

TALKING NATIVE TITLE

in Victoria

NEWS FROM THE MELBOURNE REGISTRY

Native title forums at Melbourne Registry – challenging and informative

Every month the Melbourne Registry holds a native title forum at which speakers from diverse backgrounds address and challenge the audience on a range of topics related to native title. The September and October forums are summarised below.

Gournditch-Mara: Using native title to achieve our aspirations

Damein Bell, September

The traditional owners of south-west Victoria are known as the 'fighting Gournditch-Mara' — and they're proud of it. There is proof that this attribute is well-deserved as Damein Bell, Gournditch-Mara man, told his captive audience at the Melbourne Registry's September Native Title Forum.

The Gournditch-Mara people's willingness to fight for what is theirs is also well documented in history books. Damein gave a few examples: the guerrilla war against the invading settlers in the 1840s and the protests against the Alcoa smelter in Portland in the 1980s. He also spoke about amicable community partnerships that his people had formed, acting on a realisation and understanding that: 'in order for us to prosper, the wider community has to prosper as well.'

For example, the Lake Condah Sustainable Development Project that Damein manages is an Indigenous community initiative. It aims to develop the Lake Condah/Tyrendarra area in the heart of Gournditch-Mara country (near Portland in south-western Victoria), as a major national heritage park and as a hub for sustainable development.

In July this year, the project made national headlines after Lake Condah and its surrounding landscape (referred to as the Budj Bim National Heritage Landscape) became the first indigenous heritage site to be registered on Australia's new National Heritage List. The listing acknowledges Lake Condah as one of the country's largest aquaculture ventures and one of the earliest. Thousands of years ago the Gournditch-Mara people built a highly sophisticated system of weirs, channels, water races and fish traps so they could grow and harvest fish, particularly eels, and preserve them in so-called 'smoking trees.'

Damein concluded with a summary of his thoughts on native title and what he, as an Indigenous person, expected from Australia. He acknowledged that native title had brought his people to the negotiation table. However, he still needed to assess whether his people got involved in the management of their country in a meaningful way through the rights under the Native Title Act or heritage protection regimes.

He said there was no doubt that his people would be frustrated with native title in Victoria. However through the lessons from the Yorta Yorta outcome they had a better understanding of the way native title was treated in Victoria. He appreciated the State of Victoria's shift from litigation to mediation but identified a possible danger in watering down outcomes within final agreements. Overall his conclusion was that Australia and more specifically, Victoria, would need to become a better place in the future to deal with native title properly.

An Overview of Native Title in Australia – some recent milestones and the way ahead

Tribunal President Graeme Neate, October

Tribunal President Graeme Neate addressed the registry's October forum. His presentation, *An Overview of Native Title in Australia – Some Recent Milestones and the Way Ahead*, updated people involved in native title affairs on the latest developments in law and practice. It also gave them the opportunity to consider options for dealing with native title and related matters.

Graeme dealt with three broad topics:

- recent developments in native title law and practice
- the extensive range of options available to parties to deal with native title issues, and
- some features of agreements that make them endure and hence meet the goals of the parties.

Court decisions clarified native title law

Noting that native title law was still developing, Graeme said a considerable body of judicial rulings had been produced since the Native Title Act took effect, and those rulings were not all consistent. In the 2003–2004 financial year, approximately 50 sets of written reasons for judgment were delivered. He said landmark decisions of the High Court of Australia in *Western Australia v Ward*, *Wilson v Anderson*, and *Members of the Yorta Yorta Aboriginal Community v Victoria (the Yorta Yorta case)* clarified important legal principles and compelled a reassessment of aspects of native title law and practice.

The following points arose from those judgments:

- native title is characterised by the general law of Australia as a bundle of rights
- to establish that they have native title, a group of Indigenous people must be able to demonstrate that their group's observance of traditional laws and customs has continued substantially uninterrupted since the date when the Crown asserted sovereignty
- native title claimants do not necessarily need to prove that they have recently used or been present in an area to show connection

- native title may be extinguished partially, right by right, and with cumulative effect in the event of successive grants or appropriations
- native title is extinguished completely by the grant of certain interests in land and some vesting of land
- some native title rights and interests are extinguished by the grant of some pastoral leases and mining leases.

Federal Court case management practices

Graeme also discussed the case management practices of the Federal Court which hears and determines native title applications, manages those applications and supervises their mediation. The court had recently expressed concern about a lack of progress in a substantial number of native title claims and was planning to take a more proactive role. It would use early neutral evaluation (ENE) which aims to provide a 'reality check' for clients and lawyers by providing an initial assessment of the merits of a case by an independent expert person.

Proving native title

Graeme said in some parts of Australia, groups of Aboriginal people would find it difficult, if not impossible, to prove that native title existed. Many groups were therefore reaching 'non-native title' outcomes. These could be in the form of grants of Aboriginal freehold title, or grants of perpetual lease, as was the case in the settlement of the Western (Sunset) Yalanji people's claimant application in September 1998. They could be grants of access to and use of a claim group's traditional land, rights to obtain interests in the land once existing interests expired, the creation of reserves, upgrades of existing interests, or grants of new interests to respondent parties, such as the grant of a perpetual lease for pastoral purposes to the pastoralists under the Western Yalanji land tenure agreement.

