National Native Title Tribunal

25 YEARS OF NATIVE TITLE RECOGNITION

Contents

The past decade: 2008–2017	1
Alternative settlement regimes - WA and Vic	2
700th ILUA registered	3
Reforms	3
Native Title Reform Bill	4
Institutional reforms	5
Tax law amendments	5
Connection to country: Review of the *Native Title Act 1993* (Cth)	6
COAG	6
Developments in native title law	7
Commercial interests	7
Native title compensation	8
ILUA execution	8

28 March 2013 - the Dja Dja Wurrung and the Victorian Government reached a landmark native title settlement over lands in central Victoria by entering into a Recognition and Settlement Agreement under the Traditional Owner Settlement Act 2010 (Vic). Source: Native Title Services Victoria

NATIVE TITLE MATURES

The past decade: 2008–2017

With proof of native title law largely settled and increasing numbers of native title determinations being made, this period in native title saw governments focus on review of the sector, largely aimed at creating efficiency and ensuring that the recognition of native title rights and interests delivered tangible results for native title holders.

The period was one of reform within the system.

Emphasis on agreement making

Following the 2007 amendments, government discourse increasingly referred to the issue of comprehensive native title settlements and the creative use of agreement making as a means of redressing disadvantage and providing a basis for Indigenous economic development.

In 2008, Commonwealth, State and Territory Native Title Ministers met for the first time since the Rudd Government took office. The theme for the meeting was “Making native title work better.”

Ministers agreed that a more flexible and less technical approach to native title was required nationally and discussed adopting broad and flexible processes within the context of native title negotiations to achieve practical and real outcomes for Indigenous people, while also providing certainty for other land users.

NATIVE TITLE MATURES

The Ministers established a Joint Working Group on Indigenous Land Settlements which was set the task of developing innovative policy options for progressing broader and regional native title settlements. The Working Group produced *Guidelines for Best Practice Flexible and Sustainable Agreement Making*, the introduction to which stated that "the recognition of native title can significantly contribute to the social, cultural, spiritual and economic wellbeing of Indigenous Australians." This potential had not been realised, according to the Working Group because "[t]he system has become constrained by technical and inflexible legal practices and processes."

The Guidelines committed governments to a new non-technical and flexible approach to native title and provided practical guidance for government parties on the behaviours, attitudes and practices that were identified as assisting in achieving the efficient resolution of native title matters.

In addition, the Working Group also developed a Native Title National Partnership Agreement.

Watch: Mr Graeme Neate AM, former President, NTTT

Alternative settlement regimes – WA and Victoria

Two settlement processes arose out of this new approach. The Victorian *Traditional Owner Settlement Act 2010* (Vic) provides for non-native title settlements between the Victorian Government and traditional owner groups outside of the Federal Court of Australia.

The Dja Dja Wurrung agreement was the first comprehensive settlement made under the *Traditional Owner Settlement Act*. The agreement formally settled four native title claims before the Federal Court, and recognised the Dja Dja Wurrung as the traditional owners for part of Central Victoria.

The Western Australian Government and the South West Aboriginal Land and Sea Council agreed to a settlement over the south west of WA recognising the Noongar People as traditional owners. The agreement is the most comprehensive native title agreement proposed in Australian history and comprises the full and final settlement of all native title claims covering an area of approximately 200,000 square kilometres in the south west of the State. The agreement also consists of a significant package of benefits in exchange for the surrender of any native title. It is intended that this agreement process will be implemented through Indigenous Land Use Agreements (ILUAs).

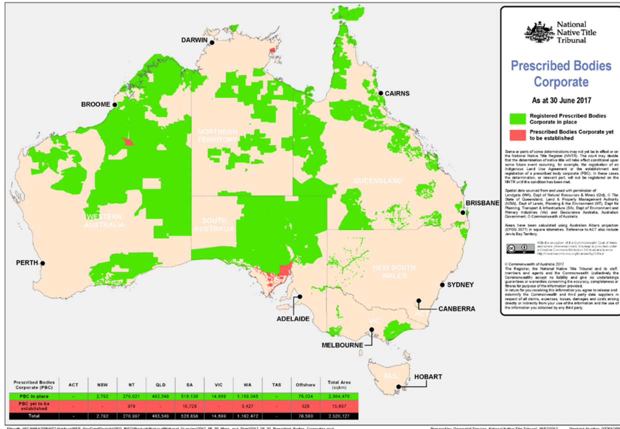
Post determination trends

At the end of the 2009–2010 financial year, there were 95 registered determinations that native title exists and 72 prescribed Bodies Corporate (PBCs) registered on the National Native Title Register. As more native title determinations were made and more land subject to the continued existence of native title, PBCs were assuming increasing importance in the native title sector, signifying a shift to the post-determination native title era.

