanus Books, RSPAS, The Australian National University, Canberra.

[3] Compare commentary from Justice Kirby in *Members of the Yorta Yorta Aboriginal Community v Vic*, M128/2001 (24 May 2002) transcript, 'when Australia began to accept their entitlement to a separate identity, it flourished again, it came again. Now, the question is: was there abandonment in that history or was it simply the reality of those times that they had to face up to?'

[4] *WA v Ward* (2002) 191 ALR 1, at [64]

relation to land relied upon to establish native title.[5] This is a peculiar romantic fascination with 'tribalism' and a refusal to import aspects of economic and political life into 'Aboriginal life'. His Honour states, for example, that work and children's education are 'non-Aboriginal factors' in decision-making about residence.[681] The Judge appeared highly critical of the applicants because their Aboriginal culture and laws had not held them to the claim area.

This essentialising of Indigenous peoples relationship to land as 'essentially spiritual' is serving to undermine their rights to the land as a proprietary interest. It also undermines the historical importance of opportunities to combine employment with the maintenance of connection to traditional country in ameliorating the impacts of dispossession.

The Judge's perception that the applicants were not 'forcibly removed', due to the absence of some extreme action on the part of the state or the leaseholders, does not give due weight to impact of land and employment policies. The impact of grants of pastoral leases on Indigenous peoples' sense of ownership over the land should not be understated. Until at least the decision of the High Court in *Wik* this land was considered the pastoralists' land. The removal of employment options on pastoral leases was part of this process of dispossession.

Access

The Judge found that the applicants had not demonstrated intent in maintaining their attachment. His Honour considered that access should have been found, 'surreptitiously if necessary', to perform their duties as Nguraritja.[106] This seems extraordinary when one considers the evidence of violence and intimidation that was reflected in the judgement.[436] The Judge considered that because the most senior stockmen felt able to occasionally visit the station after they had left, this was evidence that access was available to the claimant group if they had wanted it.[439] There was a lack of appreciation of the social alternatives available to the witnesses when it came to residence, through traditional law and historical social movements. Land to which each of the witnesses could access through their relationships within Yankunytjatjara country and also within the wider Western Desert region.

The Judge underplayed the intimidation that claimants felt in accessing the land. Not simply through the use of actual force, firearms, and locked gates; but the historical relations of power that are implicit in the pastoralist as the white boss and the Aboriginal owners as barely enjoying the status of employees. White law imposed this new conception of ownership over their own sense of ownership and allowed their effective exclusion up until the recognition of native title in 1992. The idea that Aboriginal people would know and enforce their rights under legislative reservations is to underestimate the influence of historical understandings of entitlement. In contrast, the *Mabo* decision had a much greater impact on Aboriginal and Torres Strait Islander peoples' sense of entitlement to assert their ownership of traditional lands. It is not surprising the claimants exercised their economic and cultural choices to live elsewhere until a firm recognition of their right to be on the claim area was recognised by the non-Indigenous community.

The evidence of Aboriginal witnesses and the role of experts

The Judge commented on the question of evidence from Indigenous witnesses and the hearsay rule. His Honour was of the view that proof of the existence or otherwise of native title depends upon events that occurred in the past and actions of earlier generations. He therefore accepted evidence, which in other proceedings may be considered hearsay. He held that Aboriginal witnesses should be able to give evidence of their beliefs, based upon what they have been told. This is evidence not just of the

[5] Indeed, had they been they may have fallen short of recognition by the common law under the 'repugnancy' rule. See [508, 512]

fact that the witness believes those statements, or that the statements were made, but also, that in all probability, as evidence of the truth of the facts asserted.[270-1]

The Judge rejected the need to establish the circumstances of Aboriginal people as they existed at the time of sovereignty, noting the difficulties of proof facing Aboriginal claimants seeking historical and anthropological material to support their claim. His Honour favoured the inferences drawn from the evidence of the Aboriginal witnesses over the opinions of experts or historical material.

The Court heard evidence from a variety of experts on the linguistics, history, archaeology, and anthropology of the claim group and the region. The evidence of different experts was received with differing levels of acceptance. General theories applicable to the broader region were not accepted as applying to the claim area without specific evidence. Where theories or observations were inconsistent with the evidence of witnesses, the Judge was reticent to accept them. Despite these limitations and the significant disruption of the lead anthropological witness being unable to give evidence,[6] the supporting evidence adduced by the claimants was generally thought valuable. However, the Judge was critical of the applicants where they were unable to clearly articulate their connection to country or their laws and customs. His Honour refused to accept the observations of experts in the absence of reasonable primary evidence from the claimants, complaining that, 'The onus is upon the claimants, if they wish to establish their right to a determination of native title, to give the evidence that will establish that right. They had the opportunity to do that in closed session but they failed to do so.'[342]

[6] The Judge expressed sympathy for the anthropological expert asked to fill the breach at the 11th hour but accused him of advocacy for presenting what he considered a sometimes sanitised view of the evidence he had collected.[352, 357]

Alternative determination and extinguishment

The Judge was satisfied that a determination of native title was potentially available to the claimants if they had been able to establish the requisite connection. The State had originally argued that Imperial legislation establishing the colony had wholly extinguished native title throughout the state. However, they withdrew those submissions during the course of the trial. Similarly, the government, after the decision in *Ward*, did not press its argument that the pastoral leases extinguished native title.[237, 245]

The Judge held that native title had not been extinguished by historical events and would not have been wholly extinguished by the grant of the particular pastoral leases that make up De Rose Hill station. His Honour determined that the pastoral leases did not grant the lessee a right of exclusive possession and expressly reserved the rights of Indigenous peoples over the land, first through a clause in the lease itself and later as a statutory provision.

Any extinguishment would therefore be limited to the extent of any inconsistency. Citing the Full Court of the Federal Court in *Ward*, his Honour noted that the immediate consequence of the grant of a pastoral leases was that the exclusive right of the native title holders to possess occupy use and enjoy the land was, 'Henceforth … a shared one'.[7] However, his Honour summarised the decision of the High Court in *Ward* concluding that, having lost the right to exclusive possession, the native title holders also lost the exclusive native title right to control access to the land and to control the use to be made of the land.

The Judge takes an extreme interpretation of this conclusion, suggesting for example that where the lessee refuses entry to an Aboriginal person who is an invitee of the native title holders, the lessee's decision will prevail. There is no suggestion of a concept of reasonableness in the exercise of this

[7] [531], citing *WA v Ward* (2002) 191 ALR 1, at [316]

power which undermines any sense of 'shared' possession.

The Judge submitted that if he were in error in relation to the loss of connection, an appropriate determination would recognise no more than access to the claim area for hunting, gathering, use of water and natural resources for shelter and cultural or hunting artefacts, as well as the right to hold meetings and religious ceremonies including the right to invite others to participate, but that those rights would be subject to the discretion of the pastoral leaseholder. In effect, native title would provide less rights and interests than those protected under legislation.

