

TALKING

Native Title

NEWS FROM THE NATIONAL NATIVE TITLE TRIBUNAL

MARCH 2009

Determination recognises Gulf islanders' home

Mornington Island traditional owner Karen Chong with grandchildren Renagi (left), Shaylene, Navu, Alvin, Cathy and Nadia.
© Newspix/ Bruce Long.



They won recognition of their sea rights the hard way, through a long battle in the courts. But on 9 December 2008 the Wellesley Islands' traditional owners became native title holders of their land after just two years of negotiations.

At a Federal Court hearing on Mornington Island, the Lardil, Yangkaal, Gangalidda and Kaiadilt Peoples had their native title rights and interests recognised over 121,775 hectares on 23 islands in Queensland's Gulf of Carpentaria.

Justice Jeffrey Spender made a consent determination, recognising the groups' exclusive native title rights over most of the Wellesley, South Wellesley, Forsyth and Bountiful Island groups and their non-exclusive native title rights over the remaining 25 hectares.

This outcome was achieved for the groups after negotiating with parties including the State Government, Mornington Shire Council, Airservices Australia, Telstra Corporation, Ergon Energy,

sublessees and permit holders about their respective rights and how they would coexist.

Tribunal Member Robert Faulkner, who provided mediation assistance, said the Lardil, Yangkaal, Gangalidda and Kaiadilt Peoples now have the exclusive right to access and use most of the determination area, and the right to protect and maintain that land.

"The determination recognises their rights and customs that have existed since before European colonisation," he said. "It is not a grant of new rights or a handback."

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National
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Readers, please be aware that this edition of Talking Native Title contains photographs from some historic native title events and may contain images of deceased people.

From the President Graeme Neate



This year marks the 15th anniversary since introduction of the Native Title Act.

Although many successful native title outcomes have been achieved in the past 15 years, many challenges still lie ahead.

Participants in the native title process must undertake a number of critical tasks if current and future native title claims are to be resolved at a faster rate.

About 71 per cent of all claims lodged since the Native Title Act 1993 began operating on 1 January 1994 have been addressed – some of them by determinations.

Most were combined, discontinued, dismissed or struck out. The 117 native title determinations made during this time have resolved 146 claims and 87 per cent of those determined have been made with the consent of parties.

Indigenous peoples, governments, pastoralists, miners and other groups across Australia have also resolved some native title claims and many other matters through 362 registered indigenous land use agreements (ILUAs).

However, there are now about 473 native title claimant applications in the system. The Tribunal predicts that (based on national rates averaged between 2000 and 2007) all claimant applications, including those yet to be lodged, will not be resolved until about 2035.

To date, the average time it has taken to resolve a native title application by consent is six years.

Claims are being finalised at different rates in different regions of Australia. In some regions, claims are expected to be finalised within the next few years.

Although the Native Title Act provides a range of processes and options to resolve native title issues, it is the parties who decide whether and when agreements will be made and what they will contain.

The Tribunal agrees with the Federal Attorney-General, Robert McClelland, that the attitude of the parties to native title claims may have to change before there can be substantive change to the resolution of native title.

Four critical tasks must be undertaken to ensure steady progress to resolution through mediation.

These are:

- the timely preparation and assessment of connection material (evidence of claimants' ongoing connection to country)
- resolution of disputed overlapping claims
- identification of tenures that have extinguished native title
- reduction of the number of parties to claims, where their interests will not be affected by native title.

Parties can speed up progress by adopting flexible approaches to negotiations and making use of template determinations and agreements where available.

NT projects show the benefits of ILUAs

Indigenous land use agreements (ILUAs) can be useful tools for diverse projects affecting a broad range of stakeholders, and this is illustrated by agreements being dealt with by the Tribunal in the Northern Territory (NT) this month.

Four ILUAs relating to the construction of the NT Government's 286 km gas pipeline, from the Blacktip gas field in the Joseph Bonaparte Gulf to the Channel Island power station near Darwin, were registered with the Tribunal on 5 March.

