NATIVE TITLE NEWSLETTER

AIATSIS
Native Title Research Unit

September and October 2001
No. 5/2001

The Native Title Newsletter is published on a bi-monthly basis. The newsletter includes a summary of native title as reported in the press. Although the summary canvasses papers from around Australia, it is not intended to be an exhaustive review of developments.
The Native Title Newsletter also includes contributions from people involved in native title research and processes. Views expressed in the contributions are those of the authors and do not necessarily reflect the views of the Australian Institute of Aboriginal and Torres Strait Islander Studies.

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Australian Institute of Aboriginal and Torres Strait Islander Studies

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NEWS FROM THE NATIVE TITLE RESEARCH UNIT

New AIATSIS building

AIATSIS recently celebrated the official opening of its new $13.7 million building with speeches by its founder the Honourable W. C. Wentworth and its first Indigenous Chairperson, Mr. Ken Colbung. To mark this historic occasion, the traditional owners of Canberra, the Ngunnawal People, performed a smoking ceremony. The Institute also hosted a visit of the Anbarra People from north central Arnhem Land who performed a Rom ceremony over three days.

New Access Officer

Angela Terrill has joined the NTRU as Access Officer. She will be providing AIATSIS library services and document delivery. Angela has recently returned to Australia after a post-doctoral research fellowship at the Max Planck Institute in Germany. She has a PhD in linguistics from the Australian National University, and has been working on the languages of Queensland, as well as the Papuan languages of Island Melanesia. In addition to her position with us, she is a Visiting Fellow at the School of Language Studies at the ANU.

AIATSIS Research Grants

AIATSIS provides grant funding for research each year. The current year's information packet and application form is available at http://www.aiatsis.gov.au/rsrch/rsrch_grnts/rg_abt.htm or by post through Grants Administrator, Research Section, AIATSIS, GPO Box 553, Canberra, ACT 2601. The closing date for the application is 31 January. Please note that referees reports and evidence of community support for research must accompany the application. The applicants will be advised of their success or otherwise in July 2002 and funds will become available in August 2002.

Issues papers

Graeme Neate and Bruce Shaw have each written Issues Papers for the NTRU. Graeme Neate has graciously allowed us to publish his summation of the National Native Title Tribunal's Native Title Forum 2001: Negotiating Country held in the first week of August in Brisbane, 'Review of Conference: Emerging Issues and Future Directions'. Bruce Shaw, a well known anthropologist turned oral historian, provided 'Expert Witness or Advocate? The Principle of Ignorance in Expert Witnessing,' a version of his presentation at the Australian Anthropological Society meeting, also in August.

Those of you on our distribution list will receive copies shortly. The papers will be posted on our web-site as well. Should you wish to receive a copy, but are not on our mailing list, simply contact us. We are still actively seeking Issues Papers from our readers. If you have a suggestion for a topic or, better yet, have a paper you would like us to consider for publication please contact the Unit.

Croker Island on the web

Responding to the recent Croker Island decision in the High Court, the Unit has posted a web page with comprehensive resources on the decision and sea rights in general. The site has several papers about this decision, links to the High Court judgement and earlier Federal Court decisions, other papers on the case, a brief bibliography of related materials, and links to other sites of interest. To reach the site, go to http://www.aiatsis.gov.au/rsrch/ntru/ntru_hm.htm (the NTRU page) and click on News and Notes *or* click on the Latest News button at www.aiatsis.gov.au. Paul Burke's summary of the decision appears on the next page.

Summary of the High Court decision in the *Croker Island* case, *Commonwealth v Yarmirr* [2001] HCA 56 (11 October 2001)

A majority of the High Court (Gleeson CJ, Gaudron, Gummow and Hayne JJ) found that limited native title rights could be determined under the *Native Title Act 1993* (NTA) in the offshore areas covered by the Croker Island native title claim. In doing so, it rejected the arguments of the Commonwealth that:

- it was legally impossible for native title to exist offshore because the common law did not extend offshore and it is a requirement of the NTA that native title rights are recognised by the common law, or alternatively
- because native title had been extinguished by the vesting of offshore waters and the seabed in the Northern Territory.

But it also rejected the claimants' argument that it is possible to recognise exclusive native title rights even if those rights are subject to the international law right of innocent passage, the public right to navigate the seas and the rights of the holders of fishing licences. The majority decided that a native title right to exclude others would, as a matter of law, be inconsistent with other rights that are recognised as existing in offshore areas, particularly:

- the common law public rights to navigate and to fish, and
- the international right of innocent passage of ships through territorial waters.

Accordingly, it was reasoned, only non-exclusive native title rights can be determined offshore.

In effect, the High Court confirmed the decision of the majority in the Full Federal Court, which in turn had confirmed the decision of the trial judge in the Federal Court, Justice Olney.

Of the judges in the minority, only Justice Kirby supported the full extent of the claimants' argument. He adopted a similar position to Justice Merkel, the minority judge in the Full Federal Court decision. In effect, he agreed with the claimants' argument for qualified exclusive native title rights. But he also went further than Justice Merkel in stating that Justice Olney's original evaluation of the evidence of exclusivity was in error because it was an overly narrow approach.