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Mediation of Native Title in Queensland – A Torres Strait Experience

by Terry Waia, Chairperson of Torres Strait Regional Authority

The Torres Strait Regional Authority is the native title representative body in the Torres Strait region. Stretching approximately 150 km between the northern most tip of Australia and the south coast of Papua New Guinea, the waters of the Torres Strait are dotted with over 100 islands as well as coral cays, exposed sandbanks and reefs. The Strait's population of approximately 8,000 people is dispersed over 19 small island communities. The communities are all remote, approximately 1000 km from the nearest city and have a population of between 50 and 800 people.

With the exception of Murray Island (Mer), Horn Island and Thursday Island, each of the outer community islands in the Torres Strait are held under Deed of Grant in Trust (DOGIT). DOGIT is a form of inalienable freehold held in trust for the benefit of the Torres Strait Islander inhabitants.

Beginning with the historic *Mabo* decision in 1992, the Torres Strait has led the way in native title in Australia. There have now been 15 successful native title determinations in the Torres Strait, 14 of which have been made by the Federal Court with the consent of all parties, including the State government. One of the earliest consent determinations to be made under the *Native Title Act 1993* (Cth) was in the Torres Strait in 1999, over my home island of Saibai.

In September 2002, six further claims were listed for consent determination by the Federal Court, including over the community Islands of Yam (Iama), Badu, Boigu, Darnley (Erub) and Stephen (Ugar). These determinations would have seen native title recognised over all of the outer community islands in the Torres Strait.

To the shock and disappointment of the communities involved, these court dates were vacated just three weeks before the Federal Court was due to sit in the Torres Strait after the State of Queensland wrote to the Federal Court advising that it was no longer prepared to consent to the determinations in the terms that had been agreed.

The abandoning of these determinations at the eleventh hour has been devestating for those communities affected, most of whom lodged their claims in the Court back in 1996 and have been preparing for the Federal Court hearings and subsequent celebrations for the past six months.

On Darnley Island, the Erub community had put so much work into preparing for the native title celebrations that they decided to go ahead anyway and celebrate their traditional land ownership of their Island despite the court proceedings being abandoned. Senior native title holders, while expressing their disappointment and dissatisfaction with the State Government's handling of their native title claim, affirmed their knowledge that the land of Erub was the 'birthright' of the Erubam Le, and that the day was to celebrate this knowledge, and the fight of Erubam Le past and present to have this ownership acknowledged by Australia. Similar celebrations are being planned by Iama people.

Given the successful record of achieving native title determinations in the Torres Strait with the consent of the State government, it has come as a great disappointment to the Torres Strait community that the latest determinations had to be cancelled at the last minute as a result of the actions of that government.

Torres Strait Islanders have been very concerned at the Queensland government's handling of these native title matters for some time. These concerns were conveyed to the Premier in 2001, who responded to the effect that the State would make the Torres Strait matters a priority so that they could be determined by the Court in the first half of 2002.

Despite this assurance Court dates set for mid June this year had to be abandoned as a result of lack of progress by the State Government in finalising the claims. Torres Strait Islanders thought things were back on track after a press release by Premier Peter Beattie on 3 June 2002, the 10th anniversary of Mabo Day. The Premier announced that he had signed off on the draft consent determinations for each of the claims, giving his in principal approval for the determinations to go ahead.

Shortly afterwards, further dates were set by the Court with the consent of all parties, including the State, listing the matters for consent determinations to take place on each of the community islands over a week in September 2002. The complex logistical arrangements needed to transport the Court and parties to such remote locations and the significant preparations for the Court hearings on each of the islands (including in some cases the construction of an appropriate venue) were commenced in earnest.

But again the people of the Torres Strait were to be bitterly disappointed when only three weeks before the determinations were set to take place, the Federal Court was forced to abandon the dates following a change in position by the Queensland government which advised the Court that it now required the determinations to contain a finding that native title does not exist over land on which public works are situated.

Only two weeks earlier the State had consented to the Court's proposal for a form of order that excluded from the determination area land or waters on which valid public works have been constructed,[8] and advised the Court that the exclusion of public works, as opposed to a statement of extinguishment, was "part of a negotiated outcome between the parties".

The key issue between the native title holders and the State centres around the operation of s47A of the Native Title Act, and in particular whether that section extends to overcome any extinguishment resulting from the existence of public works on land which is the subject of that section.

No previous consent determination over DOGIT land in the Torres Strait has excluded public works, or contained a finding that native title is extinguished over land or waters on which public works have been constructed. These public works for the most part take the form of community infrastructure built by or on behalf of Island Community Councils for the benefit of the native title holders. Similar consent determinations have been made in Western Australia where the State Government has not sought to exclude public works or to assert that native title is extinguished by them.

The State's changed position on public works has ramifications far beyond the current Federal Court proceedings. It places native title on a collision course with public administration and community development on these remote islands. If correct it means that infrastructure such as housing, sport and recreation facilities and water and sewerage facilities built on Torres Strait Islander land for the benefit of the native title holders will extinguish native title rights and interests on that land.

[8] These public works were to be identified in a schedule to be prepared by the State government and filed in the Court 12 months from the date of these orders being made.

To date, proponents of infrastructure works on the islands, including the Trustee Community Councils, have obtained the consent of the traditional landowners for infrastrucure works to proceed by entering into agreements with the native title claimants, which provide that native title is not extinguished by the works. State government departments and agencies have participated in many of these negotiations and have also constructed infrastructure pursuant to agreements providing that native title would not be extinguished.

The State's changed position has the potential to throw development in the Torres Strait into turmoil. Landowners will be unlikely to agree to Community Councils, government departments or statutory authorities building housing or other infrastructure on their land if that will extinguish their native title. This will lead to significant problems for these communities and will jeopardise progress that has been made in recent years to improve infrastructure and associated services to the community islands.

Up until this time the TSRA has worked closely with the State government to improve the lives of people living in the Torres Strait and is very keen to ensure this continues. We are however dismayed and disappointed at their actions, and unsure of their motivations.

Discussions continue as to how these issues might be resolved. In the meantime, with every day that these matters are delayed by the State Government, our elders are passing away and our community leaders are diverted away from the many other challenges that are facing our region. If the State government does not address their handling of these matters and take a more strategic approach to the resolution of native title matters in Queensland, the future of mediated native title outcomes in this state is looking very bleak indeed.

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Wilson v Anderson **[2002] HCA 29 (8 August 2002)**

by Lisa Strelein, NTRU

The proceedings

Michael Anderson, on behalf of the Euahlay-i Dixon Clan, sought a determination of native title over their traditional country in New South Wales.[9] The application covered areas subject to grants under the *Western Lands Act 1901* (NSW) (WLA). The claimed rights and interests were expressed as a right as against the whole world to the use possession and enjoyment of their country including all waters and land within the area of the application subject to and in accordance with the customs and laws of the Euahlay-i Dixon clans.