Responding to some of the issues arising within the post-determination environment, the Government prepared the *Native Title (Prescribed Bodies Corporate) Amendment Regulations* in 2010. The amended regulations provided for improving the flexibility of the PBC governance regime by:

- enabling an existing PBC to be determined as a PBC for subsequent determinations of native title
- removing the requirement that all members of a PBC are also the native title holders, and
- clarifying that standing authorisations in relation to particular activities of a PBC need only be issued once.

This also enabled PBCs to charge a fee for costs incurred in providing certain services and set out a procedure for review by the Registrar of Indigenous Corporations of a decision by a PBC to charge such a fee.



Prescribed Bodies Corporate as at 30 June 2017. Source: NNTT

700th ILUA registered

The use of ILUAs by parties continued during this period with the 700th ILUA registered in December 2012. There was also a marked increase in the number of body corporate agreements being made as more PBCs were established. ILUAs covered diverse interests such as future acts dealing with infrastructure, mining, oil and gas, access provisions, co-management, tenure resolution and community development matters. One significant example in the period was the Agreement entered into with the traditional owners of the area around Broome.

Yawuru People agreements

In 2010, the Yawuru People, the Western Australian Government and the Shire of Broome settled and registered two Indigenous Land Use Agreements: the Yawuru Area Agreement and the Yawuru Prescribed Body Corporate ILUA.

These agreements arose out of two litigated determinations of native title, and were amongst a number of significant global agreements entered into by the State of Western Australia, which provided a framework for management of land subject to determination.

According to the Yawuru people, the:

agreement provides an opportunity for Yawuru to influence the future development of Broome, where Yawuru have opportunities in this development and can continue to safeguard Yawuru culture, way of life and strengthen our identity.

Benefits in the agreement provided for, amongst other things:

- $56 million in monetary benefits for capacity building, preservation of heritage and culture, economic development, social housing and joint management of a proposed conservation estate
- $140 million for development and cultural heritage purposes
- the protection of Aboriginal heritage
- facilitating the future development of land in Broome
- compensation to the Yawuru Registered Native Title Body Corporate
- the development of economic and commercial capability and capacity of the Yawuru Community
- promoting economic development for the Yawuru Community, and
- freed land in Broome for residential development, tourism, heavy and light industry and an airport.

Reforms

As noted above, this period saw a number of reforms introduced into the native title sector.

Native Title Amendment Bill 2009

On 17 October 2008, the Commonwealth Attorney-General announced that the Government was pursuing a new approach aimed at encouraging more negotiated settlements of native title claims. The stated aim of these changes was to contribute to the development of a more flexible system that produced broad benefits for Indigenous people and certainty for stakeholders. A component of the approach was amendments to the *Native Title Act*.

Tribunal Member Helen Shurven conducts a mediation by telephone. Source: NNTT

The amendments made by the *Native Title Amendment Act 2009* included changes:

- enabling the Federal Court to determine who will mediate in relation to a native title claim (the Federal Court, the NNTT or another 'appropriate person or body')
- enabling the Federal Court to direct the NNTT to hold a native title application inquiry or to refer certain native title issues to the NNTT for review, and
- improving the operation of the Native Title Representative Body provisions of the *Native Title Act* by streamlining and improving processes for the recognition of representative bodies and the withdrawal of recognition, and the variation of a representative body's area.

These amendments were designed to ensure the Federal Court played a central role in the management of native title claims. According to the Explanatory Memorandum accompanying the Amendment Bill:

giving one body control over the direction of each case, from start to end, means that the Court could more readily identify the opportunities available to resolve each claim.

Native Title Reform Bill

In 2011, the Greens Senator, Rachel Siewert circulated a Native Title Reform Bill which outlined that "[t]he measures in the Bill are reforms that have been promoted for a number of years by relevant stakeholders, most notably in submissions to the Senate Standing Committee on Legal and Constitutional Affairs inquiry in the Native Title Amendment Bill 2009 and the 2009 Native Title Report from the Aboriginal and Torres Strait Islander Social Justice Commissioner."

The reforms addressed barriers related to the significant evidential burden required for proof of native title, and adopted the suggestion of Chief Justice French of a presumption of continuity which would shift the burden of proof from the claimants to the respondent.

The proposed reforms were not adopted, however, native title law and legal frameworks around connection requirements were issues addressed in the Australian Law Reform Commission's 2015 *Review of the Native Title Act 1993*.