Justice McHugh and Justice Callinan had a more restrictive view than the majority. Justice McHugh felt bound by previous High Court precedent that, in his view, authoritatively established the proposition that the common law does not extend below the low water mark. In his view, the Native Title Act and the relevant parliamentary debates clearly show that the intention was to leave this question open and was definitely not to bring about a recognition that could not happen at common law. He concluded that the claimants could only achieve their objective by an amendment of the Native Title Act. Justice Callinan came to the same conclusion for broadly similar reasons.

The result of the case is that the determination of native title rights will be in terms similar to those proposed originally by Justice Olney, namely:

- the native title rights do not confer rights to the exclusion of all others;
- the native title rights include free access to the sea and seabed within the claim area in accordance with traditional laws and customs for the purposes of:
  - travelling through or within the area;
  - fishing and hunting;
  - visiting and protecting places that are of cultural and spiritual importance; and
  - safeguarding cultural and spiritual knowledge.

Paul Burke
Consultant

Indigenous Land Use Agreements: Parliamentary Joint Committee Recommendations

The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund recently released its second interim report as part of its ongoing inquiry under s.206(d) of the *Native Title Act 1993* (NTA). The second interim report concerns Indigenous Land Use Agreements (ILUAs). The report focuses on identifying ILUAs that have been negotiated and on examining the how ILUAs operate in practice.

The Committee examines in detail some areas of potential uncertainty in the intersection of the ILUA provisions and common law contract. It recommends three legislative changes in this regard:

- an amendment to s.24EA to make it clear that registration of an agreement is not intended to exclude the operation of the contractual remedies of rescission and termination, (Section 24EA at present relevantly provides that an agreement registered as an ILUA has effect as if it were a contract among the parties to the agreement.)
- replacing s.199C(3) with a more general provision so as to ensure that where an agreement has lost its contractual effect, for whatever reason, it can be removed from the register, and
- an amendment to show how an amendment can be made to a registered ILUA.

In relation to the funding of representative bodies, non-native title parties and native title body corporates in respect of the negotiation and implementation of ILUAs, the report states that there 'is overwhelming evidence that representative bodies are not receiving adequate funding to assist in the negotiation of ILUAs within the timeframes

proponents require or prefer' and that this is causing difficulties for both native title holders and proponents.

The Committee recommends;

- more financial resources be made available to native title representative bodies for the negotiation of ILUAs (on top of the 'additional funding' provided in the 2001-2002 budget),
- the Guidelines for Provision of Financial Assistance be reviewed to ensure non-native title parties are receiving adequate assistance to facilitate their participation in the negotiation of ILUAs, and
- prescribed bodies corporate receive adequate funding to perform their statutory functions and that they receive appropriate training to meet their statutory duties. This training to include directors' duties, accounting procedures and land management.

The Committee also makes a number of recommendations proposing minor changes to the operation of the National Native Title Tribunal.

Paul Sheiner
Visiting Research Fellow, NTRU

Developments in Commonwealth agency coordination*

The *Native Title Act 1993* and the 1998 amendments provide a framework for dealing with native title that encourages the use of consensus-based mediation and agreement, rather than litigation.

The rules and administrative practices designed to achieve this outcome are continuing to evolve in response to a variety of factors, all of which present particular challenges. These include:

- a developing body of law that is both new and very complex,
- difficult legal issues that arise from some of the unique features of the legislation and its judicial interpretation,
- the distinctive characteristics of native title proceedings and mediation,
- the changing behaviour of governments as they adapt policy, practices and legislation to take account of native title, and
- the practical difficulties of drawing together the myriad of parties involved in achieving mutually acceptable native title outcomes.

Many parties play a role in the native title system – native title holders, governments at all levels, various respondent parties and the groups and agencies interacting with them. This paper focuses on developments aimed at building stronger interaction between key Commonwealth agencies involved in the native title system. These developments will improve the service to those who rely on that system to resolve native title issues.

The Commonwealth native title system

At the Commonwealth level, as at others, the native title system operates through a complex framework of relationships, programs and processes. In part, this arises from the fact that under the Act, both the Commonwealth Attorney-General and the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs have a number of responsibilities.

"Complexity arises from the diverse range and nature of the Commonwealth's interests."

Complexity also arises from the diverse range and nature of the Commonwealth's interests. As with governments at the State and Territory level, the Commonwealth is, albeit in a more limited way, a land and sea manager, administrator and holder of other interests and thus a respondent to native title determination and compensation applications. Through its constitutional capacity to legislate in relation to native title matters, it has policy responsibility for the overall legislative and policy framework under which native title is managed in Australia. The Commonwealth also funds the main elements – the Federal Court, the NNTT, representative bodies through ATSIC. It also funds a number of programs, including financial assistance for respondents, and for States and Territories (for native title compensation and the costs of tribunals undertaking native title functions). In common with other governments, it must also ensure that its future acts are done in accordance with the provisions of the Act.