The current proceedings were brought by Mr Wilson, a current lessee of a Western Lands Lease. The lease was granted 'in perpetuity' under s23 of the WLA. It was first registered on 16 March 1955. The leased land was within an area that had previously been granted under the *Crown Lands Act 1884* (NSW) as a pastoral lease.

Mr Wilson sought clarification whether the Western Lands Lease conferred a right of exclusive possession and, if yes, were any native title rights and interests which may involve presence on the land extinguished or suspended by the grant. In effect, a finding in favour of Mr Wilson would exclude the lease from the claim area.

This was the conclusion of the High Court in *Fejo* in relation to freehold.[10] Common law leases, since *Mabo*[11] are thought to also fall into this category; and acts that satisfy the criteria of 'previous exclusive possession acts' under s23B of the *Native Title Act 1993*

[9] The application has since been amended to include additional applicants and refine the native title group definition. Amendments were also made to expressly exclude exclusive possession leases, as defined by the NTA as amended in 1998.

[10] *Fejo v NT* (1998) 195 CLR 96.

[11] *Mabo v Qld* (1992) 175 CLR 1, at 69.

(Cth) (NTA) would also make a determination of such separate questions possible.

Applicable Law: NTA Pt 2 Div 2B

In contrast to the Federal Court, the majority of the High Court held that the application of the 'confirmation of extinguishment' provisions of the NTA (Pt 2 Div 2B) should be the starting point for the inquiry.

The High Court phrased the central question as 'whether the lease conferred upon the lessee a right of exclusive possession over the subject land, within the meaning of s23B(2)(viii) and s248A of the NTA'. If it does then by operation of ss23B and 23E of the NTA and s20 of the *Native Title (New South Wales) Act 1994* (NSW) (State Native Title Act), the grant of the lease is a previous exclusive possession act (PEPA). It completely extinguishes native title and the extinguishment is taken to have happened when the act was done.[12]

The lease must fall within one of the eight categories specified in s23B(2)(c). That list includes scheduled interests, freehold estates and exclusive agricultural or pastoral leases or any lease that confers a right of exclusive possession.[13]

Section 242(1) defines a 'lease' for the purposes of s23B(2)(c) to include any equitable lease, any contractual arrangement that is said to be a lease and anything that is described or declared by legislation as a lease. The definition of a lease in the NTA expands the reach of the confirmation provisions beyond the meaning of a 'lease' under general law.

The schedule of extinguishing acts contains some of the Western Land Leases, including those identified for the purposes of agriculture but those limited exclusively to grazing purposes were specifically omitted. Thus, the inclusion of these leases within the categories of PEPA relies upon their status as a 'exclusive pastoral lease' (s23B(2)(c)(iv)) or any lease that confers a right of exclusive possession (s23B(2)(c)(viii)).

The WLA authorises the Minister to grant 'leases in perpetuity'. Such leases therefore fall within the definition in s242(1). If it was shown that the lease confers exclusive possession, the lease would fall within either category (iv) or category (viii) of s23B(2)(c).

Statutory interpretation

Gleeson CJ gave separate reasons, agreeing with the majority joint judgment of Gaudron Gummow and Hayne JJ. The Chief Justice however, made specific comments about the statutory interpretation and the clear and plain intention test. His Honour confirmed that where a law or act creates rights in third parties over land that are inconsistent with the anterior native title rights, native title is extinguished to the extent of the inconsistency. Extinguishment results from the inconsistency. No inquiry is required into any specific intention to extinguish. The only question of intention to be discerned in this case, it was said by Gleeson CJ, was whether there was an intention to grant exclusive possession.

Therefore, the Chief Justice notes that statutory interpretation and matters of intention may be relevant in determining whether an act created rights and interests inconsistent with native title. This appears to have been an important device for the Court in reaching its conclusions as to the construction of the Western Lands Leases. Gleeson appeared to reject the view that any consideration of the impact on Indigenous peoples' native title rights may have a bearing on construction.[14] Rather than reading down the provisions of the interest to ensure no unnecessary trenching upon the rights of native title holders, the Court sought to give effect to the intention of the

[12] Per Gleeson CJ [3] summarising the question as posed by the majority. The provisions also concern previous *non*-exclusive possession acts, which only partially extinguish native title.

[13] The terms pastoral lease and exclusive pastoral lease are defined in the NTA (s.248 and 248A).

[14] Cf Gaudron J in Wik (1996) 187 CLR 1 at 154 per Gaudron J.

legislature to give these leases the 'essence of freehold'.

Western Division Leases in Perpetuity

The WLA s23(1)(a) allowed the Minister to grant Leases of Crown land as a lease in perpetuity or as a lease for a term. The rationale behind the idea of a lease in perpetuity was to strengthen the class of tenure to ensure lessees could obtain adequate finance on the security of their leases. (see discussion [71-73])

A consideration of whether the grant is to be considered an exclusive possession act for the purposes of the NTA, did not require the Court to reach a conclusion as to whether some or all of the different classes of lease in perpetuity were also in law grants of fee simple. The question in this case was whether the extinguishing effect was the same.

However, in aligning the lease in perpetuity so closely with the fee simple, the Court effectively pre-empted the answer to its question. The Court did not distinguish the fact that granting a lease in perpetuity goes to the length of the tenure, not the incident of exclusive possession. The fact that a perpetual tenure provided greater security for financiers is not based on the extent of the tenure but its permanency.

Indeed Callinan J, arguing that perpetuity should not suggest something less than a lease, acknowledged that the arrangement provides certain advantages for the Crown that freehold cannot, in controlling the uses to which the land could be put and securing rents rather than taxes.[204] The development of a lease in perpetuity allowed for an interest that, like freehold would last 'forever', but could remain subject to conditions and reservations. The High Court acknowledged that the number and scope of those incidents had expanded over time.

These reservations had led the Full Federal Court to conclude that the lease was not substantially different from that considered in *Wik*.[15] They found sufficient indicators of the possibility of co-existence of native title rights and the lease. The majority in that Court had held that the WLA specifically provided for leases in perpetuity for limited purposes of grazing. The limited purposes therefore allowed the continued enjoyment of some though not all native title rights and interests.[16][112]

Nevertheless, by aligning the tenure so closely with fee simple rather than other statutory grazing or pastoral leases, the High Court was able to make a presumption of inconsistency in line with freehold rather than looking more closely at the terms and conditions of the grant.

Thus the High Court confirmed that the Western Lands Lease in perpetuity is a lease within the meaning of s242 which upon its proper construction confers upon the lessee the 'essence of a freehold', including the rights of exclusive possession. Section 20 of the State Native Title Act thus mandates complete extinguishment.

Compensation

The High Court drew attention to the compensation implications of s23J of the NTA. [50-51] They highlighted that compensation arises apart from the common law and the operation of the *Racial Discrimination Act 1975* (Cth) (RDA). Section 23J provides for compensation to be payable where extinguishment occurs directly as a result of the operation of the validation and confirmation provisions. That is, compensation is payable where extinguishment by virtue of the operation of the NTA or state acts exceeds that which would have occurred under the general law.

