National Native Title Tribunal

25 YEARS OF NATIVE TITLE RECOGNITION

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Noongar elders during the negotiation of the South West Native Title Settlement. Source: South West Aboriginal Land and Sea Council

ACCEPTING NATIVE TITLE

1998 – Amendments to the Native Title Act

The legislative reforms proposed following the High Court decision in *Wik* eventually passed through the Senate in July 1998 with the amended Act differing from the Bill in the removal of the proposed sunset clause and the 'softening' of terms of the registration test.

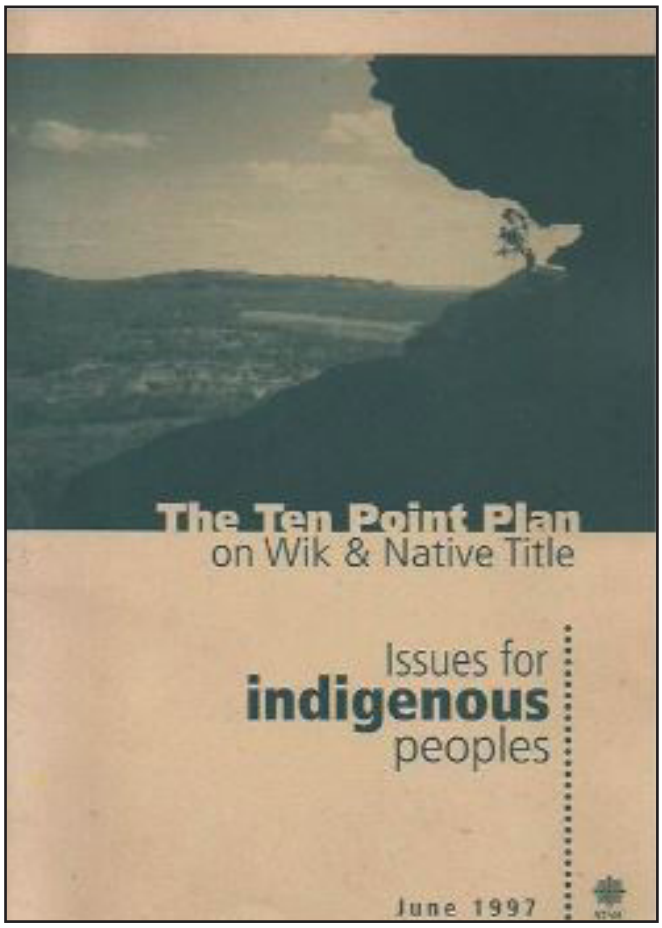
The majority of amendments contained in the *Native Title Amendment Act 1998* commenced operation on 30 September 1998, with the key features being:

- the validation of government acts done between 1 January 1994 and 23 December 1996 (intermediate period acts)
- all native title claims were to commence in the Federal Court of Australia rather than in the National Native Title Tribunal (NNTT)
- the introduction of a registration test for all claimant applications
- the extension of categories of statutory extinguishment
- broadening the scope of future acts that may progress without negotiation with native title holders

ACCEPTING NATIVE TITLE: 1998 - AMENDMENTS TO THE NATIVE TITLE ACT

- the ability for past extinguishment to be disregarded in some circumstances, and
- the introduction of Indigenous Land Use Agreements (ILUAs).

Following the introduction of the Amendment Act, the NNTT was required to apply the new registration test to claims previously lodged and to any new claims lodged with parties determining what information was required to satisfy this new test.



The Ten Point Plan tabled by the Government in 1997, in response to the Wik Decision.
Source: NNTT

Proposed alternative Right to Negotiate regimes

Under s 43 and s 43A of the amended *Native Title Act*, State or Territory governments were afforded the right to establish an alternative right to negotiate procedure, but only if the Commonwealth Minister was satisfied that the proposed alternative procedure provisions met the required criteria.

The Northern Territory (NT), Queensland and Western Australian (WA) governments sought to implement these new provisions through the introduction of new legislation.