The range of functions carried on by what could be described as the 'Commonwealth native title system' include:

- the Federal Court's managing of native title and compensation applications and the NNTT mediation processes,
- the NNTT's mediation, arbitration and assistance role,
- the Native Title Registrar's exercise of a number of statutory powers,
- ATSIC's funding of representative bodies, and
- the Attorney-General's Department's central role in advising the Attorney-General on Commonwealth native title litigation and native title policy, and administration of the legal assistance program for respondent parties and financial assistance to the States and Territories.

The 1998 amendments necessitated the management of a range of transitional tasks. These included the transfer of the management of hundreds of applications from the NNTT to the Federal Court, the re-testing by the Native Title Registrar of hundreds of claims under the new registration test and the re-recognition of representative bodies.

By mid-2000, much of this transitional work had been completed. A Steering Committee was established, chaired by the Attorney-General's Department and membership of which included the Departments of the Prime Minister and Cabinet, Finance and Administration and Reconciliation and Aboriginal and Torres Strait Islander Affairs, as well as the Federal Court and the NNTT. It reviewed resource usage during this transitional period and the future workloads and resource requirements of these bodies.

The inter-relationship between all parts of the system and potentially conflicting resource demands were noted, as was the potential for improvements in the operation of the native title system through the existence of effective consultative and information sharing processes between the key implementing Commonwealth bodies.

As a result of the review, additional funding of $86m over 4 years was provided for in the 2001-2002 Budget to the Commonwealth native title system, to strengthen its operational capacity and to facilitate speedier resolution of native title applications. Spending on the Federal Court native title program, the NNTT, the native title program in ATSIC and legal assistance for respondents will be $115m in 2001-02.

"Commonwealth agencies need to interact with each other regularly to identify the demands and stresses in the system."

The interdependence of the various parts of the native title system identified by the Steering Committee necessitates that each agency adopt a broader perspective to enable the whole system to respond flexibly to the demands placed on it. Agencies will stand to gain most benefit from sharing information when:

- they know what information to share and what are the best consultative mechanisms to use;
- they are willing to maximise cooperation and coordination between their respective activities; and
- they take steps to modify their own behaviour in the light of what other key parties do and intend to do.

These considerations are reflected in the steps that the Commonwealth is taking to build better coordination and cooperation in the system.

The Commonwealth Native Title Coordination Committee

The review of the native title system demonstrated the value of having appropriate arrangements for key Commonwealth agencies to interact with each other regularly to identify the demands and stresses in the system. It was therefore decided to retain the Committee as a standing Coordination Committee to keep performance and funding levels under review and to undertake an evaluation in the 2003-04 Budget context.

The major focus of the Committee's work is to improve cooperation, consultation, information sharing and resource use across the system at the Commonwealth level. The new Committee's purpose is to facilitate better operation of the system and assist each agency to perform its native title responsibilities to the best possible standard. The Committee has established a Working Group to report on means of:

- facilitating communication between Commonwealth agencies on shared interests,
- enhancing the system's capacity to identify and deal with obstacles to efficient and effective performance,
- improving the ability of Commonwealth agencies to consult on emerging trends and changes within the system that are likely to impact on priorities, workload and resource allocation, and

- enabling Commonwealth agencies to generate better performance information for monitoring and evaluating their activities.

The Working Group is identifying:

- any gaps or impediments that reduce effective interaction and exchange between agencies and with the parties they assist and for whom they provide services, and
- options for improving consultation and information-sharing processes at the Commonwealth level.

Although it is still early days, the Committee is proving very productive. It is hoped that information provided by users of the system through the NNTT, the Federal Court user groups and ATSIC about perceived impediments in the native title system can be shared and form a basis for any necessary remedial action.

Broader interaction

A number of fora exist where other key parties can raise issues that reflect their concerns about how well the system is working. Key Commonwealth agencies consult bilaterally on a state-wide basis and nationally as part of normal operations. At the State and Territory level, officials responsible for native title policy meet together regularly to exchange views and information. The Native Title Division of the Attorney-General's Department has been invited to participate in those meetings when appropriate.

The Attorney-General's Department also convenes a Native Title Consultative Committee which presently draws representatives from several peak industry bodies - the Minerals Council of Australia, the National Farmers' Federation, the Australian Seafood Industry Council and the Australian Local Government Association. The NNTT and ATSIC also participate. The 2000 review identified potential value in extending membership of the Consultative Committee to include other participants, such as the Federal Court and State and Territory governments.

"A number of fora exist where key parties can raise issues that reflect their concerns about how well the system is working."

The Commonwealth Native Title Coordination Committee in turn provides the Federal Court, the NNTT, ATSIC and the Attorney-General's Department with a multilateral forum to bring back the views of the parties they deal with as part of their respective responsibilities. It will help ensure that each agency looks more closely at the mechanisms it uses to maintain stakeholder involvement.