The following year, a further Bill was introduced into Parliament by Attorney-General Roxon which, building upon the amendments in the *Native Title Amendment Act 2009,* aimed to improve the operation of the native title system, with a focus on improving agreement-making, encouraging flexibility in claim resolution and promoting sustainable outcomes and to complement the reforms underway in the Federal Court and the NNTT (see below).

Proposed reforms included:

- the creation of a new s 47C to allow historical extinguishment of native title to be disregarded over conservation areas
- clarifying the meaning of good faith in the *Native Title Act* in relation to future act negotiations
- streamlining processes in relation to ILUAs, broadening the scope of body corporate agreements, authorisation for ILUAs and allowing parties to agree to certain amendments to registered ILUAs without requiring the ILUA to be re-registered, and
- amending s 47 of the *Native Title Act* to ensure that where a body corporate holds a pastoral lease on behalf of the native title group, historical extinguishment could be disregarded.

Senator Siewert proposed amendments were reflected in the content of the Bill which was introduced in 2011. The Bill lapsed at the time of the August 2013 dissolution of Parliament.

Institutional reforms

In May 2012, the Commonwealth Government announced a number of key institutional reforms to the native title system focused on improving the efficiency of the native title system and strengthening the Federal Court's ability to achieve native title outcomes. These reforms arose out of the changes to the division of responsibilities between the NNTT and the Federal Court, and recommendations made in the *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio*, conducted by Mr Stephen Skehill SC, (the Skehill Review).

The purpose of the reforms was to enable the NNTT and the Federal Court to achieve savings and to operate more efficiently and effectively. The reforms commenced on 1 July 2012 and included:

- transferring native title claims mediation and ILUA negotiations related to native title claims mediation to the Federal Court
- removing the NNTT's status as an agency for the purposes of the *Financial Management and Accountability Act 1997* (Cth)
- transferring the NNTT's appropriation and staff to the Federal Court, and
- creating efficiencies in administrative services.

The NNTT retained its future act mediation and

arbitration functions, ILUA negotiations not related to native title claims mediations, the responsibility to retain the Registers and the application of the registration test. The Federal Court assumed responsibility for the disposition of native title claims.

The NNTT continued to operate as an independent statutory authority undertaking specific statutory provisions outlined in the *Native Title Act*.

Tax law amendments

Further changes to the legislative environment in native title occurred in 2013 with the introduction of legislation regulating the manner in which native title benefits were subject to taxation. In June 2013, Parliament legislated to clarify the tax treatment of native title benefits, establishing that payments received in relation to native title rights are not subject to tax, including capital gains tax. These laws applied retrospectively to cover native title benefits received from 1 July 2008.

The changes were consistent with the objectives of the Commonwealth Government to ensure that native title holders were able to benefit from the recognition of their native title rights and interests.

Deloitte Report: Review of the roles and functions of native title organisations

The increase in the number of Prescribed Bodies Corporate (PBCs) and their interaction with Native Title Representative Bodies (NTRBs) led the Commonwealth Government to commission a review of NTRB functions undertaken by Deloitte Access Economic. The review was published in March 2014.

The objective of the review was to provide advice on the appropriateness of the roles and functions of NTRBs/Native Title Service Providers (NTSPs), especially their support for native title holders and PBCs in managing and using native title. Government was of the view that as the native title system evolved, it was important to consider the whole of the native title sector and how the recognition of native title facilitated Indigenous economic development opportunities.

The consultants undertook an assessment of how NTRBs could continue to meet the evolving needs of native title holders and PBCs.

The reviewers found that NTRBs were expected to continue to play a central role both pre- and post-determination and their knowledge, skills and relationships with native title holders were integral to effective transition from the native title claimant to the native title holder environments.

The review highlighted the need to strengthen the capacity and governance of native title organisations to support greater social and economic development for Aboriginal and Torres Strait Islander peoples. It also emphasised that PBCs and the NTRBs/NTSPs that support them are essential to the effective operation of the system and need government funding for the foreseeable future.

Connection to country: Review of the *Native Title Act 1993* (Cth)

As a further component of the review of the system, in 2013 the Australian Government referred an Inquiry into native title laws and legal frameworks to the Australian Law Reform Commission (ALRC). Of specific regard to the Government was:

- the maturity of the native title system
- the importance of recognition and protection of native title to Indigenous Australians and the broader community
- the importance of certainty of the relationship between interests in land
- the need to deliver timely, flexible and practical outcomes
- concerns about the difficulties faced by native title claimants in achieving recognition
- delays caused by litigation, and
- the capacity of native title to support Indigenous economic development.

