NATIVE TITLE NEWSLETTER

MAY 2014

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WELCOME TO THE NATIVE TITLE NEWSLETTER

The Native Title Newsletter is produced three times a year (April, August and December). The Newsletter includes feature articles, traditional owner comments, articles explaining native title reforms and significant developments, book reviews and NTRU project reports. The Newsletter is distributed to subscribers via email or mail and is also available at www.aiatsis.gov.au/ntru/newsletter.html. We welcome your feedback and contributions. For more information, please contact: jennifer.jones@aiatsis.gov.au or bhiamie.williamson@aiatsis.gov.au.

The Native Title Research Unit (NTRU) also produces monthly electronic publications to keep you informed of the latest developments in native title throughout Australia.

You can subscribe to NTRU publications online, follow @NTRU_AIATSIS on Twitter or 'Like' NTRU on Facebook.

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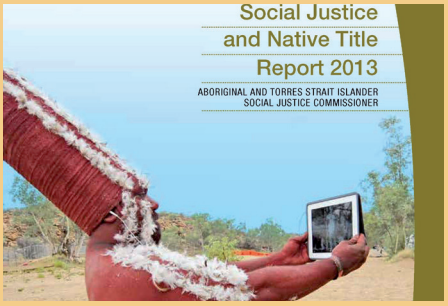

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Cover image: Daniel Wilson & Bill Drew celebrating at the Bandjalang determination.

Credit: Merinda Dutton

Aboriginal and Torres Strait Islander people are respectfully advised that this publication may contain names and images of deceased persons, and culturally sensitive material. AIATSIS apologises for any distress this may cause.

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REGISTRATIONS NOW OPEN
NATIONAL NATIVE TITLE CONFERENCE 2014
LIVING WITH NATIVE TITLE, FROM THE BUSH TO THE SEA

MONDAY 2–WEDNESDAY 4 JUNE, COFFS HARBOUR NSW

The annual National Native Title Conference will be co-convened by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and NTSCORP Limited and hosted by the Gumbaynggirr people, the traditional owners of the Coffs Harbour region. The Conference will be held at Novotel Coffs Harbour Pacific Bay Resort from Monday 2 – Wednesday 4 June 2014.

The National Native Title Conference is expecting to attract some 700 delegates again in 2014. The Conference provides a unique opportunity for a diverse range of native title stakeholders from across the country to come together to review current native title practice, policy and law.

The annual National Native Title Conference is the leading Indigenous Policy Conference in Australia and the annual professional development event for staff of native title representative bodies/service providers and relevant government agencies, as well as independent native title practitioners and academics.

The conference will feature three days of presentations:

Day 1: NTRB and PBC Program – Monday 2 June

The conference begins with the NTRB and PBC Program on Monday 2 June. This Program is for NTRB and PBC staff only.

Day 2 and 3: Public Program – Tuesday 3 – Wednesday 4 June

The Public Program is open to all delegates. This program includes keynote speeches, dialogue forums, Indigenous Talking Circles, workshops and papers presented by native title holders, claimants, practitioners, NTRB/NTSP staff, researchers, Government representatives, academics and others.

Conference Dinner – Wednesday 4 June

The Conference Dinner is held on the evening of Wednesday 4 June and concludes and celebrates the conference.

Through this structure the Conference promotes public debate about native title and Indigenous peoples' interests in land and waters and provides an opportunity for native title parties to share information and experiences.

To register for the National Native Title Conference 2014 'Living with Native Title, from the Bush to the Sea' please visit our website:

http://www.aiatsis.gov.au/events/native_title/2014/index.html

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OUR PEOPLE, OUR FOCUS

National Native Title Conference 2013 – Shaping the Future, Alice Springs NT

Gail Mabo and Maurie Ryan CLC Chair
Credit: John Paul Janke

Gumbaynggirr Traditional Owners and Natalie Rotumah (NTSCORP CEO)
Credit: John Paul Janke

Delegates listening to the Opening Plenery.
Credit: John Paul Janke

2014 National Native Title Conference

Mabo Lecture

Dr Wen-Chi Kung

Lacking the "Mabo Wonder" But Still Striving For it: The Hard Struggle for Indigenous Self Government and Land Rights in Taiwan

This year's Mabo Lecture will be presented by Taiwanese Indigenous Leader Dr Wen-Chi Kung. The following provides a summary of his lecture which will be held on Tuesday 3 June at the Opening Plenary.

The speech starts with a brief introduction to Taiwan's Indigenous people, sketching their demographics and geographical locations as well as their tribal distinctions. This is followed by a brief history of Taiwan's Indigenous people, which is deeply embedded with western and Japanese colonialism. It also discusses Indigenous policy development, highlighting the importance of the establishment of the Council of Indigenous Peoples in 1996, the sole government agency in the central government responsible for handling Indigenous affairs. Indigenous struggles for self-government and land rights have become two dominant issues in Taiwan through the past two decades. Therefore, the speech will focus on the following two major debates: One is about the strive for Indigenous self-government or autonomous regions and the government's reluctance to this appeal, the other concerns the problem of land rights. The discussion of the latter will focus on the conflicts between Indigenous claims for native title and the government's insistence on owning public land. Other problems and challenges confronting Indigenous peoples are also briefly discussed, including the effects of climate change on the Indigenous peoples and the inefficiency of administrative works. In a word, despite all the challenges and problems, there is still a silver lining, which lies in the concerted efforts of Indigenous peoples in Taiwan as well as the efficient coordination and cooperation between the government and the legislative body. For Taiwan's Indigenous peoples, native title, as promised by the Mabo Case for the Indigenous people of Australia, may not be fulfilled, but remains an ideal goal worthy o f their hard and continuous struggles now and for a long time to come.

TDr Wen-Chi Kung is a member of the Tayal tribe of Taiwan and an elected Member of the Legislative Yuan (National Parliament of Taiwan), a position he has held for three consecutive terms. During that time he has served as the Chairman in the Internal Affairs and Nationality Committee as well as in the Parliamentary Education and Culture Committee, and is currently the President of the 'Taiwan and Austronesian Island Countries Parliamentary Friendship Association'. Dr Wen-Chi Kung has for a long time been involved in advocating for recognition of the rights of indigenous Taiwanese. He has been the President of the "Taiwan Indigenous Survival and Development Association" since 2006, and has previously acted as Chairman of the Indigenous Peoples Commission for the Taipei City Government. Having received a Masters in Journalism from University of Oregon and a PhD in Social Sciences from Loughborough University in the United Kingdom, Dr Kung has held the post of Assistant Professor at a number of tertiary institutions, including National Dong Hwa University, Soochow University, Chaoyang University of Technology and Kaohsiung Ursuline Wenzao University of Languages, where he has taught Applied Foreign Language, Journalism and Communication Theories, and Ethnic and Minority Studies in Taiwan. His publications include, Let My People Know (1993, in Chinese), Loyal to the Indigenous Taste: Indigenous Media, Culture and Politics (2000, in Chinese), Indigenous Peoples and the Press: A Study of Taiwan (1997), and his doctoral thesis (reprinted in 2000), Indigenous Appeal to God.