Let me now turn to the Commonwealth's own involvement in native title matters, which is coordinated through the Native Title Division of the Attorney-General's Department.

Key objectives of the Commonwealth's approach in relation to future acts are to:

- ensure the minimum impact of any proposed Commonwealth acts on native title, and
- encourage solutions that are negotiated on a consensual basis and result in fair outcomes for all parties.

The Commonwealth seeks to resolve issues relating to development on areas subject to native title by consensus-based means, such as Indigenous Land Use Agreements (ILUAs). Several ILUAs are currently being negotiated.

This approach is consistent with the intentions of the Act. It is recognised that agreements are complex to negotiate and lack of familiarity and understanding about native title processes means that Commonwealth negotiators need guidance to achieve optimum outcomes for all parties. The Commonwealth Government has approved principles to guide Commonwealth agencies in the negotiation of ILUAs, and more detailed guidelines are currently being developed.

The Native Title Division also coordinates Commonwealth involvement in native title cases where the Commonwealth has specific interests. This work extends to over 200 native title applications. Fewer than 20 are programmed for trial before the Federal Court for and many have been referred to the NNTT for mediation.

It is pleasing to see, however, that more and more native title applications are being resolved by negotiations leading to Federal Court consent determinations, often combined with ILUAs to deal with the future relationships between the parties. The Commonwealth expects to see its involvement in this area continue to grow as outstanding issues are clarified by the courts.

Conclusion

The Commonwealth is responding to the challenge of ensuring that its own agencies are well coordinated, given their role in facilitating resolution of native title issues.

The work of the Commonwealth's Native Title Coordination Committee and the Native Title Consultative Committee will help the native title system to work better. The links forged by the Native Title Division with Commonwealth agencies dealing with native title as part of future act processes will ensure that development is occurring in accordance with the Parliament's intentions.

The native title system will continue to evolve and it will be important to keep these arrangements under regular review to identify emerging trends and opportunities. Commonwealth agencies must be able to respond flexibly to new challenges if lasting outcomes are to be achieved in native title. The best outcomes will facilitate productive ongoing relationships and sustainable development of benefit to indigenous groups and the general community.

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* This is the text of a paper prepared for the Native Title Representative Bodies Legal Conference *The Past and Future of Land Rights and Native Title*, Townsville, 28 – 30 August 2001.

This paper identifies the main issues relating to the nature of native title and extinguishment which arose in the *Ward* case, indicates the apparent judicial inclination at the High Court hearing and suggests some possible outcomes. It appears likely to be sent back to the Federal Court for further consideration of some issues. The appeals on the extinguishment issues are considered likely to be more successful than those on proof of native title.

Ward involves many of the fundamental issues of native title. That it does so is hardly surprising since it was the first contested mainland native title claim to be heard by the Federal Court and taken on appeal to the High Court. Unfortunately, it is not at all clear that the High Court will resolve the multitude of contested issues, though hopefully guidance as to their resolution will be provided. The demeanour of the High Court at the appeal did not suggest an enthusiasm for the task of resolving all the issues. Indeed, it is anticipated that the case will be sent back to the Federal Court on some issues at least.

The Miriuwung Gajerrong before the High Court sought the restoration of the judgment of the trial judge Lee J, and of the dissenting judgement of North J in the full Federal Court.

Nature of native title

A bundle of rights and partial extinguishment

The concept of partial extinguishment entails the notion that native title may be extinguished incrementally over time. The concept is founded on the idea of native title as a mere bundle of rights. It was submitted by the Miriuwung Gajerrong that, in truth, native title was an underlying right to the land itself, incidents of which might be suspended by inconsistent acts or laws, but that the right itself must be totally denied in order for extinguishment to occur.

Some of the members of the High Court did not seem enthusiastic with respect to the submission.

Content of native title

It was submitted by the Miriuwung Gajerrong that native title was a community right equivalent to ownership. Traditional laws and customs were only relevant in the sense of denoting the existence of the community or society and were not necessary to the proof of every particular right. The argument was critical to the question of rights to mineral resources.

Members of the High Court did not indicate any particular inclination.

Proof of native title

Western Australia submitted that proof of native title required that each right, for example hunting or exclusive occupation, had to be proven to exist by particular evidence with respect to every area of land and that no inferences could be drawn as to the

nature of use or occupation of, or connection to land in general; further that native title should be restricted to the area proven to exist on behalf of each estate group; that any composite Miriuwung Gajerrong group should be rejected; and that spiritual connection could not of its own suffice to maintain a continuing connection.

The Miriuwung Gajerrong challenged each of the submissions in law and by reference to the evidence before the Court.

The Court did not seem enthusiastic with respect to the submissions of Western Australia.

Extinguishment

Clear and plain intention

The importance of the requirement of a clear and plain intention founded on universal principles for the protection of property seemed to be accepted by some members of the High Court but not by others.

It is unclear how far the principles will inform the consideration of High Court.