Specifically, the ALRC was requested to advise on whether there should be:

- a presumption of continuity of traditional laws and customs
- clarification of the meaning of ‘traditional’ within the *Native Title Act*
- clarification of whether native title rights and interests could be commercial in nature
- confirmation that connection with land and waters was not required to be physical, and
- a power for the courts to disregard substantial interruption or change to the system of traditional laws and customs.

The ALRC was also requested to identify any barriers within the *Native Title Act* to authorisation and joinder provisions.

The final report made 30 recommendations for reform of the legislation, noting that “the underpinning model

of native title and the claims process is retained, while seeking to refocus on the core elements of native title law to facilitate an effective determination process."

The report also noted that during the Inquiry stakeholders stressed the need for a longer term perspective, with more attention being paid to how native title groups can effectively manage their determined rights and interests.

Council of Australian Governments

In December 2014, the native title ministers met in Brisbane to continue their discussion about improving the native title system. The ministers confirmed their commitment to work cooperatively in this space and acknowledged the October meeting of the Council of Australian Governments (COAG), where an Investigation into Indigenous land use and land administration was established to provide a report to COAG in 2015. The impetus for the COAG Investigation was to ensure that land administration was not a barrier to enabling traditional owners to attract private sector investment and finance to develop their land.

In December 2015, the Senior Officers' Working Group (SOWG) established by COAG released a document entitled "Investigation into Indigenous Land Administration and Use". As noted above, the 2014 native title ministers referred a range of native title reform proposals to improve the efficiency and effectiveness of the native title system to the working group.

As part of the Investigation, an Expert Indigenous Working Group was formed to work with the SOWG to ensure the report reflected the views of Indigenous stakeholders.

The specific area of interest of the Investigation was providing advice on improving the Indigenous land legislative, regulatory, administrative and operational systems and processes with a view to enabling:

- Indigenous land owners to derive economic benefits from their land
- jobs and economic advancement for Indigenous people
- Indigenous home ownership and commercial enterprise
- private sector investment and finance, and
- industries and businesses to support Indigenous development.

Recommendations as a result of the Investigation identified five key areas where governments should focus their efforts:

- gaining efficiencies and improving effectiveness in the process of recognising rights
- supporting bankable interests in land
- improving the process for doing business on Indigenous land and land subject to native title
- investing in the building blocks of land administration, and
- building capable and accountable land holding and representative bodies.

The COAG recommendations concentrated upon facilitating economic development opportunities from native title recognition. Other forums also considered this aspect.

- In June 2015, the Commonwealth government released *Our North, Our Future: White Paper on development Northern Australia*. A key component of this was the announcement of Commonwealth investment in relation to Indigenous land and native title, linking into the COAG process.
- In 2015–16 the Australian Human Rights Commission facilitated the Indigenous Leaders Roundtable on Property Rights to identify how to better enable economic development within the Indigenous estate.
- In August 2014, the *Creating Parity – The Forrest Review* was released. A component of this Review identified how the processes relating to development on Indigenous land and how land subject to native title could be improved to assist in creating parity between Indigenous and non-Indigenous Australians.

The developments in this space illustrate that the future of native title is moving towards realising direct benefits to native title holders following the recognition of their native title rights and interests.

Developments in native title law

Three significant decisions were handed down by the Federal Court in 2016–17. These were decisions in relation to rights and interests extending to commercial use, native title compensation and the execution of ILUAs.

Commercial interests

In 2013, the High Court found that Torres Strait Island native title holders had the right to take marine resources for trading and commercial purposes in *Akiba*. In subsequent decisions in relation to the Western Desert in Western Australia, the Federal Court also found that rights could be commercial in nature in *Pilki* and *Birriliburu*. In June 2016, Justice Mansfield handed down a decision in relation to the rights and interests of the Rrumburriya Borroloola claim group in the Northern Territory. Justice Mansfield found

that the interactions between the claim group and the Macassans comprised the exchange or trade of resources of the land and waters within the traditional laws and customs of the claim group, rather than falling outside of those traditional laws and customs. Further, he concluded that the dealings with the Macassans were conducted by the Indigenous people of the region, including the claim group, in exercise of their unrestricted rights to control access to the region, and access to take the resources of the region.

Therefore, his Honour found that the right to access and take for any purpose the resources of the estate, was a native title right held by the claim group.

20 June 2008 - Young male dancers at the Birriliburu Native Title Determination, Western Australia

Native title compensation

One of the emerging areas of of native title as it moves further into the post-determination era is determining issues of native title compensation.