NUNATSIAVUT, OUR BEAUTIFUL LAND:

LEARNING ABOUT THE LABRADOR INUIT LAND CLAIMS AGREEMENT

By Geoff Buchanan, NTRU

Based on a seminar by and interview with Steven Michelin, Conservation Officer, Fire Suppression and Management, Department of Natural Resources, Government of Newfoundland and Labrador. Some additional material has been sourced from the Nunatsiavut Government website <http://www.nunatsiavut.com/.>

Steven Michelin is an Inuit man with fire in his blood. A member of the Labrador Inuit, he currently works as a Conservation Officer specialising in fire suppression and management with the Government of Newfoundland and Labrador's Department of Natural Resources. 'My father was a firefighter so I've kind of followed in my father's footsteps'. Steven grew up in North West River in the central part of Labrador, Canada. 'It's a very outdoors oriented place. A lot of people still live off the land, partially. Of course that's always something I loved to do – hunting, fishing, stuff like that'. He always wanted a job in the outdoors and completed studies in forestry and silviculture before moving into a position in fire management in 2006.

When Steven visited AIATSIS in late October 2013, bush fires were burning across the state of New South Wales. Back home the forest fire season had just ended. As Steven described them, the forests of Labrador sounded very different to those in Australia. 'We're in boreal forest, so we're probably 75 per cent black spruce, and a bit of birch, poplars. A lot of the ground vegetation is mosses, so that's a lot of what we have to deal with. With a lot of the caribou lichens they're very prone to ignition, especially from lightning. The majority of our fires within Labrador are lightning caused. Lichen is actually quite a lot like paper when it dries, it's very crumbly and it burns like paper—it's easy to ignite and burns through the forest'.

But Steven wasn't visiting AIATSIS to talk solely about fire management. Presenting a seminar titled 'Nunatsiavut and the Labrador Inuit Land Claims Agreement' in the Mabo Room at AIATSIS, his main topic was Inuit self-government within the Labrador Inuit Settlement Area. In Inuttitut, Nunatsiavut means 'Our Beautiful Land'. 'The Settlement Area totals approximately 72,500 square kilometres of land in northern Labrador, including 15,800 square kilometres of Inuit-owned land and an adjacent ocean zone of 48,690 square kilometres'. In addition, Steven noted, 'the Torngat Mountains National Park Reserve was established within the Settlement Area, consisting of approximately 9,600 square kilometres'.

Steven spoke of how the Labrador Inuit Land Claims Agreement 'was the realisation of the goals set by our elders three decades earlier'. He spoke of a 28 year long journey that commenced in 1977 when the Labrador Inuit Association filed a statement of claim with the Government of Canada. On 1 December 2005, the Agreement and the Labrador Inuit Constitution came into effect. 'The Agreement is basically a contract between the Inuit of Labrador, the Government of Canada and the Government of Newfoundland and Labrador'.

The Labrador Inuit created their own constitution which established the Nunatsiavut Government as the primary regional Inuit government along with five Inuit community governments: Rigolet, Makkovik, Postville, Hopedale and Nain. The Nunatsiavut Government may make laws to govern Inuit residents of Labrador Inuit lands and the Inuit communities for matters such as education, health, child and family services, and income support. It also has jurisdiction over its internal affairs, Inuit language and culture, and the management of Inuit rights and benefits under the Agreement. It may also establish a justice system for the administration of Inuit laws.

The Agreement includes important economic elements, with the Government of Canada to transfer $140 million to the Labrador Inuit over 15 years and provide an implementation fund of $156 million. The Nunatsiavut

Government is entitled to receive 25 per cent of provincial government revenues from subsurface resources in Labrador Inuit Lands, while in the rest of the Settlement Area it receives 50 per cent of the first $2 million and five per cent of any additional provincial revenues from subsurface resources. It also receives five per cent of provincial revenues from subsurface resources in the Voisey's Bay area—an area with a pre-existing nickel mining project that may be selected as Labrador Inuit Lands or part of the Settlement Area after the project's closure.

Labrador Inuit have the right to harvest wildlife and plants, fish and marine mammals for Inuit food, social and ceremonial purposes throughout the settlement area. The Agreement establishes co-management arrangements for both wildlife and fisheries in the Settlement Area, while Labrador Inuit have greater control within the Labrador Inuit Lands. Under the Agreement, developers are responsible for compensating Inuit for any damage to or loss of wildlife, fish, wildlife or fish habitat, or harvesting activities suffered as a result of their projects.

Inuit are guaranteed a percentage of new or additional commercial fishing licences in the ocean zone under the Agreement. Steven mentioned the case of the Torngat Fish Producers, 'an Aboriginal-owned organisation, owned by the 500 Inuit members of the cooperative who export a variety of fish throughout the world'. In relation to freshwater, Labrador Inuit have the right to personal and domestic use throughout the Settlement Area. Compensation agreements must be negotiated with the Nunatsiavut Government where developers propose to use water in a way that may affect water quantity, quality or rate of flow on or adjacent to Labrador Inuit Lands. In addition, the issuing of water use permits to new developers by the provincial government needs to be approved by the Nunatsiavut Government.

While comprehensive, one thing the Labrador Inuit Land Claims Agreement does not explicitly cover is fire management. Steven noted that as the Inuit communities tend to be located further to the north and on the coast, forest fires are less of an issue there. That said, fires still occur on Inuit land. 'Recently we had one small fire within Rigolet, which is one of the communities within Nunatsiavut. We went and did our normal job. [The community] came back to me to see what they could do to prevent something like that happening again'.

While the Nunatsiavut Government doesn't currently have capacity to undertake fire management, it's staff do work alongside Steven's team if a forest fire does break out. 'They have their own conservation officers, they've been trained to be able to assist us in forest fire fighting, but basically they have no equipment'. But Steven advised us that the Nunatsiavut Government is set to acquire some impressive fire management equipment soon. 'Universal Helicopters Newfoundland Limited (UHNL) is being sold to the Nunatsiavut Group of Companies, the business arm of the Nunatsiavut Government, in partnership with Tasiujatsoak Trust and CAPE Fund. UHNL has continuously provided contract services for the Government of Newfoundland and Labrador including a seasonal contract with my own Department for fire surveillance and suppression'.

A scene from the near future presents itself of Steven Michelin seated in one of these Inuit-owned helicopters flying over the beautiful land of his ancestors as he continues to follow in his father's firefighting footsteps.

Opposite page: Aerial view of a fire in the boreal forest landscape.

Above: Steven Michelin presenting 'Nunatsiavut and the Labrador Inuit Land Claims Agreement' at the AIATSIS Seminar Series in October 2013.

BANDJALANG PEOPLE'S NATIVE TITLE
RECOGNISED AFTER CLOSE TO SEVENTEEN YEARS

By Tori Edwards, Senior Solicitor, NTSCORP Ltd.