These ILUAs address access and cultural heritage protection issues in the pipeline corridor area where

it crosses four pastoral leases. Other ILUAs may be lodged for parties in other sections of the corridor.

An ILUA between the Lhere Artepe Aboriginal Corporation and the NT Government for an 80-block land development at Mt John Valley in Alice Springs was lodged with the Tribunal on 2 March.

The Tribunal's NT manager Tony Shelley said these ILUAs demonstrated the versatility of agreement-making. "ILUAs can be used by stakeholders to lay the foundations for a positive future working relationship, and these ILUAs demonstrate that," he said.

Toolkit helps progress Noongar claims

A Tribunal genealogical research project is helping progress the mediation of the five South-West native title claims that underlie Western Australia's Single Noongar Claim (SNC).

The result is the 'Connection fact comparison toolkit' – a set of five databases on CD's containing genealogical material for claimants in the Gnaala Karla Booja, Yued, Ballardong, Wagyl Kaip and South West Boojarah 2 claims.

The Western Australian Government and the claimants' representative body, the South West Aboriginal Land and Sea Council (SWALSC), had compiled evidence showing individual claimant's links to 'apical' ancestors as far back as 1829 in preparation for the SNC hearing before Justice Wilcox in 2006.

The evidence came from a range of sources, but there were inconsistencies between some details. The Tribunal, as mediator of the five claims, used expertise from its research, geospatial, information services and mediation units to develop the kit.

Individual reports can be created from the data to identify 'agreements' and 'exceptions' between the sources. The kit also provides an annotated index of all source material provided to the Tribunal.

Tribunal Member John Catlin said the Tribunal was involved in the management of connection evidence that hadn't only come from the public record.

"Earlier projects were restricted to public record data. This project, begun at the request of SWALSC and later supported by the WA Government, developed



Several Tribunal business areas were involved in the creation of the toolkit. The team included South West case manager Trish Sinclair-Jones (left), researchers Kathryn Neville and Stacey Scott and information services consultant Amrat Bhudia.

a database of all evidence previously presented, plus cross-checked all information contained in SWALSC's family tree database with State genealogical data," he said.

Those processes fed into the current mediation schedule, which involves the parties agreeing to genealogical facts in each of the five claims.

"The Tribunal demonstrated a capacity to manage connection material effectively and impartially. My view is that this could be taken further towards streamlining connection processes elsewhere in Australia," Mr Catlin said.

Tribunal research officer Kathryn Neville and South West case manager Trish Sinclair-Jones developed three prototypes before finalising the kit.

SWALSC's in-house counsel Simon Blackshield, who prepares SWALSC's 'Notices to Admit Facts', said the kit was a very useful tool for addressing non-contentious issues with the State, and could cut the costs of litigation.

Fishing to stay at Blue Mud Bay

The Northern Land Council (NLC) has endorsed an extension of the interim licensing and permit regime for commercial and recreational fishing in tidal waters at Blue Mud Bay in the Northern Territory until 31 December 2009.

In July 2008, as a result of the High Court decision in the Blue Mud Bay case, it became clear that the NT's Fisheries Act could not authorise people to fish in tidal areas within the boundaries of an Aboriginal land rights grant.

Permission from the area's traditional owners was

needed. This may be granted via a permit from the NLC, acting for the wishes of the traditional owners, under the Aboriginal Land Act.

However, traditional owners agreed not to change existing arrangements before 30 July 2009. The interim scheme involves the guaranteed approval of licences to commercial operators, with recreational licences granted on request.

For more about the Blue Mud Bay decision visit www.nntt.gov.au and go to Native Title Hot Spots Issue 28.

After 15 years, flexible approach is the key to a positive future

In the 15 years since the Native Title Act began operating there have been many successful native title outcomes, but the system could still be improved, says Tribunal President, Graeme Neate.

