

TALKING

Native Title

NEWS FROM THE NATIONAL NATIVE TITLE TRIBUNAL

SEPTEMBER 2007

Strathgordon Mob look to brighter future following native title recognition

Jerry Ned, Strathgordon elder, near the site of the old Strathgordon Station. On 26 July when the Strathgordon Mob's native title claim was finalised they were recognised as native title holders over mostly pastoral land in far north Queensland.



They were once paid only tobacco and food for hard labour at Strathgordon Station but on 26 July 2007 far north Queensland traditional owners, the Strathgordon Mob, had their native title rights recognised under Australian law.

Sitting at the remote homestead, 415km north-west of Cairns, Justice Andrew Greenwood told the Strathgordon Mob their exclusive native title rights over all land under the 1180sq km pastoral lease were recognised through a consent determination, as were their non-exclusive native title rights over the waters, including the rights to hunt, fish and gather.

For native title holder Fred Coleman, whose grandmother was born on Strathgordon Station, the outcome seemed sudden after a long wait. "Everyone is getting land back which we can call our own.

They (the Government) took our rights away from us, now they're giving us something back," he said.

Resolution of native title issues over land and waters.

The consent determination finalises the Strathgordon Mob's native title claim, which the Cape York Land Council lodged on their behalf in 2003.

Negotiations between the Strathgordon Mob, the Poonko Strathgordon Aboriginal Corporation, State of Queensland, Cook Shire Council and Queensland Lapidary and Allied Craft Clubs Association led to agreement about their respective rights and interests.

Two indigenous land use agreements were also reached that establish how their rights and interests will be carried out on the ground.

Continued page 2.

In this issue

- *What the native title reforms mean*
- *Tjurabalan Mob seek benefits of native title*
- *Native title and land rights are different*



**National
Native Title
Tribunal**



From the President Graeme Neate



Constitutional changes made 40 years ago paved the way for the 104 determinations of native title that have been made under the *Native Title Act 1993*, and the

287 indigenous land use agreements currently registered with the Tribunal.

This year marks the 40th anniversary of the referendum which changed the ‘race’ power in the Australian Constitution. The anniversary is a good time to remember the important role this vote had in the ongoing recognition of native title.

The Native Title Act would not have been possible without the constitutional changes that resulted from the 1967 referendum.

Before it was changed, the Australian Constitution gave the Australian Parliament power to make laws for: “The people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws.”

With the approval of 91 per cent of the voting public, the largest majority in the history of Australian constitutional referendums, the words “other than the aboriginal race in any State” were removed.

This significant change gave the Australian Parliament the power to make ‘special’ laws with respect to Aboriginal people.

The only Aboriginal land rights legislation that existed in 1967 was the South Australian *Aboriginal Lands Trust Act 1966*. In the decades after the referendum, the *Aboriginal Land Rights (Northern Territory) Act 1976* was passed followed by various types of land rights schemes in most jurisdictions in Australia. Those schemes enabled Indigenous peoples to claim certain areas of land or for title to land to be transferred to them.

In June this year was the 15th anniversary of the historic decision in *Mabo v Queensland (No 2)* when the High Court first recognised, under Australian common law, the native title rights of Indigenous Australians in accordance with their traditional laws and customs.

Relying on the 1967 amendments to the Constitution, the Australian Parliament enacted the *Native Title Act 1993*. There was a challenge to the constitutional validity of the Act but, in 1995, the High Court rejected that challenge. The judges held that the Act “is ‘special’ in that it confers uniquely on the Aboriginal and Torres Strait Islander holders of native title (the ‘people of any race’) a benefit protective of their native title...Whether it was ‘necessary’ to enact the law was a matter for the Parliament to decide.”

The anniversaries of the 1967 referendum and the Mabo decision remind us that both events played important roles in developing systems to recognise and protect Indigenous peoples’ rights to land, including the *Native Title Act*.

Strathgordon Mob look to brighter future from page 1



Justice Andrew Greenwood and Senior Strathgordon elder, Rosie Upton, with children at the Strathgordon homestead.

For Cape York Land Council Chair, Michael Ross, the determination held special significance as he is a member of the Strathgordon Mob. While welcoming the victory he said the hard work was far from over for the Strathgordon Mob who faced the challenge of carving out a future on the property for future generations.