The Full Court of the Federal Court and the High Court reached different outcomes when beginning from two different starting

[15] (2000) 97 FCR 453 at 484.

[16] The lease also contained other reservations to the Crown. Of particular importance, the Court noted the reservation on the lessee's right to take timber and stone.[115-6]

points – the common law versus the statute. This may indicate that the conclusion, that the leases grant exclusive possession, has been influenced by the introduction of the statutory scheme for confirmation of extinguishment. However, as the Western Division Leases were not scheduled interests, the question of exclusive possession remained the substance of the inquiry in both instances.

The process of bringing Western Division Leases within the Torrens titles system was formalised by an amendment to the *Real Property Act 1900* (NSW) in 1980, after the introduction of the RDA. The holders of registered leases were issued with a certificate of title and received the benefits of indefeasibility under the Real Property Act.[17] The impact of the creation of indefeasible title through registration on any persisting native title rights and interests, may therefore have possible compensation implications.[83]

Broader significance

The 'perpetual lease', this paradoxical tenure, as the Court described it, was not unique to NSW. The Court in *Ward* attributed the same reasoning to a permit to occupy and to certain leases in relation to the Keep River National Park.[432] It should be noted however, that in the latter case, the non-extinguishment principle applied as the tenure was one concerned with nature conservation.[448]

The Martu Native Title Determination

by Michael Rynne[18]

"They remain one of the most strongly "tradition-oriented" groups of Aboriginal people in Australia today partly because of the protection that their physical environment gave them against non-Aboriginal intruders. It is not a welcoming environment for those who do not know how to locate and use its resources for survival. Of great importance is the continuing strength of their belief in the Dreaming."[19]

With such a finding the Martu people may well have believed that recognition of their native title rights and interests was well overdue when Justice French made the consent determination at Pungurr rockholes on 27 September 2002. The partial determination was one of exclusive possession over 136,000 kilometres of unallocated Crown land in the West Australian desert; remaining areas are subject to further mediation. The application had not been programmed to trial nor the Court approached to cease mediation. Consequently the incentive for agreement was primarily the will of the parties to resolve relevant issues.

History of Proceedings

The application was lodged on 26 June 1996 for and on behalf of the Martu people who comprised the descendants of groups representing 12 language areas in the western desert of Western Australia. The initial native title representative body (NTRB) was the Western Desert Puntukurnuparna Corporation. Subsequently the Ngaanyatjarra Council assumed NTRB responsibilities for the claim as a consequence of the 1999 NTRB re-recognition process.[20]

Other parties were the State, mining entities with productive mining and exploration interests, local government and Telstra. One claim already existed to part of the area and other overlapping claims were soon lodged; various sub groups of the Martu made claims, the northeastern corner was subject to an overlap with the Ngurrara people and the Ngalia people claiming a small area in the south.

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[17] The Leased Land in question was brought under the RPA and a computer folio (the modern equivalent of certificate of title) was issued in April 1987.

[18] The author is a Barrister who has represented the Martu people since 1998.

[19] French J at para 8 of the Court's reasons for determination.

[20] The application area fell partly within three NTRB areas: Pilbara, Kimberly, and Central Desert.

A threshold to the commencement of formal mediation was the State's satisfaction that the overlapping claims were resolved and that the applicants native title rights and interests were supported by some evidence. Long standing political associations were an important part of resolving the overlapping claims amongst the Martu in favour of supporting one native title application.

The overlap with the Ngurrara people was somewhat different. Since the 1960s the Ngurrara people's identity as a group separate to the Martu was maintained by each looking to different Indigenous and non-Indigenous service providers. While members of each group were descended from the original inhabitants, interaction was primarily limited to cultural ties to the overlap area and some family associations. Resolving this overlap was possible by directing the text of any determination to reflect this association. Once resolved the Ngurrara people withdrew their separate claim to the overlap area, became a party to the Martu claim, and were recognised as holding the same rights and interests with the Martu in the previously overlapped area.

The Ngalia overlap area was excised from the determination application. The reasons for dealing with this small overlap in such a way are outlined in *James on behalf of the Martu People v State of Western Australia* [2002] FCA 849 (2 July 2002).

While resolving the issue of overlapping claims the applicants submitted an anthropological report (connection report) to the State seeking to address relevant criteria. The process of consideration and final acceptance of the report took some time and once the consent of the parties had been secured it was filed with the Federal Court.[21]

After the connection report was accepted, the mediation with other parties moved forward. The mediation process was lengthy and technical. It was also the only option that the applicants would contemplate – the Martu had considered it a sign of great disrespect that they would be required to litigate recognition of their rights. Additionally the mediation proceeded in a somewhat uncertain environment with the High Court yet to hand down its decision in *Western Australia v Ward* (2002) 191 ALR 1 (*Ward*); this impacted on pre-1994 mining leases.

As agreement became imminent and all parties to the application were required to consent to the determination it became apparent that the issue of parties who had not participated in the mediation process for various reasons had to be addressed. Application was made to the Federal Court to make orders deeming parties as only those who filed a notice of address for service. Orders were subsequently made.[22] One party inadvertently failed to file a notice and sought rejoinder. While that application was unopposed and granted, it was apparent that parties who failed to comply with such orders should not expect rejoinder without sufficient reasons.

It then became a case of expect the unexpected. After agreement in principle had been reached and the text of the agreement was being settled, the High Court handed down its decision in *Ward*. Consequently the determination made reflected that pre-1994 mining leases, vested and unvested reserves, and an area of unallocated Crown land that was excised from a national park would not form part of the determination area. These areas remain subject to mediation.

The conclusion of the determination (albeit only partially, but nonetheless over a large tract of land) represented the culmination of a 25-year struggle of the Martu for recognition of rights to their traditional lands.

Notably the determination was achieved while working clearly within the process established in the Native Title Act of mediation as a precursor to judicial proceedings. From my perspective, commencing a proc-

[21] Judgment para 5.

[22] *James on behalf of the Martu People v State of Western Australia* [2002] FCA 849 (2 July 2002).

ess of mediation in the context of litigation was not to be viewed as anything remarkable. Attempting to settle litigation through mediation is standard practice in a contemporary legal system that recognises the benefits of parties owning the outcome of a dispute. Perhaps native title mediation is remarkable for two reasons. The first is recognising that it is as much concerned with identifying the dispute as it is with settling it. Second, even where connection is not substantially at issue, the process of resolving recognition is probably as demanding as litigating – if not more so in the case of multiple tenures and overlapping claims – but nonetheless demanded in order protect and enhance social capital with the ancillary benefit of minimising litigation time and money.

The Determination

The determination appears in the reasons of Justice French of the Federal Court in *James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208 (27 September 2002).[23] For present purposes this paper is confined to what is does recognise and an illustration of how that interacts with other interests.

