ISSUE NO. 23

TALKING

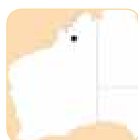
Native Title

NEWS FROM THE NATIONAL NATIVE TITLE TRIBUNAL JUNE 2007

Collaboration, courage and persistence win out

The Yungngora people were officially recognised as native title holders and presented with a plaque that commemorates the day: pictured are native title holders Frank Davey and Dickey Cox, and Wayne Bergman, Executive Director of the Kimberley Land Council.

Fred Chaney recently retired as Deputy President of the National Native Title Tribunal, his work ending with the Noonkanbah native title determination in April – he writes.



Contrast the events at Noonkanbah station in the Kimberley in 1980 and today and you would have to believe we are moving towards better treatment of Indigenous Australians.

In 1980 after persistent and unsuccessful efforts by the Western Australian Government to get the Aboriginal leaseholders on Noonkanbah station to agree to allow drilling for oil on the property a convoy of trucks supported by the police forced their way on to the station and drilled what proved to be a dry hole.

The leaseholders, the Yungngora community, had asserted that the target was a site too important to be drilled.

Media coverage at the time showed the attempts of community members and their supporters to block the entry and the police overpowering them and arresting some.

It was a violent scene and a time of despair.

Contrast that past with now. In April the Federal Court sat at Noonkanbah to order by consent that the Yungngora people are the holders of exclusive possession native title over all but the public facilities on the station.

The critical consent came from the state government which had worked with the community for two years after indicating support for recognition of native title to ensure all legal requirements were met.

Continued page 7.

In this issue

- *Australia's 100th native title determination*
- *SA commitment to resolving native title*
- *Managing native title rights takes resources*

National Native Title Tribunal

Resolution of native title issues over land and waters.

From the President Graeme Neate

This June marks the 15th anniversary of the High Court's landmark decision in *Mabo v Queensland (No 2)*. As a response to this decision, the Australian Parliament enacted the *Native Title Act 1993* and established the National Native Title Tribunal.

As with all anniversaries it is an important time to reflect on the past and focus on improving how we reach native title outcomes into the future.

Although there are still legal issues to be resolved by the courts and creative negotiating options still to be explored by the parties, we can take stock of how the system is performing and how it can be improved.

To date there have been 101 determinations of native title entered on the National Native Title Register, of those, 67 are that native title exists (in part or all of the determination area), and most of those (79 per cent) have been with the consent of parties, many without the need for a trial.

Some of the consent determinations that native title exists are accompanied by other agreements, including indigenous land use agreements (ILUAs). There are currently 271 ILUAs on the Register of Indigenous Land Use Agreements.

The steady rise in determinations of native title and the accompanying increase in ILUAs demonstrates that the native title scheme can deliver, and has delivered, direct and positive outcomes for some Indigenous Australians.

Much work remains to be done, and improvements to the system are needed.

With recent amendments to the Act we have entered the next era of native title. *The Native Title Amendment Act 2007* commenced on 15 April this year. It is a part of a package of reforms aimed at providing more efficient and effective outcomes from the current native title system.

The changes affect native title representative bodies and prescribed bodies corporate, as well as many respondent parties to native title claims, the Federal Court and the Tribunal.

The Tribunal has been given some extra powers and functions to deal with native title claims that are referred to it by the Federal Court for mediation.

Experience over the last 15 years shows that parties to native title claims can work together to secure just and enduring outcomes in a timely way. The Tribunal's new powers and functions are tools to assist parties to reach that objective.

These changes will be supplemented by the Native Title Amendment (Technical Amendments) Bill 2007, introduced into the House of Representatives on 29 March 2007 – *see further details on page 8.*

Changes to registration testing of native title claims

One of the first changes following amendments to the *Native Title Act 1993* will be to the registration testing of native title claims.

This will affect a relatively small number of claim groups, but will need to be done as efficiently and quickly as possible to provide an impetus for other changes to the system.

Under the new laws the Native Title Registrar is obliged to apply, and in some cases reapply, the registration test to native title applications.

These applications include those which have failed the registration test and are not on the Register of Native Title Claims, and those that are on the Register but have never been through the registration test.

Identified claimants have been contacted by the Tribunal directly or through their representative body.

Claimants have been asked to decide whether they want to provide new information to support their application, amend their application in the Federal Court or withdraw their claim.

Applications affected by the changes will be tested within 12 months.