"The importance of the requirement of a clear and plain intention founded on universal principles for the protection of property was accepted by some members but not by others."

The impossibility of coexistence

Impossibility of coexistence as the criterion of inconsistency was relied upon in the context of the extinguishment by actual use of land in the Ord River project area and the consideration of the rights conferred under permits to occupy, and leases for mining, grazing and restricted purpose, and conditional purchase.

During the course of the hearing members of the Court seemed to become increasingly favourable to the submissions of Miriuwung Gajerong that extinguishment had not occurred in the Ord project area except to the limited extent found by the trial judge. The Court seemed less favourable to the submissions of the Miriuwung Gajerong with respect to non-extinguishment by the permit to occupy and various leases, and showed a lack of enthusiasm for exploring the circumstances and legislative structures associated with each disposition.

Suspension and mining leases

A grant of a disposition for a temporary period would seem not to manifest a clear and plain intention to permanently extinguish and such was submitted by the Miriuwung Gajerong in relation to leases and the permit to occupy.

Some members of the Court had some difficulty with the submission, but others appeared interested if not necessarily favourably inclined.

A clearer inclination to favour was manifested towards the submission that the Mining Act indicated that mining leases in Western Australia were never intended to extinguish any interest, let alone native title.

The loss of exclusivity

It was submitted that loss of exclusivity of native title entailed regulation not extinguishment, especially in the case of environmental controls and the public right to fish.

Some of the Court appeared unenthusiastic, perhaps reflecting the long argument on the point already conducted before them in the Croker case. But it may be that the Court accepted the point, but were not sure how it could be framed in a determination.

The pastoral leases

The Full Court held that the provision for Aboriginal access to unenclosed or unimproved areas in Western Australian pastoral leases manifested a clear and plain intention to extinguish native title in enclosed or improved areas. That conclusion was submitted by the Miriuwung Gajerrong to be fundamentally at odds with the rationale and requirement of a clear and plain intention to extinguish.

It was not evident what the inclination of the members of the Court was on this issue.

Expropriation of native title rights to minerals

The issue of expropriation of native title rights to minerals by the operation of the Mining Act of Western Australia was the subject of extensive written submissions by the Miriuwung Gajerrong and Argyll Mines. Time however precluded oral argument by Counsel for either side.

The court had little opportunity to indicate its inclination but seemed familiar with the nature of the issue.

Racial Discrimination Act and past acts under the Native Title Act (NTA)

The Full Court had failed to hold that mining leases granted and a resumption of land undertaken after 31 October 1975 when the Racial Discrimination Act came into effect were past acts within the NTA, apparently because they were not considered to entail violations of the Racial Discrimination Act. It was submitted by the Miriuwung Gajerrong that the grants and resumption were made without any regard to native title and clearly denied equality before the law to native title holders.

"It was submitted that loss of exclusivity of native title entailed regulation not extinguishment."

Some members of the Court clearly favoured the submission and were hostile to contrary submissions.

The Titles Validation) *and Native Title* (*Effects of past acts*) *Amendment Act 1999* (*WA*)

In May 1999 the *Titles Validation Amendment Act 1999 (WA)* (WA Act) came into effect, but only partially implemented the deeming confirmation extinguishment provisions of the *Native Title Amendment Act 1998*. The May 1999 WA Act generally required that a disposition would only extinguish native title if it was in effect on 23 December 1996. The *Ward* case was argued before the full Federal Court in July and August 1999. Since many of the dispositions concerned were historic in nature and no longer in effect on 23 December 1996 the WA Act was not overly emphasised. But on 19 December 1999, just before Christmas, the WA Act was amended to introduce the full deeming extinguishment effect empowered by the *Native Title Amendment Act 1998*.

The Act was obviously of much greater relevance to the dispositions inthe *Ward* case than had appeared previously. The Full Court handed down its decision on 3 March 2000, but no further submissions had been placed before the Court and none were called for relating to the amendments to the WA Act.

The High Court early in the hearing raised the question of the application of the amended WA Act. The Court clearly seemed inclined to send several of the questions relating to the application of the Act back to the Federal Court. Indeed there were some suggestion that they were inclined to do so at the start of the hearing without hearing the full arguments.

"The Court clearly seemed inclined to send several of the questions relating to the application of the Act back the to the Federal Court."

Likely outcome

Impressions of judicial attitudes to submissions are not a reliable indicator of likely outcomes to appeals before the High Court. But speculating as to outcomes is of course a highly engaging activity and one which can also be said to measure a lawyer's skills in predicting what the law is and may become. In that context a guide to possible outcomes is as follows:

Nature of native title

- Proof of the existence of native title does not require particular evidence, such as traditional laws and customs, as to every area of land and as to every right asserted.
- Native Title is not confined to estate groups.
- Spiritual connection can suffice to sustain a continuing connection in the context of other containing associations with traditional land.
- Native Title may not be partially extinguished.
- Native title of Miriuwung Gajerong extends to mineral resources.