The Queensland government was the first government to seek approval for an alternative regime in November 1998 with the *Land and Resources Tribunal Bill 1998*, followed by the NT. Seven of the 13 Queensland schemes proposed survived disallowance in the Senate but were then found by the Federal Court to be invalid. The Full Federal Court subsequently found all seven to be valid. Despite this the Queensland government abandoned the schemes. In rejecting the NT Bill, the Senate cited a failure of the NT Government to obtain the consent of the land councils and the diminution of rights afforded to native title claimants by the proposed legislation.

In October 1998, the WA government introduced similar proposed legislation with the Native Title (State Provisions) Bill 1998, with the stated object to establish a more meaningful, state based future act process.

The alternative scheme under s 43A proposed by the WA government was to apply to acts creating a right to mine and some compulsory acquisitions of native title rights and interests on pastoral lease or reserve land. The legislation also made provision for the establishment of a WA Native Title Commission to oversee the alternative future act process, administration of native title claims and registering ILUAs, thereby replacing the NNTT.

As with the previous two Bills, the Attorney-General determined that the proposed s 43A scheme complied with the provisions of the *Native Title Act*. However, on 9 November 2000, the Senate voted to disallow the determination. Arguments for this disallowance rested upon the argument that the proposed Act diminished the rights of Aboriginal people, particularly in relation to pastoral lands and allowing the Act would diminish consistency across the states in the management of native title.

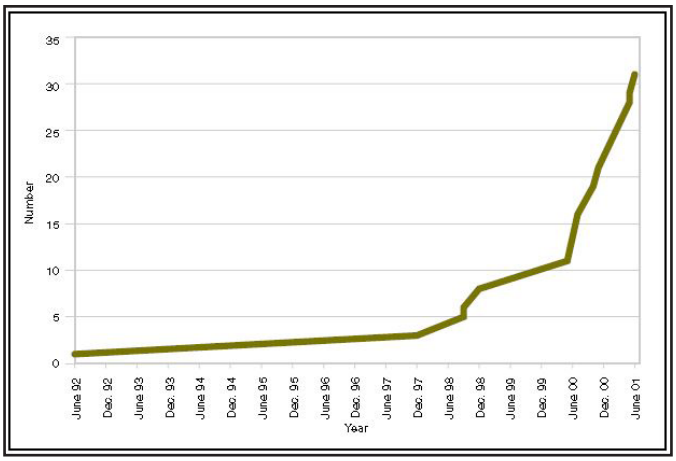
Development of state connection guidelines

As case law clarified the requirements of the *Native Title Act*, governments turned their minds to policy initiatives to assist in the negotiation of consent determinations. One aspect of this was the clarification of government requirements of proof of continued existence of native title.

In 1999, the Queensland Government published its *Guide to Compiling a Connection Report*, which

was the first articulation by a state government of its requirements for agreeing to a determination of native title or for entering into negotiations for the settlement of native title claims.

The Queensland guidelines were followed closely in 2000 by the WA Government's *General Guidelines – Native Title Determinations and Agreements*, the 2001 Victorian Government's *Guidelines for Native Title Proof* and the 2004 South Australian *Consent Determinations in South Australia: A Guide to Preparing Native Title Reports*. Many of these guidelines have been subsequently updated with evolving law and policy environments.

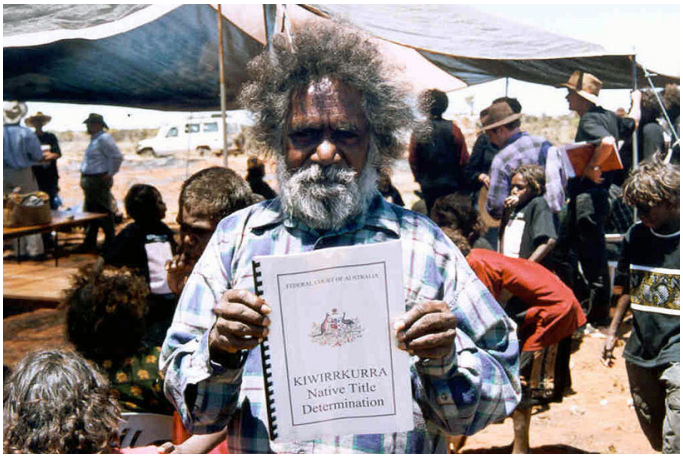


Growth in number of native title determinations (claimant and non-claimant) including proposed, draft and/or conditional determinations to 30 June 2001. Source: NNTT