The rights and interests recognised were:

(a) the right to possess, occupy, use and enjoy the land and waters of the determination area to the exclusion of all others, including:

(i)the right to live on the determination area;

(ii)the right to make decisions about the use and enjoyment of the determination area;

(iii)the right to hunt and gather, and to take the waters for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual, ceremonial, and communal needs;

(iv)the right to control access to, and activities conducted by others on, the land and waters of the determination area;

(v)the right to maintain and protect sites and areas which are of significance to the common law holders under their traditional laws and customs; and

(vi)the right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners of the determination area;

(b) the right to use the following traditionally accessed resources:

A. ochre;

B. soils;

C. rocks and stones; and,

D. flora and fauna

for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs;

(c) the right to take, use and enjoy the flowing and subterranean waters in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs, including the right to hunt on and gather and fish from the flowing and subterranean waters.

Some commentators choose to describe those rights listed at (a) above as "exclusive" and those at (b) & (c) as "non exclusive". Of themselves the individual rights should not be seen as exclusive or non-exclusive. Rather my preference is to adopt a view of the late Ron Casten QC who opined that one merely looks at all of the rights and interests recognised and determines if their sum total equates to exclusive possession. Adopting that view, paragraph (a) is seen as representing an example of the rights considered as founding exclusive possession.

Native title is subject to laws of the State, Commonwealth and common law. How this works in practice is illustrated in the second schedule of the determination that reads in part with my emphasis:

[23] Readily accessed at www.austlii.edu.au

For the avoidance of doubt in respect of the relationship between the native title rights and interests described in paragraph 5 and the rights of holders of the mining leases set out above, **the rights conferred by the mining leases are exclusive rights to conduct mining operations** on the areas the subject of the mining leases.
The later rights **prevail over the native title rights and interests and their exercise is wholly inconsistent** with the continued exercise by the common law holders of their native title rights and interests on those areas of the mining leases **where mining operations are conducted,** while the mining leases or any renewal of them are is in force.

The text thus identifies that it is the mining operations as conducted on the leases that prevail over the exercise of the native title rights and interests. Mining operations was defined in the paragraph 1 as:

"mining operations has the meaning given to that expression by the Mining Act 1978 (WA) and includes the construction of roads, tracks or other crossings".

Rights of access and enjoyment of existing roads by the public and interested parties was included and highlighted by the use of maps that illustrated many of the existing roads within the determination area.

At all times in seeking a determination by consent the parties were mindful that agreement is not of itself a complete guarantee that the Federal Court will make a determination. Justice French in his reasons noted that the parties' agreement is but one matter that the Court needs to take into account in considering if the determination can be lawfully made. Others included the determination being fair and just and some evidence that justifies a finding of connection.

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CONFERENCE REPORTS

Genealogies Workshop, AIATSIS, Canberra, 5-6 October 2002

Report by Patrick McConvell and Grace Koch

It has become obvious that the products of commercially available software for constructing genealogies are not meeting the needs of researchers and Indigenous communities.

In order to examine some of these issues, a workshop on Genealogies was held at AIATSIS on 5-6 October. Its purpose was to examine software being used by researchers and Indigenous communities for Native Title, Family Separation and Family History. Approximately 40 people attended the workshop. Representatives came from Aboriginal communities, land councils, native title representative bodies, universities, and regional authorities.

The first day was spent on discussions of what software is available and the types of functionality that Native Title, Family Separation and Family History units and projects require in a computer package for working with genealogies. Central Land Council representatives displayed their use of the Progeny program. The second day brought two presentations that crystallised the thinking on functionality, providing solutions to many of the problems raised the previous day. John Burton, from the Torres Strait Regional Authority, drew upon his experience in computer science and his work with large-scale genealogies to list the requirements of genealogical databases. Next, Prof. Shigenobu Sugito and Sachiko Kubota demonstrated their program, ALLIANCE. Its development has been financed by the Japanese government. They had produced genealogies tailored to the cultural needs of the Galiwin'ku community in Arnhem Land. Community member Elaine Guyman and

teacher Kaye Thurlow demonstrated their database being used at Galiwin'ku.

After discussion, the meeting put forward the following resolutions:

1. That we commend the work of Prof. Sugito, Dr Sachiko Kubota and their team and look forward to further cooperation with him and to give him any written support that he may need to continue his work with genealogies.
2. To formulate a list-serve for delegates' use in contacting one another.
3. To explore the feasibility of creating a national catalogue of genealogies.
4. To recommend that AIATSIS take a leadership role in policy development in the area of genealogies.
5. To recognise the importance of the national role of the AIATSIS Family History Unit and their importance in the conservation and dissemination of genealogies and training in genealogical methods.
6. That AIATSIS create a position of at least six months duration to review current practices in genealogical research in Indigenous communities; to describe the needs for genealogical software, training personnel, ethics and to recommend measures to meet these needs.
7. To initiate discussions with ATSIC about the need for a national initiative on Indigenous genealogies as part of their program on capacity building (including IT), consisting of improving existing software and training in collection and collation of genealogical information.
8. That AIATSIS publish the papers as agreed by the delegates.

Website and email list

As a result of the workshop an "Indigenous Genealogies" website (ATSIGEN) has been set up at www.ausanthrop.net/atsigen with an associated ATSIGEN e-mail list which can be subscribed to by clicking on 'Moderator' on the website.

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Custom: The Fate of Non-Western Law and Indigenous Governance in the 21st Century, ANU, Canberra, October 1-2

Organized by James Weiner, Francesca Merlan, Katie Glaskin and Andrew McWilliam

Report by James Weiner

The ground-breaking studies of the "invention of *kastom*" in the South Pacific by Australian-based anthropologists such as Tonkinson, Jolly, Keesing and Thomas in the 1980s did much to cement Australia's key role in the analysis of evolving Indigenous tradition in the Asia-Pacific region. But since that time, *kastom* itself has become more and more codified under developing and increasingly sophisticated national regimes of customary law. How has this affected the moral and judicial force of customary law at the local level? How have courts, both national and international, come to play an increasingly decisive role in the adjudication of custom, culture and local governance in this part of the world (as well as elsewhere)? What will be the evolving relationship between anthropology, political science and law under these conditions?

In both Papua New Guinea and Australia, landmark court cases such as *Wik*, *Yorta Yorta*, *Hides Gas Project*, and *Gobe Land Dispute* are establishing legal precedents for the description and adjudication of Indigenous customary ownership of land, while other cases such as *Bulun Bulun* are reconfiguring what we take to be property relations in societies which traditionally had a very different understanding of individual or private property and its ownership.

Stimulated by the extent to which Australian courts were being called upon to define these issues in recent native title cases in Australia, a workshop was held in Canberra in October 2002. Supported by UNESCO Australia, the Academy of Social Sciences in Australia, and the National Institute of Social Sciences, ANU, it brought together anthropologists, lawyers and legal scholars

working in the fields of Indigenous societies in Indonesia, the Pacific and Australia to address the above questions and others pertaining to non-western law, governance and the intersection of law, culture and politics.