Gunditjmara dancers welcome visitors to the country at a smoking ceremony before the Federal Court hearing commences.

Australia's 100th native title determination

More than 200 years since their ancestors systematically farmed eels for food and trade the Gunditjmara people of Victoria have gained recognition of their native title rights through Australia's 100th registered native title determination.

On 30 March in an outdoor courtroom at Mt Eccles National Park north-west of Warrnambool, Justice Tony North made a consent determination recognising the Gunditjmara people's non-exclusive native title rights and interests over 140,000 ha. The area includes more than 2000 parcels of vacant crown land, national parks, reserves, rivers, creeks and sea.

It's only the second time the Federal Court has recognised native title through a consent determination in Victoria – a state where native title has been difficult to prove due to a history of dispossession of the Aboriginal people.

With Australia's 100th determination and Victoria's second by consent the Gunditjmara people are now native title holders.

The determination finalises the majority of the Gunditjmara people's two native title claims in south-western Victoria which the group has been working on for the past 11 years.

Lake Condah in the south-east of the determination area – now grass and stone – was once the site of one of Australia's earliest and largest aquaculture ventures operated by the Gunditjmara people.

Tribunal Member, Gaye Sculthorpe, said the Gunditjmara people provided evidence of their strong links through traditional law and custom from this earlier society until today, maintaining an ongoing connection to their country in spite of many pressures.

"The Gunditjmara people have demonstrated great perseverance to reach this determination which acknowledges their special native title rights while protecting the rights and interests of other parties," she said.

When handing down his decision Justice North noted the significance of the determination for Australian society as a whole: "By doing justice to the Gunditjmara people, the State, the Commonwealth and the other respondents have taken a step to right past wrongs and lay a basis for reconciliation between Indigenous and non-Indigenous Australians."

Gunditjmara representative Damien Bell said: "It means an enormous amount to the Gunditjmara people that the parties have agreed to the terms of the consent determination."

National park management needs Indigenous knowledge

Elder Linda Vidler, Premier Morris Iemma and elder Dulcie Nichols seal the ILUAs that incorporate arrangements to co-manage national park areas at the Byron Bay ceremony.

Indigenous people should have a greater role in managing national parks, a Senate Committee inquiry into national parks and protected areas has recommended.

The report, "Conserving Australia" was released by the Senate Environment, Communications, Information Technology and the Arts Standing Committee on 12 April 2007.

It found that Indigenous Australians "have a unique relationship with Australia's land and sea" including the conservation estate. In areas which may be subject to native title claims or rights, Indigenous people have "a legal as well as historical role to play in the ongoing management of such land."

"Indigenous land management practices have helped shape the modern landscape and biodiversity, and their knowledge or continuing use of such practices will be important to the ongoing protections of conservation values," the committee stated.

Tribunal President, Graeme Neate, has welcomed the committee's third recommendation: "that all governments give greater priority to Indigenous knowledge and participation in park management generally, and fire management in particular."

"Under the *Native Title Act 1993* groups around the country have negotiated indigenous land use agreements (ILUAs) and reached native title consent determinations that incorporate various management arrangements between Indigenous groups and governments in national parks and state forests," Mr Neate said.

"These arrangements have proved to work for the parties involved as Indigenous people benefit from the opportunity to take responsibility for their traditional land and governments benefit from the Indigenous groups' cultural knowledge."

In February this year the Bundjalung people of Byron Bay, in northern New South Wales, and the state government signed two ILUAs that incorporate arrangements to co-manage national park areas. The agreements build on an earlier ILUA the two groups reached in 2001 that created the Arakwal National Park and provided opportunities for the native title group to train to become rangers. A number of young people have since gone through the training process and have been employed as rangers.

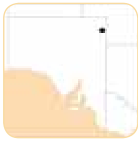
The Githabul people also finalised an ILUA with the State of New South Wales in February 2007 that incorporates a commitment for the parties to work together to manage and protect 10 national parks and 13 state forests within the agreement area in northern New South Wales.

Mr Neate said agreements to co-manage national park areas had also been reached in north Queensland, the Northern Territory, Western Australia and Victoria.

"Such agreements not only establish a framework for the protection of the natural environment and the harnessing of cultural knowledge, but give groups the opportunity to learn from one another and build constructive working relationships."

For a copy of the Senate Committee's report go to *http://www.aph.gov.au/Senate/committee/ecita_ctte/nationalparks/index.htm*

SA commitment to resolving native title



The State of South Australia has announced its commitment to resolving 75 per cent of all native title claims by 2014.