Extinguishment

- The grant of mining leases and resumption of land undertaken after October 31st 1975 are past acts within the meaning of the Native Title Act.
- Extinguishment with respect to some Crown dispositions will be referred back to the Federal Court for consideration of the application of the *WA Act* as amended.
- The requirement of a clear and plain intention to extinguish will be affirmed but with no great enthusiasm.
- The Ord River project did not extinguish native title in toto. Extinguishment was confined to the area of actual use .
- The Aboriginal access provision in Western Australia pastoral leases did not manifest a clear and plain intention to extinguish and thereby extinguish native title.
- Mining leases and short-term leases did not extinguish native title but rather suspended native title.
- The loss of exclusivity of native title entails regulation and suspension not extinguishment.

- Native title to minerals was not extinguished by the *Mining Act* of Western Australia.

It is considered that the appeals by Miriuwung Gajerong with respect to extinguishment are likely to have more success than the appeals of the state of Western Australia with respect to the proof of native title.

Richard Bartlett
Professor of Law, University of Western Australia

The Goldfields Regional Heritage Protection Protocol

An historic agreement between the Government of Western Australia, major mining and prospecting industry organisations and the Goldfields Land and Sea Council (GLSC), on how to better protect Aboriginal heritage in the Goldfields region, was signed on August 15, 2001. The agreement (protocol), known as the Goldfields Regional Heritage Protection Protocol, was signed by the WA Chamber of Minerals and Energy, Association of Mining and Exploration Companies and the Amalgamated Prospectors and Leaseholders Association. The State's Deputy Premier, Eric Ripper, who has responsibility for native title, also endorsed the protocol on behalf of the WA Government. It is the first time that the State government and Western Australian industry-wide representative associations have entered into an agreement of this kind.

By signing the voluntary protocol they have all acknowledged that:

- Protection of Aboriginal heritage is very important to Aboriginal people and requires the cooperation and respect from all persons who want access to land;
- Aboriginal heritage and the traditional laws and customs of Aboriginal people are cornerstones of native title. Heritage protection can therefore not be separated from the recognition of native title; and
- Friendly and productive long-term relationships with traditional owners and their representative body (the GLSC), based on trust, goodwill and mutual respect, are the best relationships for everyone to have.

The protocol sets out the principles by which this goal will be achieved. The protocol was drawn up by a special working group (Goldfields Native Title Liaison Council) chaired by the President of the National Native Title Tribunal, Mr Greame Neate.

The working group, convened by the NNTT in order to develop general principles to regulate land access and protection of Aboriginal heritage, had members from peak bodies of pastoral and mining interests in the Goldfields, the State government and the GLSC. While the new protocol was based on existing heritage agreements between claimant groups and mining companies, this is the first time the concept has received support from the State government and peak mining bodies. The principles identified in the protocol will now be taken to the various claimant groups for further discussion and negotiation with mining companies and pastoral groups as part of determination proceedings. The protocol fills a gaping hole in the current WA Aboriginal Heritage Act, which only requires developers to 'protect and preserve' Aboriginal heritage. For example, under the Act there is no requirement for heritage surveys to be done to

clearly identify heritage sites, where they are, their level of significance and how to protect them.

Anthropologists: It is agreed that the quality and professional standards of anthropological services being used needs to be improved. Ideally, minimum standards and a system of accreditation should be introduced. Meanwhile, only mutually acceptable anthropologists or other suitable qualified persons should be engaged.

Register of surveys and sites: It is important to establish a register of surveys and sites in order to build on the work already undertaken and to avoid duplication of effort.

Role of representative body: From time to time, the Goldfields Land and Sea Council may, if requested, provide assistance in arranging heritage surveys.

Enforcement and compliance: Developers should keep claimants informed of all ground-disturbing activities to avoid misunderstandings occurring. It is noted that where the developer has agreed to fund and conduct a heritage survey, there is an expectation that the tenement would be granted.

Dispute resolution: When disputes arise, everyone should try to resolve them as quickly as possible. If they can't, then they should get expert advice or the services of a mutually-agreed mediator.

Further development of guidelines: Finally, everyone has committed to working together to further develop these principles by resolving any outstanding issues and then going on to develop a more detailed Heritage Protection Agreement for use at the level of individual claims.

"It is essential that each party's role in heritage surveys be decided and clearly spelt out, prior to commencement."

What was agreed: The groups who signed the protocol have agreed to recommend to their members that they abide by the following key principles when heritage surveys are undertaken:

Survey procedures: The type of survey to be undertaken will be determined on a case-by-case basis, depending on the nature and scope of the planned activity. It is reasonable that people providing services for the survey be paid (eg. traditional representatives of country who assist in conducting the survey), to ensure that the survey process is fully effective. When striking payment rates, one of two methods should be used, either variable costs (according to the time the survey takes and number of participants); or lump sum payment (no matter how long it takes or how many people).

Management of survey/processes: It is essential that each party's role in heritage surveys be decided and clearly spelt out, prior to commencement. Representatives of the developer (for example the mining or exploration company) should accompany the survey team to clearly identify the land they want to use, and to provide any other assistance. However, it is agreed that the survey team may sometimes require privacy for discussing culturally sensitive issues.