On 2nd December 2013, NSW saw the third and fourth consent determinations in the State's native title history, and the first determination since 2007. For Bandjalang People, the determination by consent of their two native title determination applications brought to a close one chapter in the process of seeking recognition of their native title that had begun almost seventeen year's earlier with the filing of the original claim in 1996.

Following a Welcome to Country from Aunty Grace Cowan*, supported by Applicant Doug Wilson, the Court convened a special sitting in Evans Head to formally recognise Bandjalang People as the Traditional Owners of an area of land in northern NSW centred on the coastal town of Evans Head, and taking in a number of National Parks and State Conservation Areas including parts of Bundjalung, Broadwater and Bungawalbin National Parks.

Bandjalang native title holder Warren Williams addressed those assembled for the hearing, stating:

> "It's been a long and hard journey. A lot of people have put in time and effort over many years to get to today. This is recognition of who we are – Bandjalang People".

Justice Jagot also used the occasion to remark on the need for parties to work to achieve swifter outcomes for Traditional Owners:

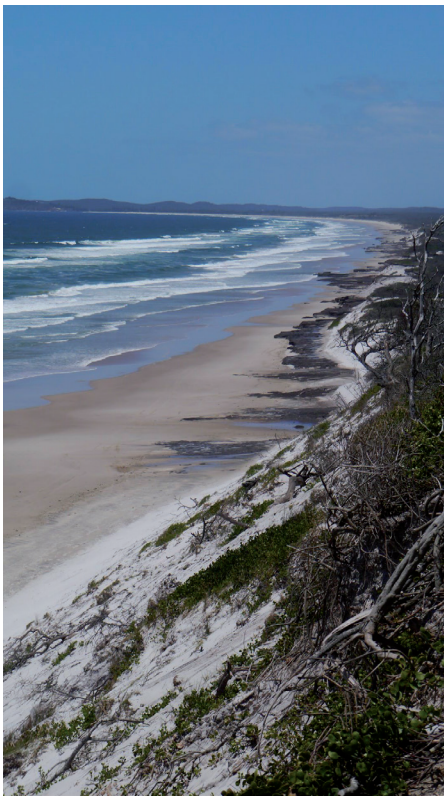
> "Renewed dedication to ensuring that native title disputes are resolved justly, according to law, and as quickly, inexpensively and efficiently as possible is required. That dedication, and the flexibility of mind to see constructive resolutions and new ways of doing things, which I do see in the terms of the proposed determination in the present case, is a responsibility we share".

As the native title service provider for NSW, NTSCORP Limited has long advocated publicly for the need for substantial change to State government policy to enable more timely outcomes for native title claimants, and to avoid matters spending years in the credible evidence assessment process. Under the case management of the Federal Court of Australia, matters such as the Bandjalang People's applications have moved swiftly towards resolution, requiring the creativity of the parties which Justice Jagot alluded to in her judgment. These determinations will hopefully pave the way for more judicious outcomes for NSW Traditional Owners in other matters.

The content of the determinations was negotiated over the course of several years following the State of NSW accepting Bandjalang People's connection to the country under claim in 2010. The native title holding group is made up of five main families, and Bandjalang People appointed a Family Representative Group with individuals from each of these families to conduct negotiations with the State. These Bandjalang People gave substantial time and energy to the finalisation of these matters, not only through attending negotiations, but through being a means of communicating with the wider Bandjalang community about what was happening in their native title claims.

The Bandjalang People determinations (#1 & #2) recognise the non-exclusive rights of the Bandjalang People to:

- Hunt, fish and gather traditional natural resources for non-commercial, personal and domestic use;
- Take and use waters;
- Access and camp;
- Conduct ceremonies;
- Teach the physical, cultural and spiritual attributes of places and areas of importance; and
- Have access to sites of significance, and maintain and protect them from physical harm.



Above left: Daniel Wilson & Bill Drew celebrating at the Bandjalang determination.
Credit: Merinda Dutton
Above: Bandjalang Country.
Credit: Merinda Dutton

The process of negotiating the consent determinations also brought Bandjalang People into contact with a range of respondent parties, including the Commonwealth, local governments, Reserve Trust management boards and individual commercial fishers and bee keepers. Where possible, the Bandjalang Family Representative Group used this process to establish or build upon existing relationships with stakeholders such as Richmond Valley Council. These interactions have already led to positive outcomes in addressing vital issues such as burial of Bandjalang People in cemeteries on Country.

The State and Bandjalang People have also signalled they intend to continue negotiating an Indigenous Land Use Agreement in 2014, through which they will enter into arrangements relating to National Parks, State Forests, Crown Land and Fisheries resources. This ILUA will establish practical arrangements for the exercise and management of native title rights and interests, address how future acts within the determination areas will be dealt with, and constitute compensation for the native title holders for past extinguishment of native title.

The determinations therefore pave the way for the Bandjalang People to work with the State on opportunities for input into the management of lands in which native title has been recognised. This input commenced even prior to the determinations with the establishment in late 2011 of a National Parks Interim Joint Management Committee comprised of Bandjalang People and staff from the Office of Environment and Heritage (National Parks and Wildlife Service). This Committee has met regularly for the past two years to discuss matters relating to Park management, and a programme for the temporary employment of Bandjalang People with the National Parks and Wildlife Service.

In 2011, the native title claimant group and the State collaborated to undertake a Business Opportunity Analysis. This project was a stock-take of the economic development aspirations of the Bandjalang People, and an examination of the various opportunities presented in Bandjalang Country, including a fast-growing eco-tourism industry. Bandjalang People intend that the native title determinations be used as a spring board for pursuing such opportunities to develop businesses on Country, to manage land, and to employ Bandjalang People.

For the native title holders, the Federal Court sitting in Evans Head in December 2013 was an occasion of celebration and recognition of the hard work of seventeen years of prosecuting the claims. It was also a day of some sadness in remembrance of those who had passed away in the past seventeen years. Bandjalang People used the occasion to recognise the many Elders and community members who did not live to see the positive outcome, including original Applicant Uncle Lawrence Wilson. Susan Phillips, Counsel for the Applicant addressed the Court at the time of the determinations regarding the significance of the day for the native title holders:

> "This is a day that the people have worked towards for 17 years, it is a day of relief, a day of celebration and a day tinged with sadness. So many of the people who were part of this effort have passed away. The years of negotiation and court proceedings have been a heavy burden for the people but a burden they have carried in order to demonstrate to others the depth of their connection to their land and the survival of their law."

In addressing those assembled on 2 December, Bandjalang native title holder Margaret Yuke said: "Today we thank all the people who have joined us on this journey, particularly our Elders who showed us the way, and our children, who are the reason we have persisted to today".

*Sadly Aunty Grace, a respected Bandjalang Elder passed away soon after the determination in early 2014

Top left: Bandjalang People celebrating at the determination.