“We hope for a brighter future so we can live and we can work. Today is the start of something big.”

Building relationships and making agreements



Pastoralists and traditional owners from stations east of Port Hedland in Western Australia were brought closer together when working

towards agreements on native title rights and land management for the area.

On 30 May 2007 the Federal Court recognised the Ngarla people as the native title holders of about 4655sq km of land in the Pilbara region.

The State of Western Australia, the Commonwealth Government, the De Grey and Pardoo pastoralists, mining companies, fishermen and others all agreed to the Federal Court's determination.

The Ngarla people now have non-exclusive native title rights in the area. This means they can access the land for camping, performance of rituals, ceremonies, management of their cultural heritage and collection of flora, fauna, fish, water and other traditional resources.

The consent determination, Ngarla and Ngarla #2 (Determination Area A), covers most of the area claimed in the Ngarla and Ngarla #2 native title applications, including the De Grey and Pardoo pastoral stations.

The remaining area is land that overlaps with the Warrarn and Njamaal peoples' native title applications and will be dealt with in a separate native title determination — Determination Area B.



Justice Annabelle Bennett congratulates Ngarla elders Jeffery Brown, Charlie Coppin and Stephen Stewart now native title holders of about 4655sq km of land in the Pilbara region.

Ngarla elder Charlie Coppin, born at the De Grey station, said he was relieved the decision had finally come to pass.

"It has taken a long time, but I'm happy that us elders can pass this on to the next generation," he said.

An indigenous land use agreement (ILUA) negotiated between the traditional owners and the two pastoral leaseholders was also signed on the day.

Githabul move closer to a native title determination



The Githabul people have taken another step towards the recognition of their native title rights with the Tribunal's registration of their

indigenous land use agreement (ILUA) on 15 August.

They finalised the ILUA with the State of New South Wales early this year over 112,000 hectares of national parks and state forests in the Kyogle, Woodenbong and Tenterfield area of north-eastern NSW.

The registration of the ILUA with the Tribunal finalises the legally binding agreement.

Expected to deliver employment opportunities, freehold land and co-management of national parks, the ILUA is a milestone in the progress towards a consent determination.

Now that the ILUA is registered the parties will apply to the Federal Court to make a consent determination that will recognise the Githabul people's rights to practise their traditional laws and customs, including the right to access and camp on the areas, as well as to hunt, fish and gather plants for personal use.

Native title and land rights are different

Many people confuse land rights with native title when they are in fact two different sets of legislation.

Native title does not come from a government grant. It comes from the traditional laws that Indigenous people were following when the British first came and which Indigenous people have been following since then.

The Australian legal system does not create those rights. Rather, a court recognises rights that have long been held by Indigenous people under their system of law and custom.

It is made up of some of the traditional rights and interests that Indigenous people already have and that a court recognises under the *Native Title Act 1993*.

Therefore, the native title rights for that area depend on the traditional laws and customs of the native title holders.

These rights also depend on what other non-native title rights (such as pastoral leases) exist over that area.

As one of the Arrernte people, Brian Stirling is a native title holder over land in Alice Springs. He said the difference between land rights and native title, for him, was that native title allowed black and white people more of an opportunity to work together for their common interest of the land.

“Local (non-indigenous) people come to ask us about what we think is best for the land and we sit together around a table and have a yarn,” he said.

When Brian was chairman of the Lhere Artepe Aboriginal Corporation seven years ago, he said Alice Springs council representatives would often discuss infrastructure development with him and the discussions worked very well.

“They (council) would give us a ring and invite us to executive meetings and we would discuss how we could get our young kids involved with anything that needed to be done,” he said.

Land rights laws involve a government deciding to grant Indigenous people title to an area. When the



Lhere Artepe negotiated an indigenous land use agreement for land in the Larapinta Valley, attending the signing of the agreement in 2004 was Chief Minister, Clare Martin, Brian Stirling, traditional owner, Betty Pearce and former Minister for Central Australia, Dr Peter Toyne.

government makes the grant it creates a legal title over that area.

A successful land rights claim usually results in the government granting special freehold title or perpetual lease to an Indigenous community or organisation. There are restrictions on how the land can be dealt with.

Harry Nelson is one of many Warlpiri people who hold land rights title over a very large area in the Tanami region of the Northern Territory. He is a senior man in the Yuendumu community and a representative on the Central Land Council executive.