In January this year the Premier, Mike Rann identified this target in an updated Strategic Plan for the state.

There are currently 22 native title claims in SA. To resolve these claims the state plans to focus on recognising native title rights and interests through indigenous land use agreements (ILUAs) and negotiating consent determinations, or withdrawal of claims by agreement.

"The ILUA process can provide fair and balanced outcomes for the first South Australians as well as for pastoralists, farmers, miners, fishers and government," the plan sets out.

The Statewide ILUA Strategy (SA) resolves native title matters through negotiation rather than litigation. In response to the state's commitment to resolve most native title claims by 2014 the strategy is currently under review.

Reaching agreement, recent success

This year there have been seven ILUAs finalised over land in far north South Australia, covering pastoral and petroleum exploration activities in the Yandruwandha/Yawarrawarrka native title claim area as a part of this strategy.

Petroleum Conjunctive ILUA

South Australia's first Petroleum Conjunctive ILUA was signed in a ceremony in Adelaide on 16 February.

The Yandruwandha/Yawarrawarrka people, state government, the South Australian Chamber of Mines and Energy, and the Aboriginal Legal Rights Movement came to agreement on the ILUA in the lucrative Cooper Basin area in north-east SA.

This agreement covers the exploration and production of any petroleum with the traditional owners to receive royalties, jobs and skills training.

Paul Holloway, Mineral Resources Development Minister said the agreement was an excellent outcome that manifests trust in the processes that protect native title and enable upstream petroleum operations in SA.

Pastoral ILUAs

After two years of negotiation the Yandruwandha/Yawarrawarrka people, six pastoral leaseholders, and the state government have signed ILUAs for the pastoral stations.

At a ceremony on 2 May at the Callyamurra Waterhole, near Innamincka, the agreements were signed by the pastoralists. The agreements give certainty to both the traditional owners about access and protection of their heritage and the pastoralists about getting on with their business.

The Yandruwandha/Yawarrawarrka people and six pastoral leaseholders gather at Callyamurra Waterhole, near Innamincka, to celebrate the signing of indigenous land use agreements on 2 May 2007.

Traditional owners gain fishing controls over Blue Mud Bay

Traditional owners of Arnhem Land's Blue Mud Bay region have a stake in the local fishing industry because of a recent decision made by the Full Federal Court.

On 2 March the court decided freehold title existed over areas of Blue Mud Bay under the *Aboriginal Land Rights Act*. It also found the *Northern Territory Fisheries Act* did not apply and the Director of Fisheries had no power to grant Fishing Act licences over those areas.

The grants under Land Rights extend to the low watermark, which includes the inter-tidal zones of certain areas of Blue Mud Bay.

Chief Executive for the Northern Land Council, Norman Fry, said the decision gave the traditional owners an opportunity to work with the Northern Territory's fishing community.

"The traditional owners' aim is to become a stakeholder in the fishing industry and ensure that it prospers, not close it down," Mr Fry said.

The NT government is seeking leave to appeal to the High Court against the Full Federal Court's decision.

In the meantime, the state, the Northern Territory Seafood Council and the Northern Land Council have reached an interim agreement for fishing licence procedures.

"Both commercial and recreational licences will be free, will apply to all tidal water over Aboriginal land and will expire two months after the High Court determines any appeal," Mr Fry said.

Although the traditional owners have freehold title to the affected areas of Blue Mud Bay, the court decided that they do not have exclusive native title rights over those areas.

Aboriginal land rights and native title are different because under the *Aboriginal Land Rights Act* Indigenous people are granted title to the land, whereas native title recognises the traditional rights of Indigenous claimants under the *Native Title Act 1993*.

(Left to right) Traditional owner Bobby Bandi Bandi, Northern Land Council chairman John Daly and key claimant Gawirrin Gumana.

Managing native title rights takes resources

Moa Island, one of the first Torres Strait claims to have native title recognised.

The Mualgal people of Moa Island hold hope for a brighter future after more than eight years of struggle to see the benefits of their native title.

Mualgal Torres Strait Islander Native Title Corporation Council Chairman, David Bosun said although the island was one of the first two areas of the Torres Strait to have native title recognised, not a lot had been done to benefit his people.

"It has been a struggle because there has been very little support and resources given to us to set up a Prescribed Body Corporate (PBC)," he said.