As noted above, the settlement of a number of important legal principles and technical aspects of the *Native Title Act* by the courts in the years following its introduction provided parties with the necessary guidance to enable them to resolve matters by agreement. Accordingly, post-2000 there was a significant rise in the number of native title applications being resolved by consent.

Some of the consent determinations made during the 2000–2001 period included:

- Gumulgal Mabuiag People (Mabuiag, Aipus, Widul, Warukuikul Talab and Talab (Florence) Islands, Torres Strait)
- Porumalgal Poruma People (Poruma (Coconut) Island, Torres Strait)
- Wik and Wik-Way People (Western Cape York Peninsula, Queensland)
- Spinifex People (Central Desert, WA)
- Kiwirrkurra People (WA)
- Kaurareg People (Ngurupai (Horn) Island, Torres Strait), and
- Tjurabalan People (Tanami Desert, Halls Creek, WA).



A Kiwirrkurra Elder proudly holds the native title determination, October 2001. 28 November 2000. Source: NNTT

Traditional owners at Spinifex native title determination, 28 November 2001. Source: NNTT

2001 - The Wand Report

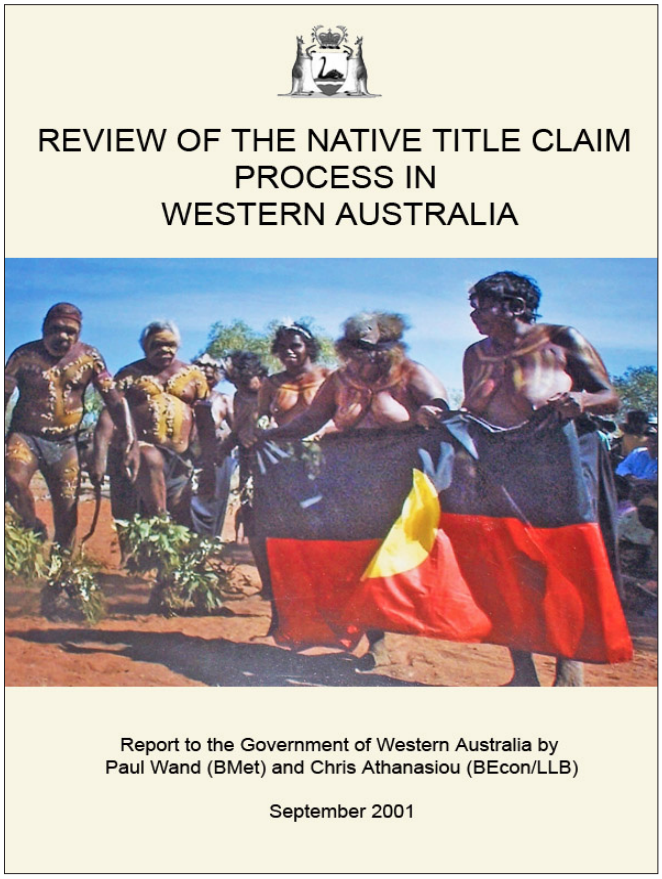
The increasing focus on settlement by agreement was the impetus behind the commissioning of a report by the WA Labor government in 2001: the Review of the Native Title Claim Process in Western Australia by Paul Wand and Chris Athanasiou. The objects of the review were the development of principles to guide the State in native title negotiations and processes governing the production, confidentiality and assessment of connection reports.

Announcing the commissioning of the Review, the Deputy Premier and Minister with responsibility for native title, Mr Eric Ripper, stated that the objective was to set the framework to "speed up the settlement" of native title claims in the State and to "provide the Government with recommendations on the best way to achieve an environment where native title agreements are the norm rather than the exception."