For Mr Nelson and the Warlpiri people, this ownership of land is very important because it gives them independence.

Through land rights ownership, Mr Nelson’s community has been able to negotiate receipt of royalty payments from a small mining operation on their land.

“It (land rights) gives us economic independence for paying costs and we are the ones that make sure decisions made about the land are what we want,” he said.

Tjurabalan Mob seek benefits of native title



For the Tjurabalan Mob in Western Australia's Kimberley region, having its native title recognised has been both bitter and sweet.

The Tjurabalan Mob had their native title recognised over 26,000sq km in 2001 through a consent determination.

Tjurabalan Prescribed Body Corporate (PBC) Senior Project Officer, Donovan Jenkins, said the Tjurabalan Mob was very proud of gaining native title recognition.

"People felt a sense of great achievement to be recognised and get those rights recognised as some didn't believe it possible," he said.

Since then, the Tjurabalan Mob have felt both pride and frustration.

Recently, the Tjurabalan Mob managed to negotiate a mining agreement with Tanami Gold NL.

"The agreement took less than a year, which is a cracking pace in mining terms," Mr Jenkins said.

From that agreement, young Tjurabalan Mob people have been trained and employed. However a lot of funding to the traditional owners depends on gold production which has not yet happened.

"Everyone is still waiting for the benefits as the money we receive is based directly on gold production, so until gold production increases we will not be able to do much in the way of relieving poverty in our communities," Mr Jenkins said.

The Tjurabalan PBC was set up in 2001, around the same time as the native title determination came through. However it was not until this year that the PBC was able to employ a Senior Project Officer, rent a vehicle and run a small office.



The Tjurabalan mob celebrated their native title consent determination in 2001 and remain proud of their achievement.

"Our main office is yet to be opened properly and our second administration position has not been filled," Mr Jenkins said.

He said to function properly the PBC still needed funding for Project Officer salary, administration staff salary, vehicle costs, office expenditure, board meetings and community benefits for approximately 4000 traditional owners.

The Department of Families, Community Services and Indigenous Affairs recently announced the availability of funding to PBCs through an application process.

However, Mr Jenkins said the Tjurabalan PBC was not eligible for that funding because of the mining agreement it negotiated with Tanami Gold NL.

He said if the Tjurabalan PBC was able to obtain funding it would be better able to represent the native title holders.

"We would also like to own shops and road houses around here, not only to gain employment, but to stock healthy food so our people aren't spending their money on stuff that isn't good for them," he said.

Correction for issue 23 of *Talking Native Title*

In issue 23 the incorrect locality map was pictured on page three with the story *Australia's 100th native title determination*. This map should have shown the Gunditjmarra people's native title

determination in south-west Victoria.

The map has been corrected on the Tribunal website (www.nntt.gov.au). We apologise for the error.

What the native title reforms mean

In 2005 the Australian Government started a process to make the native title system more efficient and effective.

The Government focused on a series of reforms that would achieve improvements across the native title system, including improving the rate of claims resolution, reforms affecting Prescribed Bodies Corporate (PBCs) and Native Title Representative Bodies, and changes to financial assistance programs for respondent parties.

The first set of amendments to the Native Title Act flowing from the reforms commenced on 15 April 2007. A second set of minor and technical amendments to the Act received Royal Assent on 20 July 2007 with the majority of these changes starting on 1 September 2007.

Changes to how claims are handled

Registration testing

Under the amendments the Native Title Registrar is required to report to the Federal Court when an application does not meet the merit criteria for registration or if there is not enough information to make a decision. The court may then consider whether the application should be dismissed.



Chris Doepel, the Registrar, is responsible for the management of the Register of Native Title Claims, the National Native Title Register and the Register of Indigenous Land Use Agreements, as well as the administrative functions of the Tribunal.

The amendments require the Registrar to apply the registration test to applications that have previously failed the test and those that are on the Register of Native Title Claims but have never been tested. Nationally, a total of 118 applications fitting this description were identified for testing by April 2008.

Previously, when an application on the Register of Native Title Claims was amended it needed to be re-tested. In some cases this will no longer be necessary. For example, where the only amendment is to reduce the area covered by an application it will not require a re-test so long as the amended description is adequate.