The Commonwealth Native Title Act 1993 was legislated after the High Court first recognised native title in Australia, in the Mabo decision of 1992.

The Act began operation on 1 January 1994. Since then, 82 determinations have been made that native title exists, covering about 11.6 per cent of Australia's land mass (889,477 sq km) and 27,380 sq km of sea (below the high water mark).

The Act also provides a platform for broader agreement making options, such as indigenous land use agreements (ILUAs). At 19 February, 362 ILUAs had been registered, covering about 14 per cent of Australia's land mass and 2,555 sq km of sea.

"There have been many good outcomes but there is always room for improvement," Mr Neate said. "Over the 15 years successive governments have amended the Act to improve the process and expand the options for settlement. Leading court



Tribunal Member Graham Fletcher (left) and case manager Gary Lui (right) with Elizabeth Lui of Iama at the 2004 native title determination at Yam (Iama) Island in the Torres Strait.

decisions have clarified the law so that parties are working with clearer parameters than in the early days."

The Australian Government released a discussion paper on proposed native title amendments, after its announcement that it would make changes to the role of the Federal Court in relation to native title applications.

"Currently parties have a broad range of options for settling native title claims under the Act, including ILUAs and agreements about related matters," Mr Neate said.

"It is important this flexible approach remains under the proposed changes so that all parties can negotiate outcomes that meet their local circumstances."

Mr Neate said there were 473 native title claimant applications currently in the system and it was essential to find ways to facilitate faster determinations of native title.

"The Federal Government is encouraging more negotiated settlements of native title and the Tribunal welcomes this."



Yungngora people's representative Ernie Bridge (left) and Tribunal Member Fred Chaney at the Noonkanbah native title hearing near Fitzroy Crossing in Western Australia in 2007.



Justice North made Australia's 100th native title determination in 2007 when he recognised the rights and interests of the Gunditjmarra People in Victoria's western district

Share your favourite Native title memories

With your help, this year Talking Native Title will look back over the past 15 years of native title.

In each edition we'll publish favourite photos from native title determinations, and we'll also publish these on the Tribunal website.

To share your memories, send digital photos to enquiries@nntt.gov.au . Please include details about the event, who's in the photo and your contact phone number.



Tribunal President Graeme Neate (second from right) and Member Bardy McFarlane (right) congratulate native title holders at the Yankunytjatjara/Antakirinja consent determination in Marla, South Australia, in 2006.



Tribunal member John Sosso (second from left) with some of the parties to the Githabul People's claim, at the 2007 Federal Court hearing in Woodenbong, NSW, which recognised the traditional owners' non-exclusive native title rights to the land.

Islanders can call Wellesley home from page 1

Gangalidda tribe chairman Murrandoo Yanner said that after a litigated determination recognising their sea rights in March 2004, the group decided to negotiate over their rights to land.

"The sea claim was a battle and we won that. We always knew that by winning the first one it would pave the way for the land claim. Therefore we went for negotiations for a consent determination," he said.

Queensland's Minister for Natural Resources and Water, Craig Wallace, said the determination provided certainty for people with interests in the region.

"This is a great example of how parties working

together can achieve quicker and better outcomes in native title negotiations," he said.

Mr Yanner said the next step for the groups was to work with their native title representative body, the Carpentaria Land Council, to decide how to "use these hard fought rights as a platform to improve circumstances" and develop a strong economic base on the islands.

They wanted total equity and would consider joint ventures in the tourism and fishing industries.

"We've turned a new page and it is exciting because the ground ahead of us is uncharted. But we're seafaring people and we go into uncharted waters with great confidence."

NTV turns ideas into images

Upgrades to a Tribunal internet mapping and spatial enquiry service is ensuring subscribers involved in native title negotiations have access to some of the latest geospatial tools.

In February the Tribunal's Native Title Vision (NTV) system was rebuilt using a new version of IntraMaps – this retains existing functions as well as introduces improvements to make the system easier to use.