Credit: Merinda Dutton

Left: Jagot J, Registrar Irving and Bandjalang People.

Credit: Merinda Dutton

CONGOO ON BEHALF OF THE BAR-BARRUM PEOPLE #4 V STATE OF QUEENSLAND [2014] FCAFC 9 (21 FEBRUARY 2014)

Case summary and analysis by:
Martin Dore, Principal Legal Officer, North Queensland Land Council and
Donna Bagnara, Senior Project Officer (Legal), Native Title Research Unit, AIATSIS

The following is a case summary of a recent decision by the Full Federal Court.On 21 March 2014, the State asked the High Court for special leave to appeal the decision.

During World War II, more than 13,500 Military Orders were made throughout Australia that allowed the military to take possession of land.[1] Between 1943 and 1945, five Military Orders were made over land on the Atherton Tableland in Far North Queensland. In 2001, the Bar Barrum people sought a determination of native title over that land.[2]

The Full Federal Court was asked to decide whether native title was extinguished by these Military Orders.

Normally, decisions about native title are made by a single judge. However, Logan J thought this question was sufficiently important and difficult to answer[3] to be referred to the Full Federal Court to consider as a "special case".[4]

Both the Commonwealth and the Northern Territory intervened in the proceedings.

The Full Federal Court found that the Orders ***did not*** extinguish Native Title. This decision was reached by North and Jagot JJ with Logan J dissenting.

Laws in place for the Duration of WWII plus 6 Months

The *National Security Act 1939* (Cth) (**NSA**) and the National Security (General) Regulations (the NSR) gave the Commonwealth Government powers that were "flexible and far reaching"[5] to provide for the war effort and to defend Australia. This included that the Minister of State for the Army (**the Minister**) could acquire, or take and keep, any property ***other than land*** in Australia. Section 51 (xxxi) of the Constitution provides for the acquisition of property on 'just terms' compensation (meaning that compensation will be paid).

Although the Minister could not acquire the land, the NSA and NSR allowed the Minister to make a Military Order giving an authority to certain members of the military to take possession of land. This could only occur if it might help keep the public safe, defend the Commonwealth or help in other ways with the war.

The NSA and the NSR also allowed the Minister to say what that land could be used for, as if the Minister owned the land.[6] The Minister could even go beyond the rights that an owner would have because, under the NSA and NSR, the Minister could stop activity on that land that the legal owner would not have been allowed to stop.

The Court paid special attention to the fact that the NSR provided that compensation was available, where Military Orders interfered with legally recognised rights over land. Also important was that the Commonwealth could only be in possession of the land, under the NSA and NSR, during war time and for six months after the end of World War II.

Three questions before the Full Federal Court

1. Were the Military Orders an acquisition of the property of the Bar-Barrum People other than on just terms?
2. If the answer to question 1 is yes:
   (a) were the Regulations that allowed for the Orders or the Orders themselves a "past act" under the Native Title Act 1993 (Cth) (the NTA)
   (b) and if yes, were those past acts validated (made lawful) by the NTA; and
3. (a) did making the Orders extinguish native title
   (b) and if not, did being in occupation of the Bar Barrum land because of the Orders, extinguish native title.

Question 1 – Acquisition other than on just terms

North and Jagot JJ[7] considered that, as the NSA scheme provided for compensation for loss suffered, just terms were provided.

North and Jagot JJ also discussed the issue of acquisition and considered that the Bar Barrum people's "bundle of rights" had been "seized and taken away" for the period of possession, and concluded, at [76]:

… question 1 should be answered "No". While property was

1 The North Queensland Land Council Representative Body refers to affidavit material filed in the Federal Court as the source for this figure.
2 Bar-Barrum People #4 claim, National Native Title Tribunal File No: QC2001/032.
3 *Congoo on behalf of the Bar-Barrum People #4 v State of Queensland* [2014] FCAFC 9 (Congoo), at [79] per Logan J.
4 The matter was referred to North, Jagot and Logan JJ under s 25(6) *Federal Court of Australia Act 1976* (Cth).
5 *Congoo* at [5] (quoting the then Prime Minister in the second reading speech for the Act).
6 *National Security (General) Regulations* r54(2)(a) provide that the authorised person could:
"…do, in relation to the land, anything which any person having an unencumbered interest, in fee simple in the land would be entitled to do by virtue of that interest."
The term "unencumbered interest, in fee simple in the land" implies absolute ownership free of any other interests or rights.
7 *Congoo* at [66-76].

acquired, it was acquired on the basis of just terms.

Logan J said that native title rights, in this case, were proprietary but that the Commonwealth had not acquired them. Rather, those rights were extinguished.[8]

In Mabo, the High Court said that legislative extinguishment of native title rights is the same as taking property.[9] However, Logan J decided that the extinguishment of the Bar Barrum people's rights and interests should not be recognised as an acquisition of property. His reasoning was that Australia was at war and the Bar Barrum people lost their rights and interests in a form of "collateral damage".[10]

Logan J said, if a majority of the Court found that the Commonwealth had acquired property (in the form of the Bar Barrum people's native title rights and interests), that acquisition would have been on just terms because of the compensation scheme under the NSR.

The applicant asked whether compensation is for "just terms" if its availability is restricted. In this case, the NSR allowed only two months to apply for compensation.

Logan J rationalised the application of s 51 (xxxi) of the Constitution by saying, at [124]:

> there is a balance to be struck when determining whether the scheme for acquisition and compensation is "just" between the imperatives of national defence during a time of pervasive international conflict entailing … a prospect of invasion and what will amount to an arbitrary acquisition of property without any fair right to compensation.

Question 2 – Validated Past Acts

North and Jagot JJ did not deal with Question 2 because it was not necessary to answer and further, at [77], considered it was "not appropriate to deal with the question on a hypothetical basis."

Logan J made some observations, but considered that it was not necessary to answer Question 2.[11]

Question 3 – Extinguishment

An act of parliament will not extinguish native title unless that was parliament's intention. The NSA and NSR were passed a long time before the NTA was enacted. Therefore, the Court had to consider the ***objective intent*** of parliament. In other words, the Court had to consider what parliament would have intended, if it had known about the NTA when it created the laws in 1939.

Judges interpret laws generally by considering established principles. When dealing with issues of native title, judges also consider what has been said about native title in Australia's High Court, Federal Court and Supreme Courts.

North and Jagot JJ considered the general principle to working out parliament's objective intent was clearly stated by the High Court in *Akiba v Commonwealth* (***Akiba***) as:

> a statute ought not to be construed as extinguishing common law property rights unless no other construction is reasonably open.[12]

Also in Akiba, at [29], French CJ and Crennan J discussed the difference between the **existence** of native title rights and the **exercise** of native title rights and stated:

> Put shortly, when a statute purporting to affect the exercise of a native title right or interest for a particular purpose or in a particular way can be construed as doing no more than that, and not as extinguishing an underlying right, or an incident thereof, it should be so construed.