Other types of outcomes

He said having a role in managing what happened on the land was another possible non-native title outcome. It could mean joint management of national parks or other conservation areas, involvement in cultural heritage surveys and other aspects of cultural heritage protection, or participation in relevant town planning and other administrative processes. Symbolic recognition of traditional affiliations with the land could be granted in the form of signage indicating that the area was the traditional country of a named group of people, place naming rights, involvement of representatives of the group at certain official functions or events and/or statements of formal recognition of traditional ownership of lands in which native title had been or might have been extinguished. More tangible outcomes could lead to employment (e.g. with a mining company or as rangers in national parks) and other economic opportunities in relation to commercial enterprises on the land, such as equity participation.

Agreement-making on the rise

Experience had shown that agreement-making was increasingly the preferred method for dealing with native title issues, whether they arose from claimant applications or proposed future acts. Relatively little attention, however, had been given to what made a sustainable agreement in the months and years after it had been signed. The challenge was to develop agreements that met the reasonable aspirations of the parties and were expressed in ways that ensured their long term effectiveness.

Graeme Neate's full paper is available on the Tribunal's website at www.nntt.gov.au under 'Information and publications/Papers and other publications'.

STOP PRESS

In October 2004 the Federal Court made consent orders replacing the registered applicants in the Gunai Kurnai matter. For more information contact Nadja Mack on (03) 9920 3018.

Native title demystified for Victorian miners

Around 40 government and mining industry representatives attended the Tribunal's workshop that aimed to 'Demystify the Native Title Process for Tenement Applicants'.

The four-hour workshop held in Carlton in August kicked off with a presentation by Maree Halligan from the Department of Primary Industries (DPI) who offered some insight into DPI's future act assessment policies and processes.

Tribunal Victorian state manager Ian Campbell-Fraser spoke about the future act regime under the *Native Title Act 1993* and explained the Tribunal's mediation and arbitration functions as well as its role in assisting parties in indigenous land use agreement (ILUA) negotiations.

Georgia Denisenko, a legal practitioner representing miners, shed some light on the different agreement options available to miners, including the Victorian template agreements.

Paul Simmons from Native Title Services Victoria, the body that represents most of the native title claimants in the state, followed with an outline of the difficulties that his organisation encounters when negotiating agreements with miners and discussed the merits of template agreements from the claimants' and the representative body's perspectives.

Chris Fraser from the Minerals Council of Australia concluded the workshop with a summary of the council's indigenous relations engagement policy.

Are you interested in a native title workshop that addresses your needs? We might be able to assist. Please contact the Melbourne Registry's state manager, Ian Campbell-Fraser on (03) 9920 3002 to discuss details.

Everything you wanted to know about native title but were too confused to ask

Bundle of rights, extinguishment, future acts, past future acts... native title can be a complex and intimidating subject. Even one of the most experienced judges in Australia, Mary Gaudron, agrees. The former High Court justice is the only judge to have heard and given judgment in every native title case in the highest court of Australia, from *Mabo* in 1992 to *Yorta Yorta* in 2002. Her verdict: 'There is, I think, no more demanding or difficult area of law.'

To help people understand native title, the Melbourne Registry has developed a standard presentation that covers a broad range of native title related issues and provides an overview of the processes under the Native Title Act.

As well as the basic 'What exactly is native title anyway?' the presentation deals with questions such as:

- Why was Australia declared *terra nullius* when it was actually inhabited?

- Who was Eddie Mabo and what motivated him to lodge his famous native title claim?
- How did the High Court's *Mabo* decision change the course of Indigenous land justice?
- What is so important about those other famous native title cases – *Yorta Yorta*, *Wik*?
- What (in 50 words or less!) does the Native Title Act say?
- How are native title claims lodged, mediated and finally decided?
- How does native title affect governments, private companies and individuals?

If you would like to join the mailing list for forum notifications, receive copies of workshop papers and presentations, or have someone from the Tribunal explain native title to your organisation, please contact Nadja Mack on (03) 9920 3018.

Who's who in the Melbourne Registry?

Name	Position	Claims	Contact No.
Ian Campbell-Fraser	State Manager	Sundown Point	(03) 9920 3002
Nadja Mack	Senior Case Manager	Gournditch-Mara Gunai/Kurnai Gunai/Kurnai/Boonerwrung Kurnai	(03) 9920 3018
Chris Loorham	Case Manager	Wotjobaluk Dja Dja Wurrung Yupagalk Wamba Wamba, Barapa Barapa & Wadi Wadi	(03) 9920 3006
Hamish MacLeod	Case Manager	Latji Latji Latji Latji Wergaia Robinvale	(03) 9920 3012
Lisa Jowett	Case Manager (P/T)	Bidwell Taungurung	(03) 9920 3016
Erin Crosby	Senior Administrative Officer	Coordinates the work of the administrative team	(03) 9920 3004
Jan Weate	Administrative Officer	Works primarily to Nadja, Ian & Lisa	(03) 9920 3011
Lesley McGeough	Administrative Officer	Works primarily to Chris & Hamish	(03) 9920 3007
Brenda Dagnall	Client Services Officer	Reception, searches, library, etc	(03) 9920 3000
Anoushka Lenffer	National Federal Court Portfolio Officer (P/T)		(03) 9920 3017

The following Tribunal members also work in Victoria and Tasmania:

Member	Claims	Assistant	Contact No.
Doug Williamson	Wotjobaluk, Dja Dja Wurrung Yupagalk, Wamba Wamba, Barapa Barapa & Wadi Wadi, Sundown Point	Tina Djohanli	(03) 9920 3014
Gaye Sculthorpe	Gournditch-Mara, Gunai/Kurnai Gunai/Kurnai/Boonerwrung Bidwell, Taungurung	Tina Djohanli	(03) 9920 3014
Neville MacPherson	Latji Latji, Latji Latji Wergaia Robinvale	Lucy Puls	(03) 9920 3019