NTV does not rely on specialist knowledge or extensive training and is used by more than 300 subscribers to create maps and images using information from a wide range of geospatial data. Tribunal Member Graham Fletcher said the geographic data from NTV enabled the Tribunal to identify solutions to issues that arose during the native title mediation process.

"Identifying the land tenure of an area within the claim, or the location of public infrastructure, and sharing that visual information can provide a solution to what may otherwise have been an issue," Mr Fletcher said.

The internet service has subscribers from around the world. Among the latest is a Paris-based Australian geologist who works for a French exploration company, that aims to secure appropriate native title agreement permissions for its activity in Australia.

Lawyer Alice Hoban, of Finlaysons, in Adelaide, said NTV is useful for work relating to the resources industry, and the information was comprehensive, up-to-date and readily available.

"NTV is an invaluable tool for our practice. Our purpose may be to identify native title claims, the location of tenements or the nature of land holdings," Ms Hoban said.

While the service is now used by diverse stakeholders, it was originally designed to provide visual native title information to staff at the Federal Court of Australia. The Federal Court's trial logistics manager (native title), Bob Sheppard, regularly uses NTV to help plan on-country Federal Court hearings.

"Being able to readily visualise the landscape of the area from satellite imagery and identify potential locations for setting up the Court infrastructure – from the office – can save significant reconnaissance time in the field and therefore resource and cost savings," he said.

The native title unit in the Commonwealth Attorney-General's Department is also a NTV subscriber and regularly uses the system to identify possible Commonwealth interests, such as Defence and Bureau of Meteorology facilities, in claim areas.

The Tribunal's geospatial services manager, Peter Bowen, said the application brought together a number of layers of geospatial information and this information was regularly updated.

"One of the key factors in the success of NTV has been the collaborative partnerships established with State and Territory Government geospatial data custodians," Mr Bowen said.

"This has instituted regular access to their data holdings to allow integration with the Tribunal's native title information," he said.

For more about NTV email geoservices@nntt.gov.au

The Federal Court of Australia's manager client services (WA) Brendan Mitchell (left) with the Tribunal's geospatial services manager Peter Bowen – The Federal Court uses NTV to prepare for on-country hearings.



Mediation initiative speeds up WA pastoral claims

Some Western Australian native title claims may now be resolved more quickly, thanks to a renewed emphasis on earlier consultation between parties as part of mediation.

On-country mediation ‘scoping’ conferences were initiated after consultations between the Tribunal and the Pastoralists and Graziers Association of WA (PGA) in 2007.

The conferences aim to give respondents and native title claimants an opportunity to meet and discuss issues related to the claim earlier in the mediation process. The conferences held so far have been mainly attended by pastoralists, as well as some by mining and local government interests.

The first scoping conference was held for the Wajarri Yamatji claim on 26 August 2008 and was followed by others for the Wiluna, Njamal and Nyikina and Mangala claims. About seven more are scheduled for 2009. The conferences are scheduled at a crucial stage of the mediation process – ideally before claimants’ connection material is completed and submitted to the State Government for assessment.

Tribunal Member Dan O’Dea said this gave the parties the chance to raise and address any issues they had about claimants’ connection to the land before material was submitted.

“This is particularly relevant in claims over pastoral areas, where individual pastoralists and claimants may have lived on the land side-by-side for generations,” Mr O’Dea said.

“They can resolve any questions about people’s relationship to each other and the land informally, face-to-face, at the conference, and they can also talk about their propositions for the path to a consent determination.

“In the past, pastoralists had been excluded from the connection process and their concerns could only be raised later after the material has been assessed by the State. This could add years to the process.”

The idea of earlier engagement in mediation was discussed at the July 2007 Getting Outcomes Sooner workshop, which the Tribunal coordinated with the Australian Institute of Aboriginal and Torres Strait Islander Studies.