Survey reports: A survey report should be prepared at the end of each survey, and should clearly identify who did the survey, including relevant information about them,

the date of the survey and the area surveyed. If heritage sites are identified, then only culturally appropriate (non-sensitive) detail is to be included in the report, but to include: location and description; dimensions (including any buffer area necessary to protect the site); and its significance. The reports should have clear descriptions and enough detail of heritage sites for the developer to be able to rely on them when planning prospecting, exploration, mining and associated activities, so as to avoid or minimise disturbances. The survey reports should also provide recommendations as to how sites could be managed. The developer should be provided with a copy of the survey report. If members of the survey team want to record private, culturally sensitive information, then this should be included in a separate part of the survey report. This would not be provided to the developer.

Goldfields Land and Sea Council

NATIVE TITLE IN THE NEWS – September & October 2001

National

The High Court ruled that Aboriginal people of the Croker Island region northwest of Darwin hold native title over 3,300 sq km of sea. The court found that native title coexists with other interests and that non-title holders could not be stopped from using the waters below tide mark. This decision is welcomed by ATSIC as just and honorable. Aboriginal elder Mary Yarmirr who led the Croker Island fight said the decision was bitter sweet and was happy that Australian law had confirmed native title can exist over sea country as it does on land. Based on the decision, over 120 claims to areas of sea and 60 to areas in the intertidal zone will be lodged according to Graeme Neate, President of the NNTT. (*Aus 12 October 2001*, NNTT Press Release 11 October)

New South Wales

The Darug Tribal Aboriginal Corp has filed a native title claim to eight parcels of Crown Land in Canada Bay near the city's foreshores (NC 97/8). Speaking to counter statements by fellow City Councilors, Neil Kenzler suggested, 'The simple thing is we need to be party to the discussions…This is the first step in a long due process of law.' (*Glebe and Inner Western Weekly 17 October 2001*)

The first meetings of interested parties in the Muthi Muthi native title claim to land near Balranald and Hatfield were convened by NNTT member Bardy MacFarlane in Balranald in late September. (NNTT Press Release 24 September)

In an arbitrated decision the NNTT has granted a sand mining lease to State Government and Mineral Deposits Pty Ltd at Stockton Bight on land of interest to the Maaiangal Clan. Under future acts provisions of the NTA, the Tribunal was asked to enter negotiations when the two parties failed to reach agreement. The decision to allow the license was based on minimal impact on the rights, interests and traditions of the Maaiangal Clan and the social and economic benefits to the community. (NNTT Press Release 25 September)

In an agreement reached outside of the courts, a stretch of land south of the Cape Byron Lighthouse has been handed back to the Arakwal Aboriginal People at Byron Bay. After

seven years of negotiation with the NSW government, the two parties have created the Arakwal National Park. To symbolise the unity the agreement entails, Premier Bob Carr and other government leaders placed brightly colored handprints on a canvass alongside the handprints of Arakwal elders. (*Newcastle Herald 29 October 2001*)

Victoria

The NNTT acting state manager, Toni Shelley has called for interested parties to register for talks regarding the Latji Latji and Wergaia Peoples' claims to land near Mildura. (NNTT Press Release 17 October)

South Australia

The public has until 18 December to register an interest in the Kaurna People's native title claim (SC 00/1) which has elicited considerable interest by including metropolitan Adelaide. The claim covers around 8,160 sq km of land stretching from Cape Jervis to Port Wakefield, although only about 10 per cent of the area is actually claimable. It affects around 30 Councils and has been lodged with the NNTT. SA Farmers Federation (SAFF) Natural Resources Manager Chairman Kent Martin said a number of SAFF members had received notification from the NNTT that they had property interests within the boundaries of a new native title claim. (*Advertiser 30 October 2001, Times Victor Harbour 20 September, 25 October 2001*)

The Federal Court has been asked by the Kujani People to recognize their traditional rights and interest in an area that includes Whyalla (SC 00/3, 00/2 95/4). The application includes claims over many parcels of land under the care, control and management of Whyalla Council, City Manager David Knox said. A meeting will be called by the Council to discuss the matter and the recommendation that the Council lodge an application to become a party to the Kujani native title claim. (*Whyalla News 8 October 2001*)

A native title agreement which was signed in Adelaide is seen as opening the way for a surge of exploration in the Cooper Basin for petroleum thought to be worth around $240 million. The agreement involves three Aboriginal groups (the Edward Landers Dieri, Yandruwandha/Yawarrawarrka and Wangkangurru/Yarluyandi Peoples), seven oil and gas explorers and the SA Government and includes operations of petroleum licenses, exploration activity, instructions in Aboriginal culture and compensation. The agreement also establishes a process to protect Aboriginal heritage before and during field operations. Minerals and Energy Minister Wayne Matthews said that it would act as a precedent for future native title negotiations throughout Australia. (*Australian Business News 23 October 2001*)