Put simply:

1. where an act of parliament affects the exercise of native title rights;
2. and
3. it is possible to do so;
4. the objective intent of parliament is not to have extinguished the underlying existence of those native title rights.

North and Jagot JJ considered propositions from leading cases, at [35-59],[13] and found, at [52-53], that the Commonwealth had no objective intention to extinguish native title rights and interest.

The majority judgment was that the Commonwealth's exclusive possession did not allow the Bar Barrum people to exercise their native title rights and interests, at that time. However, that did not lead to the conclusion that parliament's objective intention was to extinguish native title.

The majority found that the operation of the scheme in place under the NSA was not to confer a right of exclusive possession that would leave no room for the continued existence of native title rights and interests. Rather, those rights continued to exist while the scheme operated so those rights simply could not be exercised during that period.

Logan J accepted the arguments by the State and the Northern Territory and, at [30], found that native title was extinguished because:

- native title rights and interests are not the same as other rights and interests in land;
- the Military Orders authorised the exercise of interests to the exclusion of all others; and
- unlike a mining or pastoral lease, the Military Orders did not confine the exercise of any right over the land to a particular purpose.

Testing the Extinguishment of Native Title

Radical Title The term "Radical Title" explains the full proprietary rights held by the Commonwealth, except to the extent of native title.[14] In *Mabo (No 2)*, Brennan J discussed that a valid grant of an interest by the Commonwealth, when holding the radical title, is binding on the Commonwealth. That "bindingness" is known as the principle of derogation.

8 *Congoo* at [92-100].

9 *Congoo* at [105] quoting *Mabo v Queensland (No 2)* (1992) 175 CLR 1, per Deane and Gaudron JJ at [111].

10 *Congoo*, at [105].

11 *Congoo*, at [126-129].

12 *Akiba v Commonwealth* [2013] HCA 33, per French CJ and Crennan J, at [24].

13 including *Mabo (No 2), Wik Peoples v Queensland* (1996) 187 CLR 1, *Fejo, Commonwealth v Yarmirr* (2001) 208 CLR 1, *Western Australia v Ward* (2002) 213 CLR 1, *Yanner v Eaton* (1999) 201 CLR 351 and Akiba.

14 Secher, Ulla (2005) *The meaning of radical title: the pre-Mabo authorities explained – part 1.*Australian Property Law Journal, Vol 11 (3), 179-208. http://www.lexisnexis.com.au/en-AU/products/Australian-Property-Law-Journal.page.

North and Jagot JJ noted, at [29], that the submissions of the State and the Northern Territory, in support of extinguishment:

> … did not recognise the essential difference between the exercise of sovereign power by the holder of radical title to land and the exercise of sovereign power which held no right or interest in the land.

Their Honours observed that that difference can be very important for determining parliament's objective intention.

The intention of parliament to extinguish native title will be apparent if a Crown grant:

> vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land.[15]

In this case, the Commonwealth exercised power in circumstances where it was not the holder of radical title. Determining parliament's objective intention is, therefore, not impacted by the principle of derogation.

Inconsistency of Incidents The "inconsistency of incidents test" asks whether the continued existence of native title is inconsistent with legal rights and interests created by executive or legislative acts. This test can be used to show that native title rights and interests are impacted, but it does not show …?

The State submitted there are the following two separate tests:

1. the objective intention test; and
2. the inconsistency of incidents test.

North and Jagott JJ corrected this approach, at [50], saying that there is only the objective intention test.

Logan J did not make the distinction, stating at [112]:

> so far as extinguishment is concerned, there is no relevant distinction to be drawn between a grant, such as a grant of an estate in fee simple or a leasehold estate giving exclusive possession and the taking of possession by the Commonwealth of the land pursuant to the military orders. Each was of the character of a sovereign act inconsistent with the continued existence of Native Title rights.

Logan J was satisfied that, when the Commonwealth was in possession, no person was able to exercise their right relating to the land. He considered that the rights of the owner was suspended, but continuing but that that native title rights, inherently vulnerable, were extinguished.[16]

Timing of taking possession Question 3 was split into part (a) and part (b). This reflects different interpretations about when possession took place.

North and Jagot JJ considered, at [64], that it was "inherently impractical and unlikely" that the Commonwealth took possession, simply by the Minister "filling in a form and no more." While physical occupation was not necessary, North and Jagot JJ agreed that more than the completion of a form was required, but they did not expand on what that might be.

Logan J, following the submissions of the State and the Northern Territory, found that possession occurred when the Military Order to take possession were made stating, at [86] that:

> as the regulations prescribed no special method or means of taking possession and noting that the power to give directions in connection with the taking of possession meant that possession was taken my making the order in writing.

Logan J said, at [87], that the contrary construction would lead to *inconvenient if not, absurd results.*

Conclusion

The majority decision in this case was that the Commonwealth did not have an objective intention to extinguish native title.

North and Jagott JJ said, at [52], that the language of the statute did not disclose any intention *let alone a clear and plain intention* that rights or interests in land no longer be recognised. It discloses an intention wholly to the contrary.[17] (emphasis added)

At [21], North and Jagott JJ said that the native title rights in the land could not be exercised when the Commonwealth was in possession but, once that possession ceased, all rights could once more be exercised.

The Commonwealth's submissions, discussed at [27], seem to have been impliedly accepted by the majority. The Commonwealth submitted that:

- the NSR restricted exercise of a right only during the Commonwealth possession;
- r 54(3) NSR pre-supposed the continuation of underlying rights by requiring any owner or occupier to provide information about the land to the Commonwealth whilst the Commonwealth was in possession;
- r 55AA NSR demonstrated that this was not an acquisition of proprietary interests by providing that, if at a later time the Commonwealth compulsorily acquired the land, the value was to be assessed without taking into account any increase or decrease in value as a result of anything done by the Commonwealth whilst exercising its power;
- the NSR provided for compensation both during and after the time the Commonwealth was in possession, implying that rights and interests in the land continued and could be exercised once the Commonwealth possession ceased; and
- the purposes for which possession could be taken were limited to public safety, defence, efficient prosecution of the war and maintaining supplies and essential services.