Papers were presented by Colin Filer, Lawrence Kalinoe, Dionisio Soares, Andrew McWilliams, Jeff Sissons, Graham Neate, Tony Connolly, James Weiner, Francesca Merlan, Bruce Rigsby, David Martin, Lynette Blucher, Ben Smith and Susan Phillips. In addition, Ian Keen, Nic Peterson, Toni Bauman and Jon Altman acted in the roles of session convenors.

Although a wide range of topics relating to law and custom throughout the region were examined, there was a focus on recent developments in judicial understandings of tradition in the Australian native title arena. Many of the papers addressed some aspect of the evolving definition of tradition in contemporary Aboriginal land-holding communities.

The workshop was highly successful in its avowed goal—to promote a sophisticated and theoretically informed dialogue between anthropologists and legal practitioners and scholars on the intersection of legal and anthropological contributions to the definition of culture and tradition. The papers are currently being co-edited by Katie Glaskin (kglaskin@cyllene.uwa.edu.au) and James Weiner (james.weiner@anu.edu.au) for submission for publication.

Archaeology & Linguistics conference, Arcling II, National Museum of Australia, Canberra, 1-4 October 2002

Report by David Nash

The second Archaeology & Linguistics conference, Arcling II, was held at the NMA, 1-4 October 2002. Abstracts and papers are posted at http://crlc.anu.edu.au/arcling2/

There were papers in historical linguistics, and archaeology, exploring methodologies and case studies and looking for links between the two discplines. While none addressed Native Title explicitly, a number of papers deal with themes of relevance to Native Title connection reports and generally evidence of continuity and particular people-land connections.

Australian Anthropological Society Annual Conference 2002, Anthropology and Diversity: Disciplinary and Practice Perspectives, 3-5 October 2002, ANU, Canberra

Report by Benjamin R. Smith

This year's Australian Anthropological Society annual conference, on the theme of 'Anthropology and Diversity: Disciplinary and Practice Perspectives', included a number of papers of relevance for Native Title practitioners, and for anthropologists and others working in Indigenous Australian contexts more generally. More details are available on the conference website http://www.aas.asn.au/2002conf.htm

The majority of the relevant papers from the three parallel streams of the conference were given in the *Articulating Culture* session co-convened by Melinda Hinkson, David Martin and myself. The session attracted a wide range of papers almost exclusively dealing with Australian material, which sought to analyse the increasingly substantial interweaving of Indigenous and non-Indigenous lifeworlds across Australia, and move beyond the still-widespread anthropological circumscription of Indigenous communities which fails to elucidate the interactions through which these communities are reproduced. The papers presented were of a high quality and we are now seeking to publish an edited volume based on the session.

Papers at the session included a number of contributions from current or former em-

ployees of NTRBs alongside a number of others working as Native Title consultants or conducting academic research on Aboriginal organisations. The papers ranged from theoretical engagement with notions of the 'intercultural' (e.g., Francesca Merlan, Patrtick Sullivan), through studies of particular situations of interculturalism, for example, the papers given by Sarah Holcombe on the Luritja management of the state or Julie Finlayson's analysis of case studies of governance issues in Indigenous organisations, to the analysis of interpersonal relationships, including Tony Redmond's paper on mutualities and dependencies in the pastoral north Kimberley region of Western Australia. Many of the papers also provided provocative intellectual challenges to current rhetoric, including Nic Peterson and John Taylor's paper on 'secular assimilation' in New South Wales. Papers from other conference sessions dealt with issues of Indigenous violence, public discourse and current challenges to self-determination (Gillian Cowlishaw) and issues of anthropological analysis of Aboriginal kinship (e.g., Laurent Dousset, Ian Keen).

Key issues for those interested in Native Title related to the organisation of formal institutions representing Indigenous interests (e.g., David Martin and Bruce White's papers) which highlighted the important role of anthropological analysis in 'practical' or 'applied' contexts and extended current concerns with governance in Indigenous organisations, a theme also developed in Jeff Stead's keynote address to the conference which preceded the conference dinner.

Broadly, the conference pointed to the continuing role of anthropology both in Native Title practice and in the critique of the contemporary situation of Indigenous people within the Australian nation-state, highlighting continuing marginalisation, as well as the growing complexities of Australian Indigenous lives that remain masked by the essentialising ascription of difference.

NATIVE TITLE IN THE NEWS

National

The Gladstone Regional Art Gallery and Museum officially opened the exhibition Native Title Business, which will travel around Australia over the next three years promoting understanding, communication and reconciliation. Works include paintings, prints, photography, mixed media, installation, carving, textiles and ceramics. The exhibition was opened by Richard Johnson, executive board member of the Gurang Land Council. *Gladstone Observer, 10 October 2002.*

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Around 400 people went to Geraldton in Western Australia for the annual Native Title Conference 2002. The conference hoped to hear from Indigenous communities about the success and failures of the native title process. Aboriginal delegates of the conference spoke of their resentment of the Native Title Act. They called a meeting exclusively for Aboriginal people, in which they decided to establish a national working party to provide an Aboriginal response to the Act and its problems. Aboriginal and Torres Strait Islander Chairman Geoff Clark said that ATSIC would fund the national working party. *Mid-West Times (Geraldton), 4 September 2002. West Australia, 6 September 2002.*

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Northern Territory

In early September the first native title claim over land in a capital city reached the Federal Court. The claim by nine Larrakia families covers 575 sq kms of Crown land in Darwin and Palmerston. The case has been set down for 10 weeks, with Justice John Mansfield to hear evidence from the Larrakia. *Economist, 7 September 2002. Geelong Advertiser, 3 September 2002. The Australian, 3 September 2002.*

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Fifty national parks in the Northern Territory have been made invalid because of the High Court's decision in the *Ward* case which held invalid the 1981 declaration of the Keep River National Park, on the Western Australia border. The finding means that all parks created between 1978, the time of self government, and 1998, the time of the native title amendments, are invalid. The government's advisers said that if Aboriginal people wanted to test native title in any of the parks, they would almost certainly win. *The Australian, 26 October 2002. ABC Indigenous News, 25 October 2002.*

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Western Australia

The Wutha native title claim group has joined the Ngalia people in condemning an application by mining company WMC Resources to destroy heritage sites, under s18 of the *Aboriginal Heritage Act 1972* (WA). The State's Aboriginal Cultural Materials Committee has been called upon be the Ngalia people to adjourn a decision on the WMC application until further anthropological assessment can be carried out over the area which falls within the Barr Smith Ranges. *Kalgoorlie Miner, 5 October 2002*