On 24 August 2016, Justice Mansfield handed down his decision in the Timber Creek compensation proceeding (*Griffith v Northern Territory of Australia (No 3) [2016] FCA 900*), the first instance where the court has made a ruling in relation to compensation, and how the quantum of compensation payable to native title holders, for the loss or impairment of their native title rights and interests, is to be calculated.

The Ngaliwurru and Nungali People hold native title in the area of Timber Creek, Northern Territory. After successfully having their native title recognised they filed a compensation claim in relation to 60 areas of land where their native title rights where determined to have been extinguished or impaired by prior land grants or public works.

Justice Mansfield determined that $3.3 million dollars be paid to the Ngaliwurru and Nungali People in compensation. The amount included:

- $512,000 awarded for economic loss (80% of the freehold value of the relevant land)
- $1.488 million awarded in interest, and
- $1.3 million awarded for solatium, or non-economic loss.

The Commonwealth, Northern Territory Government, and claim group appealed the decision.

On 20 July 2017, the Full Federal Court upheld most of the trial judge's findings, however, it reduced the award for economic loss from 80% to 65% of the freehold value of the relevant land.

Federal Court Justice Mansfield (wearing brown hat) takes evidence at Timber Creek, Northern Territory, during the claim for compensation. Source: Northern Land Council

Timber Creek township. Source: Northern Land Council

ILUA execution

In 2017, the Full Federal Court handed down a decision in the matter of *McGlade* (*McGlade v Native Title Registrar* [2017] FCAFC 10) in relation to four of six ILUAs negotiated between the Government of Western Australia and the Noongar people of the southwest of the State. The ILUAs formed the basis of a comprehensive settlement which followed an extensive history of litigation in relation to native title claims in the region.

In each of the four ILUAs subject to the McGlade litigation, at least one of the named applicants had not signed the agreements and sought to prevent the agreements from being registered as ILUAs on the basis that they had not been appropriately executed.

The litigation rested upon the appropriateness of the 2010 *Bygrave* decision by Justice Reeves where he held that it was not necessary for all named applicants to be signatories to an agreement for it to become a registered area ILUA.

The Full Court, in McGlade, overturned the *Bygrave* decision, and found that all named applicants were required to be signatories for an agreement to be considered an Area ILUA under the *Native Title Act*.

The decision cast doubt over the validity of a number of agreements which had been registered as Area ILUAs on the basis of the Bygrave decision and any acts that may have proceeded under the terms of such ILUAs, prompting the Commonwealth government to introduce amendments to the *Native Title Act.*

The amendments to the NTA retrospectively validated otherwise invalid Area ILUAs and clarified the process by which Area ILUAs may be authorised in the future, and the persons who are required to sign or to be a party to Area ILUAs. Under the amendments, it is no longer necessary to have all named applicants as signatories to an agreement to have the agreement registered as an Area ILUA.

Watch: *Mr Glen Kelly, Chief Executive Officer National Native Title Council*

References

Primary

Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia [2013] HCA 33 (7 August 2013)

Griffiths v Northern Territory of Australia (No 3) [2016] FCA 900 (24 August 2016)

Northern Territory of Australia v Arnhem Land Aboriginal Land Trust [2008] HCA 29 (30 July 2008)

Rrumburriya Borroloola Claim Group v Northern Territory of Australia [2016] FCA 776 (30 June 2016)

Secondary

Australian Law Reform Commission, Connection to Country: Review of the Native Title Act 1993 (Cth), ALRC Summary Report 126, April 2015

Joint Working Group on Indigenous Land Settlements, *Guidelines for Best Practice Flexible and Sustainable Agreement Making,* August 2009

National Native Title Tribunal, *Annual Report 2008-2009*

National Native Title Tribunal, *Annual Report 2009-2010*

https://www.mediastatements.wa.gov.au/Pages/Carpenter/2008/07/Native-Title-Ministers'-Meeting.aspx

Parliament of the Commonwealth of Australia, Senate, *Native Title (Reform) Bill 2011*, Explanatory Memorandum

Joint Working Group on Indigenous Land Settlements, "Guidelines for Best Practice Flexible and Sustainable Agreement Making" August 2009 at aiatsis.gov.au/.../2009-ntru-best-practice-guidelines-agreements

Shared country | shared future

For more information about native title and services of the Tribunal please contact:

National Native Title Tribunal
GPO Box 9973 in your capital city

Freecall 1800 640 501

www.nntt.gov.au

Published by the National Native Title Tribunal © Commonwealth of Australia, 2017.
ISBN: 978-0-9807613-4-4

This fact sheet is provided as general information and should not be relied upon as legal advice for a particular matter.