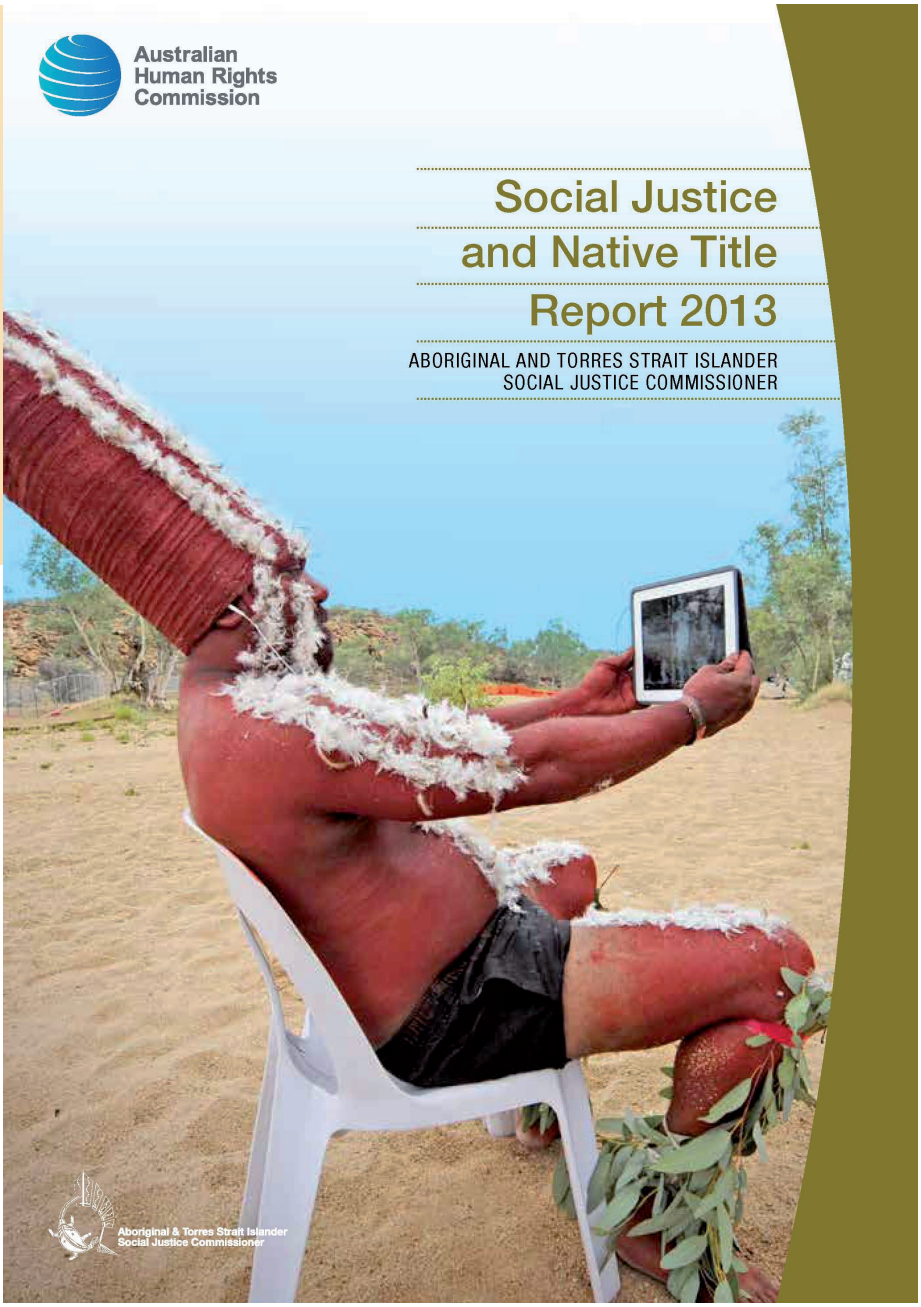
15 Congoo at [36], discussing *Mabo v Queensland (No 2)* (1992) 175 CLR 1, per Brennan J (with whom Mason CJ and McHugh J agreed), at [63]-[68].

16 *Congoo*, paras [5], [9] and [7].

17 see also Congoo at [29]: "the legislative scheme discloses an objective intention that underlying rights should continue."

SOCIAL JUSTICE AND NATIVE TITLE REPORT 2013:

20 YEARS OF THE SOCIAL JUSTICE COMMISSIONER, 20 YEARS OF NATIVE TITLE



By Dr Pamela McGrath, Research Fellow, AIATSIS

In December 2013, the Australian Human Rights Commission released the most recent Social Justice and Native Title Reports. Authored every year by successive Aboriginal and Torres Strait Islander Social Justice Commissioners since 1994 and published together for the first time this year, these reports provide a regular and independent review of the status of Aboriginal and Torres Strait Islander people's human rights and the effect of the *Native Title Act 1993* (Cth) (the NTA) on those rights.

The 2013 Report focuses on the current capacity of Indigenous communities to plan for the future based on meaningful participation in the decisions that affect them. In the words of the current Commissioner, Mick Gooda, over the past two decades these reports have consistently shown that 'social justice is entwined with our relationship to our lands and waters, and our right to protect and respect culture' (p.70).

Many of the Report's conclusions and recommendations in relation to native title in particular will resonate with those working on the ground, and as in previous years the Report is an excellent source of information about the current state of the native title system.

Developments in Native Title

Chapter Two of the 2013 Report reflects on 20 years of native title and provides brief summaries of major developments in the sector, including the Mabo decision (1992) and the negotiation of the NTA. It also highlights a number of recurring issues that continue to impede the delivery of meaningful benefits through native title.

The Commissioner reflects with considerable sadness that the NTA as it was drafted in 1993 marks high water point of native title jurisprudence. The potential of the NTA as reflected in its preamble has not been fully realised, but rather has been diminished by the interaction of case law and political context. That the system has failed to deliver on the expectations many Australians held for it has not been without consequence, particularly for those Aboriginal and Torres Strait Islander families who have fought so long and so hard for recognition.

Appendix Three of the Report provides a very useful snapshot of how native title claims progressed during 2012-13. This information (which includes statistics such as numbers of agreements finalised, determinations made and the average resolution time of applications) is particularly valuable in the absence of the National Native Title Tribunal's *National Native Title Report*, the last of which was published in January 2012. These figures draw attention to some noteworthy trends:

Native Title Determinations (p.202)

- There has been a marked increase in the number of applications resolved by consent during the reporting period (2010/11 = 10 applications; 2012/13 = 28 applications)

- And yet the number of claims currently in mediation is decreasing, with a marked increase in the number of claims in active case management (no statistics provided).

ILUAs (p.203)

- There has been a significant increase in the number of ILUAs registered during the reporting period (2009-10 = 47; 2012-13 = 122)
- The vast majority of these were in Queensland, reflecting the approach in that State to the negotiation of ILUAs as a part of native title consent determinations.

Future Act Agreements (p.203)

- There has been a drop in numbers of future act agreements being facilitated by the NNTT (2012-13 = 23), in part explained by a decrease in the number of future act determination applications referred to mediation and the fact that a 'significant number' of notified proposed tenements were withdrawn.

Despite an overall increase in the numbers of native title matters being resolved, Commissioner Gooda remains extremely concerned about the amount of time it is still taking to see claims through to determination. At 30 June 2013, the average time for resolution of a native title claim nationally was close to 13 years (p.203).

Reforms to the Native Title System

Following in the wake of a number of working groups, reviews and inquiries, the native title system is on the brink of profound change. In this environment, Commissioner Gooda suggests it is imperative that the outcomes of these various processes be coordinated to ensure that Aboriginal and Torres Strait Islander peoples genuinely benefit from reform: 'We cannot continue to invest significant resources – both time and money – into processes that create no outcomes for native title holders (p.222).