The report recommended, amongst other things, that:

- all registered claims be referred to mediation
- the government give consideration to non-native title outcomes where claimants were unable to establish native title
- amendments to be made to the 'Guide for the Preparation of a Connection Report', and
- all connection materials to be received on a 'without prejudice and confidential' basis.

The recommendations of the Wand Review led to the establishment of a well-resourced, stand-alone Office of Native Title.



Wand Review Report, September 2001

This period also saw a number of key cases heard by the Federal and High Courts, clarifying aspects of native title law, with 2002 being a particularly significant year.

Wilson v Anderson [2002] HCA 29

The *Wilson v Anderson* proceeding considered whether or not native title rights and interests in the Western Division of New South Wales (NSW) were extinguished as a result of the 1995 grant of a lease in perpetuity under the *Western Lands Act 1901* (NSW).

The High Court concluded that the conditions and restrictions on the perpetual lease did not detract from the conclusion that the grant was, in substance, freehold, and therefore gave rise to a right to exclusive possession.

As a consequence of this decision native title was found to have been wholly extinguished over much of the Western Land Division of NSW, which covers some 33 million hectares.

Western Australia v Ward [2002] HCA 28 (Miriuwung Gajerrong)

Ward reflects a shift to a more conservative approach to underlying principle and a greater emphasis on 'black letter' law. That is evidenced by the emphasis placed upon the words of the Native Title Act in determining what will constitute native title or native title rights and interests. The judgment is indicative of judicial restraint in fleshing out the law and a focus on particularity rather than generality.

Justice French, *WA v Ward: devils and angels in the detail* (FCA) [2002] FedJSchol 14

The Miriuwung Gajerrong native title application covered an area in the East Kimberley comprising of land and waters in the north of the State of Western Australia and some adjacent land in the Northern Territory.

The High Court decision set some important legal precedents including the characterisation of native title rights and interests as a 'bundle of rights' which could be partially extinguished. The decision also provided clarity on a number of aspects of extinguishment.

Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58

The Yorta Yorta People's application was the first application for determination of native title to be set down for trial following the enactment of the *Native Title Act*. During the trial oral evidence was taken from 201 witnesses over 114 days.

In an often quoted phrase, in the initial judgment, Justice Olney found that:

The tide of history has washed away any real acknowledgement of [the Yorta Yorta's] traditional laws and any real observance of their traditional customs.

Justice Olney *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Others* [1998] FCA 1606 (18 December 1998)[129]

Justice Olney's decision was appealed to the Full Federal Court and the High Court, both of which upheld his decision.

The High Court decision gave rise to terms such as "normative system" and "society" which have formed the basis of consideration of what is required to prove the continuation of native title rights and interests under s 223 of the *Native Title Act*.

The court also emphasised that a continuing vital system was required for the recognition of native title. If the system ceased to operate for a period of time, then the native title rights and interests held under the traditional system of law and custom would cease to exist.

Focus on agreement making

Increasingly parties moved toward agreement making as the most effective and efficient means of settling native title applications, and of providing a framework for co-existing rights and interests.

The movement towards agreement-making was facilitated by the amendments to the *Native Title Act* in 1998, and the continuing clarification of native title law by the courts.

Agreement Making did not only occur in relation to the settlement of native title claims but the negotiation of Indigenous Land Use Agrements (ILUA), whereby parties agreed to the doing of future acts, reached agreement on the intersection between land users' rights and native title rights, among other things.

2003 – 100th ILUA registered

On 17 November 2003, the Native Title Registrar registered the 100th ILUA on the Register of Indigenous Land Use Agreements held by the NNTT. The agreement between the Central Land Council (representing traditional owners) and two mining companies, Newmont Gold Exploration and Normandy NFM, allowed for the conduct of mining activities in an area north west of Barrow Creek in the Northern Territory.

The use of agreement making processes by parties to provide for mining, infrastructure and development, as well as agreeing provisions giving effect to the terms of native title determinations, were increasingly entered into in this period with parties adopting the ILUA provisions of the 1998 amendments to the *Native Title Act*.