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The nation's largest native title determination has formally recognised the Martu people in Western Australia's remote Pilbara region as owners of their land. The Martu people lodged a native title claim in 1996 covering 220,000 sq kms of the Western desert, including Rudall River National Park. However, the park was left out of the determination because of the recent High Court *Ward* decision which ruled that the vesting of a reserve can extinguish native title. The determination will recognise the Martu people's native title rights over 136,000 sq kms, with the right to hunt and gather on their lands, and use natural resources such as ochre, soils, flora and fauna. The Martu people will not have ownership of petroleum and minerals, and public access to the historical Canning Stock route will be preserved. *The Australian, 25 September 2002.*

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The State Government has endorsed new native title guidelines that it hopes will enable claimants to make a realistic assessment of their chances for success. With 130 outstanding native title claims across Western Australia, the Government is hoping the new guidelines will expedite their resolution. The guidelines come from a key recommendation of the 2001 native title review. The guideline are available via the web at www.ministers.wa.gov.au. *Geraldton Guardian, 9 September 2002. Kalgoorlie Miner, 9 September 2002.*

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The Minister for Indigenous Affairs Phillip Ruddock has ordered an investigation of the native title representative body Yamatji Land and Sea Council. The YLSC is the first NTRB to be investigated as such under section 203DF of the Native Title Act. The legislation says to order an investigation "the Commonwealth Minister (must be) of the opinion that there is or may be, (a) serious or repeated irregularities in the financial affairs of the representative body, or (b) a serious failure to perform its functions." *Geraldton Guardian, 11 October 2002.*

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After almost two years of meetings and negotiations the Ballardong people and the Central West people, who had native title claims over the Windarling and Mt Jackson area in Western Australia, have come to an agreement with Portman Limited. The agreement is key to moving forward with the company's iron ore growth strategy. *Mining Chronicle. 1 September 2002.*

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Pandawn descendants and Widi Mob claimant groups have joined together to sign an agreement to protect Aboriginal heritage in land over which they have a shared claim. The two groups failed to meet the native title registration test, which means that they do not have the right to negotiate over special places. Neil Phillips, spokesperson for the Pandawn people, said he believed that under the Heritage Act potential developers

had to consult all claimant groups registered or not. Yamatji Land and Sea Council executive director Roger Cook said the Heritage Act was enacted in 1972 and therefore did not take native title into account. *Mid-West Times (Geraldton), 4 September 2002.*

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Queensland

Six Torres Strait Island native title hearings which were to be held in September, will now be held in March next year. The Federal Court will visit the Ugar, Erum, Boigu, Iama and Badu Islands. *Koori Mail, 4 October 2002, Torres News, 20 September 2002.*

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The Ewamian people have lodged a native title claim over 29,000 sq km of their traditional country, including Oak Park, Mt Surprise and Georgetown. About 60 pastoral stations are in the claim area. Four meetings have been conducted between the Ewamian people and the pastoralists. The Ewamian people informed the pastoralists of their aspirations in regards to the pastoral stations: to be recognised as traditional owners and have access to hunt, fish and camp; collect bush tucker and bush medicine; protect sites of significance; collect didgeridoo sticks; and, if possible, create training opportunities for young Ewamian people. The Ewamian people also said that it was very important for the strength and vitality of the whole community that every person's right is recognised and respected. *Koori Mail, 2 October 2002.*

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Comalco is being accused of ignoring the native title rights of Gladstone's traditional owners with regards to the site of a new $1.54 billion refinery which is being built at Yarwun. Mr. Kerry Blackman who was speaking on behalf of the Port Curtis Coral Coast native title claimants said that the company was refusing to negotiate an Indigenous Land Use Agreement. A spokesman for the Comalco company said that the company recognised the relationship traditional owners had with the land and that they have entered into discussions with the traditional owners in relation to their needs and aspirations. *Gladstone Observer, 24 September 2002.*

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With the recent 10 anniversary of the High Court's decision on the *Mabo* native title claim, the James Cook University has announced that, in partnership with the National Native Title Tribunal, a Native Title Studies Centre is to be established. Cairns is to receive the native title centre of excellence. It is the first time in Australia that any state and the National Native Title tribunal have entered into an agreement with a university for the establishment of such a centre. The State Government is the other partner contributing $260,000 to the centre over a five year period. *Cairns Post, 25 September 2002.*

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After three years of negotiation the Matrix Metals company and the Kalkadoon people of north west Queensland have signed an Indigenous Land Use Agreement. *North West Star (Mt Isa), 29 October 2002. Townsville Bulletin, 29 October 2002.*

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New South Wales

Last year a group within the Barkangji Indigenous community made an attempt to have Dorothy Lawson and her son Phillip Lawson stuck off as native title registrants. Now they are making their second attempt to do the same thing. Previously Justice Margaret Stone of the Federal Court refused the request and endorsed the existing situation. The new hearing was set to take place at the Sydney Federal Court on 28 October 2002 and will be held before Justice Stone. *Mildura Independent Star, 8 September 2002.*

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Victoria

The registration of a land use agreement by the National Native Title Tribunal, over a boat harbor to be built at Blairgowrie, on the Mornington Peninsula, has sparked court action by some of Tasmania's most

prominent Aboriginal families. The Tasmanian families are trying to prove that their ancestral home includes top Victorian real estate. A spokesperson for the Victorian Bunurong group said most 'authentic' Bunurongs lived in Tasmania because their forebears were kidnapped and taken to the Bass Strait Islands early in the 19th century. *West Australian, 9 September 2002.*

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Over 12,000 people, groups or associations have registered an interest in the Gunai/Kurnai application for native title over lands and seas in eastern Victoria. Public notice ends on 6 November 2002, for people wishing to participate in the mediation process. East Gippsland Shire chief executive Joseph Cullen said that mediation is likely to occur in mid 2003 and will be facilitated by the State government's Native Title Unit. *Bairnsdale Advertiser, 6 September 2002.*

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The Victorian Government has reached an in-principle agreement for what is likely to be Victoria's first native title determination over almost one million hectares in the Wimmera region. The agreement recognises the Wotjobaluk people as the descendants of the traditional owners of the Wimmera. The agreement will recognise the Wotjobaluk people's right to hunt, fish, gather and camp along the banks of the Wimmera River. Freehold title to three Crown allotments totaling 45 hectares, which the Wojobaluk people have a cultural and historic connection with would also be returned. *Age, 26 October 2002. ABC Indigenous News, 25 October 2002.*

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The Dja Dja Wrung/Wharung people have asked for their rights to be recognised over land totaling 18.2 sq km. The areas covered in the application are located in Central Victoria: north of Ballarat, west and east of Bendigo and south of the Pyrenees Hwy near Maryborough. People with interests in land covered by the native title application have been called to register for talks with the National Native Title Tribunal. People wishing to become a party to the application have until 17 December 2002 to apply to the District Registrar of the Federal Court. *Ballarat Courier, 18 September 2002.*

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APPLICATIONS

The National Native Title Tribunal posts summaries of registration test decisions at www.nntt.gov.au. The following decisions are listed for September/October. The first number following the name is the NNTT Application Number, the second is that of the Federal Court. If an application has not been accepted, this does not mean that native title does not exist. The applicants may still pursue the application for the determination of native title. If an application does not pass the registration test, the applicant may seek a review of the decision in the Federal Court.