The PGA’s native title director Dr Henry Esbenshade said the PGA talked to the Tribunal in October 2007



PGA solicitor Marshall McKenna (left), Tribunal Member Dan O’Dea, and pastoralists Tom Jackson and Ellen Rowe inspect a map showing the Wajarri Yamatji claim, at a scoping conference in Cue, in August 2008.

about the need for earlier engagement in mediation because they could see this would benefit all parties.

Tribunal members Dan O’Dea and John Catlin responded with a blueprint for the scoping conferences.

“Rather than just having lawyers from each ‘side’ meeting to discuss their positions on the claim, the scoping conferences provide an opportunity for claimants and pastoralists to get to know each other and build relationships,” Dr Esbenshade said.

“This is a real step forward by the Tribunal to expedite the best practice to see mediation resolved. Every one of these conferences has expedited the processes underway in the Federal Court.”

Dr Esbenshade said the scoping conferences also provided a forum for discussing possible indigenous land use agreements “to set out how co-existence can be worked out”.

Mr O’Dea said scoping conferences were useful for parties where individuals lived and worked on the land or seas subject to the claim. Scoping conferences were less likely to be used when non-claimant parties were city-based organisations without any personal connection to the land.

Tribunal regional manager Tom Weaver coordinates the WA scoping conferences. He said the relationship between people involved in the claims was integral to the success of any agreement – and so far the new conferences had shown benefits for all parties.

Victoria still examining new ways to settle native title

Victorians are pushing ahead with a proposal for an alternative negotiation framework that aims to hasten the settlement of native title.

The framework was developed by a steering committee chaired by Professor Mick Dodson and comprising representatives of the Victorian Traditional Owners Land Justice Group and the State Government. State Cabinet received the proposal on 6 January 2009.

Tribunal President Graeme Neate welcomed the steering committee's efforts to develop a faster process for resolving native title in Victoria through agreement making.

Under existing laws established by the High Court in the Yorta Yorta case, native title claimants were required to prove that they had a connection to their traditional country prior to sovereignty and that this connection had continued to exist since that time.

"It can be difficult for native title claimants in Victoria to prove their ongoing connection to country due to the history of Indigenous peoples' dispossession in that state," Mr Neate said.

"When the Mabo decision was made and the Native Title Act 1993 was developed, it was made clear that not all Aboriginal groups would be able to achieve recognition of native title. This is stated in the preamble to the Act.

"Native title has been extinguished over much of southern and eastern Australia. This is why the Indigenous Land Corporation was established – to purchase land for groups who would not be able to prove native title.

"The reality is that some groups will be able to benefit directly from the native title system and others may not."

The Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk peoples had their native title rights recognised through three consent determinations in Victoria's Wimmera region at a Federal Court hearing on 13 December 2005. The Gunditjmarra People then had their native title rights recognised in a consent determination on 30 March 2007.

To date these are the only consent determinations in Victoria, among the 71 consent determinations that have been made Australia-wide.

Mr Neate said the Tribunal would be interested to discuss with the Government the ramifications of the new system in Victoria and work in a cooperative manner with the Government to meet the needs of the parties.

For more information about the framework visit the Victorian Government's website at www.vic.gov.au.

National native title statistics 19 February 2009

Determinations of native title

Total number of registered determinations of native title in Australia	117
Determinations that native title exists in the entire or part of the determination area	82
Determinations that native title does not exist	35
Consent determinations	71
Litigated determinations	22
Unopposed determinations	24

Indigenous land use agreements (ILUAs)

Total number of registered ILUAs in Australia	362
Current applications	
Claimant applications	473
Compensation applications	8
Non-claimant applications	30
Total applications	511

For more statistics visit www.nntt.gov.au

Was this information useful?

Email Public Affairs with your comments and suggestions to enquiries@nntt.gov.au or telephone (08) 9268 7495.

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Resolution of native title issues over land and waters.