Agreements became increasingly global, or comprehensive, in nature, with parties entering into expansive agreements to settle native title matters, not only where native title existed but also to deal with matters of extinguishment. Comprehensive agreements such as those below afforded traditional owners the opportunity to 'sit at the table' and influence negotiations and outcomes.

2002 – Wimmera Agreement

In October 2002, the Victorian State Government reached in-principle agreement to settle three native title applications of the Wotjobaluk, Jaadwa, Jadawadjali, Wegaia and Jupagalk peoples located in the Wimmera region in western Victoria by consent, accompanied by an ILUA.

The ILUA was executed in July 2005 and the determinations settled by consent in December 2005. Benefits included in the ILUA were joint management arrangements for state forests and national parks, 15.7 hectares of freehold to three culturally significant areas, funding for a cultural and community centre and funding of $1.6 million over five years for the administration of the Barengi Gadjin Land Council Aboriginal Corporation.

A representative of the group, Ms Jenny Beer has noted that the negotiation process re-invigorated the group's identity as traditional owners.

2003 – Burrup and Maitland Industrial Estates Agreement (BMIEA)

After a period of six months negotiation, parties reached agreement in July 2002 and executed the BMIEA agreement in January 2003.

The agreement was made between the State of Western Australia, the WA Land Authority and three native title claim groups – the Wong-Goo-Tt-Oo, Ngarluma Yindjibarndi and Yaburara Mardudhunera peoples. The agreement covers areas including the Burrup Peninsula industrial estate and the proposed Maitland industrial estate. The Burrup Peninsula is a world renowned heritage site, containing the world's largest collection of rock art.

Under the agreement, the native title parties agreed to the surrender of native title in certain areas required by the State for both commercial and residential purposes. In return, the WA government agreed to

provisions including the granting of land in freehold, co-management of certain lands, $500,000 to fund an independent study to develop a management plan, management funding of $450,000 per year for five years and construction of a Visitor's Cultural Centre at the cost of $5,500 and infrastructure funding of $2.5 million, among other benefits.

The agreement also funded the establishment of the Murujuga Aboriginal Corporation in April 2006, which was formed to manage funds, property and other benefits flowing from the BMIEA.

2005 – Miriuwung Gajerrong Ord Final Agreement

In September 2005, the Miriuwung Gajerrong Traditional Owners and the WA Government reached an agreement for the management of future development over 1,450 square kilometres of land in the Kimberley Region.

The Ord River irrigation scheme was implemented in the 1960s and included the damming of the Ord River to form Lake Kununurra and Lake Argyle, establishing the town of Kununurra and developing 14,000 hectares of farmland in the Ord Stage 1. The WA Government was committed to expanding the scheme and this expansion was the impetus for entering into an agreement with the Miriuwung Gajerrong peoples for Ord Stage 2.

3 January 2004 – Traditional Owners deliver a Welcome to Country at the Ord Final Agreement ILUA signing

The Miriuwung and Gajerrong people and the State adopted a partnership approach to Ord Stage 2, with the Traditional Owners insisting upon an Aboriginal social and economic impact assessment. In December 2003, the partnership approach wavered when the State advised the Traditional Owners that compulsory acquisition notices would be issued if they could not reach agreement. A negotiation timeframe of one year was set. Agreement was eventually reached in October 2005—22 months later.

The agreement provided the Miriuwung Gajerrong with $100,000 to establish the Miriuwung and Gajerrong Corporation (MG Corporation), $1 million per annum operational funds for 10 years, an Investment Trust of $5 million initial payment and $1 million per annum over nine years, 50,000 hectares of freehold land, and lease back arrangements over current and new conservation parks, amongst other things. These benefits were provided in compensation for agreement to the acquisition by the State and extinguishment of native title over 70,000 hectares of land.

These agreements were among the first which comprehensively dealt with the acquisition of native title rights accompanied by the provision of a package of key economic, social and legal benefits.