Buchanan Downs	DC02/16 D6017/02 **Accepted**
Bidwell Clan	VC02/1 V6001/2002 **Not Accepted**
West Bynoe	DC02/20 D6024/02 **Accepted**
Victoria River	DC02/22 D6022/02 **Accepted**
Auvergne #2	DC02/23 D6023/02 **Accepted**
Kalkadoon People Combined Application	QC99/32 QC96/12 QC99/10

	Q6031/99		**Accepted**
	Q6029/98	Carnfield Montejinni	DC02/17
	Q6011/99		D6018/02
	Accepted		**Not Accepted**
Pigeon Hole	DC02/26	Tubba Gah People	NC02/9
	D6027/02		N6010/02
	Accepted		**Accepted**
Kudjala #5	QC02/32	Combined Nebo Inland Group	QC02/20-1
	Q6030/02		Q6019/02
	Accepted		**Not Accepted**
Wollogorang North	DC2/18	Mackay Coastal Group	QC02/21
	D6019/02		Q6018/02
	Not Accepted		**Not Accepted**
Labelle Downs	DC02/28		
	D6029/02		
	Accepted		
Killarney	DC02/27		
	D6028/02		

APPLICATIONS CURRENTLY IN NOTIFICATION

Closing Date	Application Number	Application Name
3 December 2002	QC97/55	Iman People #2
	QC00/12	Mitakoodi People #2
	QC01/45	Yarpar and Uttu
	QC01/42	Torres Strait Regional Sea Claim
	QC01/44	Garboi
17 December 2002	VC99/9	Dja Dja Wrung/Whurung People
	QC02/27	Ngarragoonda
12 Feburary 2002	NC02/7	Tubba - Gah People
	NC02/7	Wonnarua People

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

RECENT PUBLICATIONS

Indigenous Futures: Choice and Development for Aboriginal and Islander Australia

by Tim Rowse, UNSW Press, 2002.

Unlike those who uphold 'cultural diversity' or 'socio-economic equality' as the objectives of Indigenous policy, in this book Tim Rowse argues that 'Indigenous choice' is a more fundamental and more widely shared political value. This publication examines the strengths and weaknesses of the Centre for Aboriginal Economic Policy Research's social scientific representation of 'Indigenous interest'. Part 2 of the publication is on 'Land, Sea, and Economic Development', and includes short chapters on hunting,

gathering and toursim; mining incomes; native title; and, representing the land-owner interests. The chapter on native title reviews CAEPR's research which focusses on the economic potential of the new 'land tenure' native title, and mentions issues such as the [re] codification of traditional laws, the negotiation of resources and income, and the emergence of new political insitutions.

Annual Reports available

The Annual Reports for the following organisations are now available:

- *Indigenous Land Corporation* – available by contacting the ILC on 08 8216 4100, or by accessing it thriough the ILC website at www.ilc.gov.au

- *ATSIC* – available thriough the ATSIC website at www.atsic.gov.au

- *National Native Title Tribunal* – available for $20 plus postage by contacting the NNTT on 1800 640 501 (or on CD-Rom for free), or by accessing it through the NNTT website at www.nntt.gov.au

NATIVE TITLE RESEARCH UNIT PUBLICATIONS

Land, Rights, Laws: Issues of Native Title

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

Volume 2

No. 18 *Diaspora, Materialism, Tradition: Anthropological Issues in the Recent High Court Appeal of the Yorta Yorta*
James F Weiner

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

No. 16 *The International Concept of Equality of Interest in the Sea as it Affects the Conservation of the Environment and Indigenous Interests*
Sir Anthony Mason

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

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

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

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

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

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

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

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

No. 7 *The Content of Native Title: Questions for the* Miriuwung Gajerrong *Appeal*

Gary D Meyers

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

No. 5 *Limitations to the Recognition and Protection of Native Title Offshore: The Current 'Accident of History'*
Katie Glaskin

No. 4 *Bargaining on More than Good Will: Recognising a Fiduciary Obligation in Native Title*
Larissa Behrendt

No. 3 *Historical Narrative and Proof of Native Title*
Christine Choo and Margaret O'Connell

No. 2 *Claimant Group Descriptions: Beyond the Strictures of the Registration Test*
Jocelyn Grace

No. 1 *The Contractual Status of Indigenous Land Use Agreements*
Lee Godden and Shaunnagh Dorsett

Discussion papers

Discussion papers are published in concert with the AIATSIS Research Program and are available from the Research Program on telephone 02 6246 1144.

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

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

Monographs

The following NTRU publications are published by Aboriginal Studies Press and are available from the AIATSIS Bookshop located at AIATSIS, Lawson Cres, Acton Peninsula, Canberra, or telephone 02 6246 1186 for prices and to order.

** New publication **

Language in Native Title, edited by John Henderson and David Nash, Aboriginal Studies Press, Canberra, 2002.

> In 14 chapters, this publication advocates for communities and linguists involved as expert witnesses in native title cases, and discusses the analytical methods most productive to presenting evidence of continuity of culture and attachment to land. Papers papers include: 'Linguistic Evidence in Native Title Cases in Australia' by Jeanie Bell; 'Linguistics and the Yorta Yorta Native Title Claim' by Heather Bowe; 'Labels, Language and Native Title Groups: The Miriuwung-Gajerrong Case' by Greg McIntyre and Kim Doohan; and, 'Linguistic Stratiography and Native Title: The Case of Ethnonyms' by Patrick McConvell. Information about the book can be found at David Nash's website: http://www.anu.edu.au/linguistics/nash/aust/lgnt.html

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

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

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

Land, Rights, Laws: Issues of Native Title, Volume 1, Issues Papers Numbers 1 through 30, Regional Agreements Papers Numbers 1 through 7, 1994-1999 with contents and index.

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

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

Earlier publications dating back to 1994 are listed on the Native Title Research Unit's website at www.aiatsis.gov.au, go to the Native Title Research Unit and then click on the 'Previous Publications' link. Orders are subject to availability.

Web Resources

The NTRU has developed a number of on-line resource pages which provide relevant and up to date information regarding specific native title cases and concerns. These pages can be accessed from http://www.aiatsis.gov.au/rsrch/ntru/news_and_notes/

At present there are four resource pages:

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

Papers from the AIATSIS seminar series *Limits and Possibilities of a Treaty Process in Australia* are also available on-line. This series explores issues surrounding the proposal for a national treaty, such as current proposals, past obstacles, Indigenous representation, political and philosophical questions, national identity, reconciliation, belonging, public law implications, and comparisons with other countries. The papers are at: http://www.aiatsis.gov.au/rsrch/seminars.htm

ABOUT THE NATIVE TITLE RESEARCH UNIT

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

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

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

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