Disappointed that the *Native Title Amendment Bill (2012)* did not pass before parliament last year, the Commissioner makes a number of specific recommendations in relation to native title reform, including that:

- The Australian government reintroduce the *Native Title Amendment Bill 2012 (Cth)* and support its passage through parliament
- the NTA be amended to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test, and
- the NTA be amended to provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgement and observance of traditional law and custom and of the relevant society.

The Commissioner also undertakes to monitor progress on the Indigenous Community Development Corporation (ICDC), an initiative that is being developed in partnership by National Native Title Council and the Minerals Council of Australia. Following a recommendations of the Working Group on Taxation of Native Title and Traditional Owner Benefits and Governance, the ICDC will be a not-for-profit body with income tax exempt status for use by Indigenous communities to assist with the management of funds received through native title agreements. It is as yet unclear whether the new federal government intends to proceed with the development of the ICDC; if they do, however, the Commissioner urges them to ensure that native title holders are adequately consulted.

Building Cultural Competency

Within the context of discussions about human rights and native title, the Report also highlights the importance of building the cultural competency of the people, organisations and governments who work with Indigenous groups. These organisations, the Commissioner suggests, have an obligation to ensure cultural security in all aspects of service delivery: 'This means dealing with people who are culturally competent and working within systems that are culturally secure' (p.9). This is happening, albeit slowly. AIATSIS recently launched its Elevate Reconciliation Action Plan, the first Australian government body to do so. The Institute is developing a suite of resources that will enable them to provide advice and support to other entities who wish to improve their cultural proficiency and provide a model for other government agencies to follow.

Native title and human rights into the future

Reflecting on progress in the areas of human rights and native title over the past two decades, the Commissioner observes that native title has generated many opportunities for Aboriginal and Torres Strait Islander groups to make meaningful social and economic change, but has also created stress and contributed to lateral violence within communities.

The way forward, he suggests, will require a framework for engagement underpinned by the principles of self-determination, free prior and informed consent, and respect for and protection of culture. At this time when not only the native title system but many Commonwealth and state heritage protection laws are also being reviewed, such advice is opportune.

The Commissioner expresses his concern that the opportunities and promises of the early 1990s that led to the establishment of both the NTA and the position of the Aboriginal and Torres Strait Islander Social Justice Commissioner have not yet been realised. Moreover, the social justice objectives of the NTA as outlined in its Preamble are unlikely to be achieved until native title is understood to be intrinsic to the human rights for Aboriginal and Torres Strait Islander peoples. As we enter a new and extremely uncertain phase of change to the native title system and Indigenous policy more broadly, it remains to be seen the extent to which the advice of this and previous Social Justice Commissioners will be acknowledged and accommodated within the current reform agenda.

The *Social Justice and Native Title Report 2013* is available online at https://www.humanrights.gov.au/publications/aboriginal-and-torres-strait-islander-social-justice Photo by Justin Brierty (Newspix). This image is of Indigenous dancer, Farron Gorey from Santa Teresa, taking a "selfie" with his iPad. More information about AIATSIS' *Reconciliation Action Plan* is available at http://www.aiatsis.gov.au/rap/

MAKING PARTICIPATION VISUAL AND ENGAGING: VIPP TRAINING IN THE PHILIPPINES

By Toni Bauman and Christiane Keller

Between 18 and 22 November 2013, Toni Bauman, Senior Research Fellow in Governance and Public Policy at AIATSIS attended an international training course on Democratising Governance through Visualisation in Participatory Processes (VIPP). The course was held at the International Institute for Rural Reconstruction (IIRR), its sponsor, in Silang, Cavite in the Philippines. The IIRR is an organisation that aims to strengthen the capacities of community groups and organisations and development practitioners in the promotion of participatory development approaches (http://www.iirr.org/).

The course was delivered by Dr Hermann Tillmann and Dr Maruja Salas of the Partnership Society for VIPP-Practice and Creative Learning. Dr Tillmann and Dr Salas, German and Peruvian, are both anthropologists, specialising in Indigenous knowledge systems, and have practiced and trained in participatory methods in various parts of the world. Using VIPP tools in 2009 they facilitated 'The Summit on the Summit' which brought together Indigenous Peruvians and Bolivians from the Andes to discuss food sovereignty.

The course taken by Toni Bauman was called 'Democratising Governance through Visualisation in Participatory Processes (VIPP)'. It was aimed at local NGOs, government and extension personnel engaged in training as well as facilitators and trainers who want to practice and improve their facilitation and trainer skills for democratic governance. Information for the course described it as follows:

> The course focuses on promoting participation, accountability and effectiveness at all levels of the organization using VIPP. The aim is to create an accountable, transparent, inclusive and responsive organization for democratic governance that is able to respond to the needs of the changing times without disregarding the important inputs and ideas of the majority.
>
> http://zunia.org/sites/default/files/media/vi/463252_vipp_course_brochure_2014_ags_nov2713.pdf.

There were eight participants, five of whom were researchers from an international, non-profit research organisation, Worldfish,[1] which focuses on food secure futures (www.worldfishcenter.org). Two of the Worldfish staff came from Cambodia, two from the Solomon Islands and the fifth from the Philippines. Other participants worked for the IIRR.

The VIPP techniques and tools have evolved from concepts developed by Metaplan, the German Foundation for International Development and the University of Hohenheim in Germany. The philosophical roots come from the Emancipatory Pedagogy of Paolo Freire. They are seen as a creative

1 WorldFish is a member of the CGIAR Consortium, a global partnership that unites organisations engaged in research for a food secure future. CGIAR research is dedicated to reducing rural poverty, increasing food security, improving human health and nutrition, and ensuring more sustainable management of natural resources. It is carried out by the 15 centres who are members of the CGIAR Consortium in collaboration with hundreds of partner organisations, including national and regional research institutes, civil society organizations, academia, and the private sector.

and systematically organised way of applying participatory methods to improving group interaction in problem solving, decision making, planning, training, and creating new visions and directions. The VIPP methodology and approach can be effective irrespective of literacy levels.

The training combined short visualised inputs, individual tasks, group work, team cooperation, learning by doing and constructive feedback. A co-operative working style, employing a variety of senses and cognitive and emotional components, was encouraged and good group dynamics were essential parts of learning and practicing. http://zunia.org/sites/default/files/media/vi/463252_vipp_course_brochure_2014_ags_nov2713.pdf.

A manual titled *VIPP visualisation in participatory programs: How to facilitate and visualise participatory groups processes* includes some of the tools and the book can be purchased at http://www.southbound.com.my/Vipp/Vipp_VisualisationParticipatory.htm.

The VIPP team is organising an international summit of VIPP facilitators and trainers in Germany at the Monastery St. Ulrich Training Centre from 20-22 June 2014. The summit will be followed by the Advanced Creative VIPP Training of Facilitators (http://www.southbound.com.my/VIPP/index.htm). The focus of both events is to develop the future of the VIPP approach and practice, including a community of practice involving a global trainer pool and a decentralised non-bureaucratic training program facilitating the democratic governance of institutions and societies.