Under the *Native Title Act 1993*, when the Federal Court makes a determination that native title exists native title holders are required to establish a body corporate to represent them as a group and manage their native title rights and interests.

The Mualgal (Torres Strait Islanders) Corporation is the PBC currently registered to represent the Mualgal people in their native title interests.

He said it was difficult for the PBC to function until it received a recent grant from the Natural Heritage Trust's *Envirofund*.

"With funding from *Envirofund* we will select four local boys to put up fences to protect the island's sacred sites and then we will try to get funding for them to go on and learn to be rangers so they can continue to monitor and protect the sites," he said.

Mr Bosun also plans to set up an ecotourism business on the island where the Mualgal people can preserve and protect their natural heritage while benefiting economically.

However, Mr Bosun said the project still had a long way to go. "Although we have had people from Melbourne University out to draw up plans, we really need assistance from the government to help move it forward," he said.

Collaboration, courage and persistence win out from page 1

The critical consent came from the WA state government which had worked with the community for two years after indicating support for recognition of native title to ensure all legal requirements were met.

The Kimberley Land Council, as the Representative Body for the region, was a consenting party after satisfying itself and its constituents that the application was well founded.

There was much to celebrate.

There is the courage and persistence of the Yungngora community which since 1980 has survived as a strong community and continued developing the station with the support of the state government and the Indigenous Land Corporation. They have kept their school, developed housing and remained intact.

There was the state's constructive role in moving this forward and reaching agreement.

There was the involvement of Ernie Bridge, a former State Minister for Aboriginal Affairs, who represented the community and worked with both the present and past governments to achieve recognition of native title.

There is the extraordinary turnaround by the mining industry with its broad support for native title and negotiation.

There was the fact that Noonkanbah is not an isolated case and that other consent determinations have been made and others are on the way.

The determination happened 10 days after I finished at the Tribunal. It was a nice way for it to end.

The Eastern Kuku Yalanji people, the Queensland Government and other parties gathered in Wujal Wujal on 11 April to celebrate the signing of agreements to be registered as indigenous land use agreements (ILUAs) over 230,000 ha between Mossman and Cooktown where the Eastern Kuku Yalanji people are seeking native title recognition.

Further changes to the Native Title Act

The Senate Legal and Constitutional Affairs Committee report for its inquiry into the Native Title Amendment (Technical Amendments) Bill 2007 was tabled in Parliament on 9 May 2007.

Technical amendments to the *Native Title Act 1993* have been put in place to improve existing processes for native title litigation and negotiation.

Some of the recommendations included:

- Enabling the National Native Title Tribunal Registrar to assist parties seeking to register an indigenous land use agreement.
- Amending the review process of decisions made by NTRBs which affect Aboriginal and Torres Strait Islanders.
- Allowing a PBC to charge a third party for costs and disbursements reasonably incurred while performing its statutory functions.
- Tribunal Members be responsible for reviewing registration of native title applications rather than the Tribunal Registrar.

A full copy of the report is available from the Parliamentary website www.aph.gov.au.

National native title statistics **8 May 2007.**

Registered determinations of native title

Total number of registered determinations of native title in Australia	101
Determinations that native title exists in the entire or part of the determination area	67
Determinations that native title does not exist	34
Consent determinations	58
Litigated determinations	20
Unopposed determinations	20

Indigenous land use agreements (ILUAs)

Total number of registered ILUAs in Australia	271

Native title applications not fully resolved

Claimant applications	538
Compensation applications	11
Non-claimant applications	36
Total applications	585

For more statistics see the Tribunal's website www.nntt.gov.au

Commonwealth Law Courts
Level 4, 1 Victoria Avenue Perth WA 6000 GPO Box 9973 Perth WA 6848
Telephone (08) 9268 7272 Facsimile (08) 9268 7299

Freecall 1800 640 501 www.nntt.gov.au

Talking Native Title is produced quarterly by the Public Affairs team of the National Native Title Tribunal. Letters to the editor can be sent to: Public Affairs, National Native Title Tribunal, GPO Box 9973, Perth WA 6848 or by email: publicaffairs@nntt.gov.au. If your contact details have changed, please let us know. **Photographs in this issue courtesy of Kubin Council, David Bosun, Todd Condie, Northern Land Council and Tribunal staff. ISSN 4116-2508**

National Native Title Tribunal

Resolution of native title issues over land and waters.