From 1 September 2007, if an application does not pass the registration test then certain applicants will have the right to request that the application be reconsidered by the Tribunal. Eligible applicants will receive information on how to do this when they receive the test decision.

The Registration Test Procedures are currently being reviewed and will soon be made available on the Tribunal's website, www.nntt.gov.au.

Dismissing applications

The Federal Court now has the ability to dismiss a native title application made in response to, among other things, the proposed grant of mining tenements (future acts) unless there are compelling reasons not to do so. The Native Title Registrar may report to the court on claims that were lodged within 3 months of when a future act notice was given; registered within four months of notification; and where the future act has been finalised.

The Registrar has so far identified 46 applications made after 30 September 1998 that fit the criteria for dismissal (those lodged before September 1998 will be handled separately). In June he reported to the court on these matters. The next report is planned for September.



On 15 August the Tribunal registered the Githabul ILUA, which was signed in February this year followed by celebrations at Woodenbong: Githabul elders Auntie Dawn Close and Nancy Hillwood.

Mediation

Changes to the Native Title Act will enable the Tribunal to apply more rigour to the native title mediation process:

- To reduce delays in the mediation of native title claims the Tribunal is now able to direct a party to attend a mediation conference and have them produce documents that may assist in reaching an agreement.
- Parties will have to focus on issues that are relevant to their interests in the area claimed. For example, if an application has been amended to remove certain areas of land and in doing so then the interests of some people are no longer affected they may be removed from proceedings.
- If the parties involved agree, the Tribunal can conduct inquiries into overlapping claims or other issues, and about the kind of matters covered in a determination of native title.
- If the parties involved agree, the Tribunal can review connection material to assess whether the native title claim group has, by its traditional laws and customs, connection to the land or waters claimed.

Making sure everyone acts in good faith

Parties to native title applications, and their representatives, have an obligation to act in good

faith in relation to the mediation. This is a clear statement of how parties should behave and focuses attention on the seriousness of the process and the need for a committed approach with a spirit of good will.

The Federal Attorney-General's Department is currently preparing guidelines on what constitutes acting in good faith in mediation.

Making a determination

The amendments simplify the requirements to get a consent determination over part of a native title application area. A determination may be made without the consent of certain people, such as those with interests outside the area being determined.

Relationship with the Federal Court

The Tribunal will work more closely with the court on resolving native title matters. It will report to the court on a wider range of issues by providing the court with regional mediation progress reports and regional work plans, and by appearing before the court.

Court reports

The kinds of reports that the Tribunal makes to the court have been expanded to include regional ▷



The value of cooperation and negotiation yield outcomes such as Australia's most recent native title determination for the Strathgordon Mob on 26 July 2007.

mediation progress reports and regional work plans. The court is now required to consider Tribunal reports.

In developing these reports, the Tribunal works with the claimants' representatives and other parties to prioritise work on claims, optimise the allocation of scarce resources and develop longer term prioritisation and planning. These reports assist in tracking the progress of claims and will bring more transparency to the native title process.

Tribunal changes to complement reforms

To complement the reform strategy to improve the efficiency of the system, the Tribunal has made operational changes to work more closely with the Federal Court and parties.

On 18 April 2007 the Tribunal introduced a national case flow management scheme (NCFMS), which will provide a national overview of native title applications' progress.

The NCFMS will identify priorities and help track native title applications, through a process of examining each claim and allocating it to one or more lists. The Registrar's List of claims will include those applications identified for registration testing and notifications, the Regional List of claims will include those that require more resources to progress and the Substantive List of claims will contain those claims that are nearing finalisation.

In preparing these lists the Tribunal will take a regional approach to best inform how claims are managed, and to prepare regional mediation progress reports and regional work plans. The Tribunal will assist parties to develop appropriate work plans then ensure that those plans are followed.

National native title statistics 13 August 2007.

Determinations of native title

Total number of registered determinations of native title in Australia	104
Determinations that native title exists in the entire or part of the determination area	69
Determinations that native title does not exist	35
Total number of decisions about determinations of native title made by a court or other recognised body	102
Consent determinations	58
Litigated determinations	20
Unopposed determinations	24

Indigenous land use agreements (ILUAs)

Total number of registered ILUAs in Australia	287
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Native title applications not fully resolved

Claimant applications	531
Compensation applications	11
Non-claimant applications	36
Total applications	578

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

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Resolution of native title issues over land and waters.