2005 – Northern Territory ILUAs

In October 2003, following the High Court decision in *Western Australia v Ward*, the Northern Territory (NT) enacted the *Parks and Reserves (Framework for the Future) Act*. The legislation provided a framework for the negotiation of agreements between the NT Government and Traditional Owners for the establishment, maintenance and management of parks and reserves.

The *Ward* decision had cast doubt on the establishment of National Parks in the NT and potentially made national parks available for native title claims. The framework was developed to address this issue.

The legislation was passed in late 2003 and came into effect in 2004. Following the introduction of the legislation, the NT government entered into negotiations with traditional owners over the national parks, representing, at that time, the largest simultaneous negotiation of ILUAs. Negotiations took place between the NT Government, the Northern Land Council and the Central Land Council, with 31 agreements being made and lodged for registration with the NNTT.

3 September 2007 – Signing Indigenous Land Use Agreements, Tennant Creek. Source: Central Land Council

2006 – *Bennell v State of Western Australia*

The decision of Wilcox J in *Bennell v State of Western Australia* [2006] FCA 1243 was the first to recognise native title rights and interests in a capital city. Following the High Court decision in *Yorta Yorta*, it came as a surprise to many that native title might continue in areas which had been closely settled by Europeans.

The initial decision by Wilcox J in 2006 prompted strong political and community reaction, with the, then, Federal Attorney-General, Philip Ruddock, stating that the judgment left doubt about exclusive use by native title claimants of vacant crown land, such as beaches and forests. ('Government to appeal Noongar decision', *The Age*, 5 October 2006).

In 2008, the Full Federal Court upheld appeals by the WA and Commonwealth governments. The parties went on to conduct settlement discussions resulting in the South West Native Title Settlement Agreements which were lodged with the Native Title Registrar of the NNTT for registration as ILUAs in 2015. These ILUAs were subsequently the subject of the Full Federal Court's decision in *McGlade* in February 2017.

Noongar elders during the negotiation of the South West Native Title Settlement. Source: South West Aboriginal Land and Sea Council

2007 – Native Title Amendment Act

The Federal Government announced reforms to the native title system in September 2005, which led to amendments enacted in 2007. Responding to the often lengthy timeframes required to reach resolution in native title matters, the Commonwealth Government commenced a number of reform initiatives designed to create greater efficiency in the native title system. The reforms were focused mainly on measures to promote resolution of native title issues through agreement-making in preference to litigation, unlike prior amendments to the statute which were prompted by significant judicial decisions. The government announced the objective of the reforms as improving the operation of the native title system and outcomes parties were able to achieve within the system through the introduction of mechanisms to encourage agreement-making.

Guiding the reform process was an independent review of the claims resolution process by Mr Graham Hiley RFD QC and Dr Ken Levy RFD.

Objectives of the reform included:

- reforms to the claims resolution processes following the independent Hiley-Levy review which considered how the NNTT and the Federal Court could work more effectively in managing and resolving native title claims
- technical amendments to the *Native Title Act* to improve existing processes for native title negotiation and litigation
- the introduction of measures to improve the effectiveness of native title representative bodies
- amendments of the guidelines of the native title respondents' financial assistance program to encourage agreement making
- reforms to the structures and processes of prescribed bodies corporate.
- the amendments, as introduced in legislation, included:
- limiting the range of persons who may become a party to claimant application proceedings
- providing the Federal Court with the power to determine whether the Court, the NNTT or another individual or body could mediate a claim, removing the previous automatic referral of mediation of claims to the NNTT
- enabling the Federal Court to rely on an agreed statement of facts between key parties in an effort to simplify the connection assessment process in consent determinations
- enabling the Court to make orders beyond matters relating to native title to encourage broader agreements

- encouraging claimant applications made in response to future act notices to be progressed and, if not, provide for them to be dismissed once the future act has occurred
- ensuring that claimant applications which previously failed the registration test were re-tested and, if they failed the merit conditions, they risked dismissal
- empowering the Tribunal to conduct a review of whether a native title claim group holds native title rights and interests in relation to the application area, and
- empowering the Tribunal to hold an inquiry in relation to a matter relevant to a determination of native title.

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