Ms Bauman aims to employ VIPP tools in future governance workshops and training to assess their value in the Australian Indigenous governance context: governance and public policy is a research priority at AIATSIS. The need to develop avenues to democratise governance and processes of Indigenous consensus-building, decision-making and engagement that are responsive to Indigenous needs and where outcomes are owned and sustainable is ever present.

VIPP course participants, trainers and IIRR support staff.
Back row left to right: Try Vanvuth, Orly Buenviaje, Gregory Bennett, Wilson Barbon, James Faiau, Joycen Sabio, Dulce Dominguez, Lily Lando, Toni Bauman
Front row left to right: Trainer Hermann Tillmann, Annie Secretario, Marissa Espineli, Sheilah Vergara, Trainer Maruja Salas, Sean Vichet.

Trainer Dr Maruja Salas and Toni Bauman putting the finishing touches on a VIPP plan for training Registered Native Title Bodies Corporate in decision-making processes.

Toni Bauman working with Sean Vichet from Cambodia.
Credit for all images: H Tillman& M Salas.

AIATSIS National Indigenous Studies Conference 2014

From the 26 – 28 March 2014, AIATSIS held its biennial Indigenous Studies Conference with the theme 'Breaking Barriers in Indigenous Research and Thinking: 50 years on'. The conference was held at the National Convention Centre in Canberra, and included a welcome reception that coincided with the launch of the 50th Anniversary of AIATSIS and the Lorrkkon Ceremony.

This conference helped to begin the anniversary celebrations by recognising how far the area of Indigenous studies in Australia has come over the past 50 years and what the future might hold.

The conference brought together almost 500 delegates with multi-disciplinary expertise from across the Indigenous studies sector, including researchers, policy makers, community members, academics, representative organisations, consultants, traditional owners and service providers.

The conference included 123 presentations by 227 presenters. Presentations ranged in topic and covered Aboriginal and Torres Strait Islander education, health, cultural heritage, arts, policy, tourism, economics, language, anthropology, archives, IT, history, native title, musicology, ethics and more. Other highlights included the four keynote speakers, four cultural performances, five launches, the trade exhibition, the poster session and the conference dinner.

The conference was an overall success and showcased the strengths of AIATSIS in not only undertaking research in the area of Indigenous studies, but also in fostering dialogue and bringing together all different sectors with an interest in the field.

AIATSIS would like to thank all Speakers, Delegates and Sponsors for their enthusiasm and support and we are looking forward to the next 50 years.

Conference name tags. (Photo Supplied)

AIATSIS would like to thank our sponsors for their kind support of the conference. Our Platinum sponsor – the Department of Education, our Silver sponsors – the Department of the Prime Minister and Cabinet and the Australian Centre for Indigenous Knowledge and Education, our Bronze sponsors – Batchelor Institute of Indigenous Tertiary Education and the Berndt Foundation, and our other sponsors – delegate sponsor – Lowitja and our satchel insert sponsors.

Professor Martin Nakata giving his keynote presentation at the AIATSIS National Indigenous Studies Conference (Photo Supplied)

Students from NAISDA performing a Torres Strait Islander dance at the closing session of the conference (Photo Supplied)

KAKADU MAN STORY JOURNEYS TO CANBERRA

By Bryce Gray

Thirty dancers, singers and ceremonial elders from Arnhem Land converged on Reconciliation Place in Canberra Tuesday 25 March, to re-enact an ancient Aboriginal ***Lorrkkon Ceremony*** *honouring Big Bill Neidjie – affectionately known as The Kakadu Man.*

The ceremony included the handover of unique film footage of Big Bill Neidjie's final funerary rites, reserved for men of high degree in Arnhem Land, to AIATSIS for safekeeping.

"Big Bill Neidjie was the keeper of ancient knowledge and the last speaker of the Gagudju language from northern Kakadu. He was instrumental in the establishment of Kakadu National Park and was deeply committed to sharing his love for his country and his culture," Professor Dodson said.

"He was a truly great Australian and we are honoured that his family chose AIATSIS to hold this very special film and help continue his journey – to share his culture with all Australians."

Led by Binninj ceremonial leader Ronald Lamilami and Yolngu ceremonial elder and Artistic Director of the event, Djakapurra Munyarryun, *Lorrkkon* was a multi-media performance including projected film sequences and live Ceremonial Dancers from across Arnhem Land participating in an ancient funeral rite practiced in Australia's north for thousands of years.

Big Bill's granddaughter, Natasha Nadji said her father was concerned that with his passing much would disappear – language, songs, dance, ceremonies, knowledge and stories.

"His desire to continue the transmission of our culture and stories was so strong that he broke with traditions and requested his funerary rites be filmed and his image, voice and stories continue to be shared with all people. So in no small way the *Lorrkkon Ceremony* was his gift to all of us," said Natasha.

The *Lorrkkon Ceremony* helped launch the 50th anniversary celebrations for AIATSIS.

Photo above: Natasha Nadji hands the film to AIATSIS for safekeeping.

Credit: Andrew Babington

As the clouds break and the sun shines for the first time in days, the crowd gathers on the lawn at Reconciliaton Place, Canberra to witness the Lorrkkon Ceremony. Credit: Andrew Babington

Justin Cooper and Solomon Cooper dancing with North East Arnhem Land Dancers watching. Credit: Andrew Babington

ABOUT US

The Native Title Research Unit (NTRU) was established through collaboration between the Aboriginal and Torres Strait Islander Commission and AIATSIS in 1993 in response to the High Court decision in *Mabo v Queensland [No 2]*, which recognises Indigenous peoples' rights to land under the legal concept of native title. The NTRU's activities are currently supported through a funding agreement with the Department of the Prime Minister and Cabinet.

The NTRU provides high quality independent research and policy advice in order to promote the recognition and protection of the native title of Aboriginal and Torres Strait Islander peoples. We facilitate access to the Institute's records, materials and collections and publish the results of our research both as a source of public information and in academic publications.

Located within the wider AIATSIS research program, the NTRU aims to provide ongoing monitoring of outcomes and developments in native title; independent assessment of the impact of policy and legal developments; longitudinal and case study research designed to feed into policy development; ethical, community based and responsible research practice; theoretical background for policy development; recommendations for policy development; and policy advocacy designed to influence thinking and practice.

SUBSCRIBE TO NTRU PUBLICATIONS AND RESOURCES

All NTRU publications are available in electronic format. This will provide a faster service for you, is better for the environment and allows you to use hyperlinks. If you would like to SUBSCRIBE to the *Native Title Newsletter* electronically, please send an email to ntru@aiatsis.gov.au. You will be helping us provide a better service.

For previous editions of the Newsletter, go to www.aiatsis.gov.au/ntru/newsletter.html

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