Queensland

The state's first regional land use agreement has been signed by mining companies and the Kalkadoon People. It is expected to boost exploration opportunities and generate jobs in the Mount Isa region where as many as 90 exploration licenses would be covered by the agreement. In exchange, the Kalkadoon People will be allowed to provide descriptions of their culture and attachment to land at induction meetings for mining staff, be given opportunities for employment, and will receive assurance from explorers that cultural heritage will receive reasonable protection. (Courier Mail *14 September 2001*)

QLD Tourism Industry Corporation (QTIC) Chief Executive Daniel Gschwind is trying to

convince tourism operators in the state's north west to become a part of the native title process. 'We are not trying to instill fear into operators, but their operator permits could be changed or revoked if a native title determination is made on the land where they operate…Information is the best preparation', he said. (*North West Star 13 September 2001*)

Mackay man Clowry Jack Kennell is heading the family efforts for native title to Ugar (Stephen Island) located near the north western reaches of the Torres Strait (QC 96/61). Ugar, one of the smallest inhabited islands in the strait with a population of about 30 people, is the traditional home of the Kennell family, who left the Island for Mackay in the 1950's and remained there for work and economical security. (Daily Mercury 12 September 2001)

More than half of the 900 backlogged mining exploration licences in QLD could be cleared within the next year following the announcement of a statewide agreement by the QLD government and Aboriginal leaders. Ralph De Lacey, speaking for small scale mining operators as President of the North Queensland Miners Association, said that the ILUA 'addressed every aspect of small mining from prospecting permits to mining leases, and covers every aspect of Native Title concern from cultural heritage protection to compensation…emphasis was placed on the protection of Aboriginal rights that may exist, regardless of native title claim status.' (*QLD Times Ipswich 2 October 2001*)

A 354,000 ha parcel of land is set to be handed over to members of the Lockhart community by the state government in one of the largest freehold title grants in the state's history. 'The QLD government acknowledges the rights of the traditional owners in the handover…This shows our commitment to Reconciliation,' Minister of Natural Resources Stephen Robertson said. The land, which was the former Lockhart River Mission, will be returned under the Aboriginal Land Act, with the handover converting the deed title to freehold. It follows a lengthy campaign by traditional owners to secure native title recognition. (*Courier Mail 5 October 2001*)

The NNTT has invited parties interested in three native title claims to register for negotiations. The three claims are put forward by the Western Yalanji for land south of Laura and south west of Cooktown, the Kangoulu for land near Emerald and Blackwater in the state's centre, and the Wakka Wakka for land near Kingaroy in south and central Queensland.

WA

An agreement between the Wom-ber (WC 96/105) and Wagyl Kaip (WC 98/70) Peoples has merged their claims to cope with previously overlapping boundaries. Hailed as a breakthrough by the state government and both Indigenous groups, the eventual success of the claim would see the groups recognized as native title holders over an area of 52,500 sq km through Albany, Denmark, Dumbleyung and Hopetown where they would be consulted on development in the region. (*WA 8 August 2001*)

The Federal Court heard evidence while housed in a tent near Bibra Lake in a native title claim covering a 9000 sq km area which includes parts of Perth. Among several witnesses to gave evidence near High Wycombe swampland, Patrick Hume told the court of his spiritual connection to land between Fremantle and Rockingham. The claimants are seeking recognition as the lands traditional owners and access to significant sites. The claim is expected to go eventually into mediation between Perth Aboriginal groups and the state

government. (*WA 20 September 2001*)

Two decades after they lost a battle to put their Aboriginal land rights above mining interests, the Noonkanbah's Yunngora People's native title rights have been recognised by the WA state government. The Aboriginal Lands Trust has handed over 260 hectares of freehold land in the middle of the 170,000 ha Yunngora territory. (*WA 22 September 2001*)

WA's new single local government body, the Country Shire Councils Association (CSCA) met in Leonora to elect a three person panel to advise the CSCA's board regarding native title issues. (*KM 2 October 2001*)

After six years of negotiation the Kiwirrkurra Pintupi People have gained native title rights to almost 43,000 sq km of land. The formal process to be held at Moyen in the Gibson Desert will be attended by Federal Curt Judge Robert French, Deputy Premier Eric Ripper, the claimants and other parties. The consent determination gives the Kiwirrkurra People the right to exclusively possess, occupy use and enjoy the land and waters within the claim area, except where native title has been extinguished. (*WA 19 October 2001*)

The Golfield Land and Sea Council (GLSC) conducted a two day staff workshop in Esperance to discuss several topics including the Council's future direction funding and current native title applicants. This comes after recent developments including the federal governments approval of the Council's 2001-2004 Strategic Plan. Speaking at the meeting, GLSC Director Brian Wyatt said, 'The change in approach to native title by the new state government, coupled with the imminent commencement of Federal Court hearing for Goldfields claims signal a new phrase in our developments'. (*Esperance Express 11 October 2001*)

NT

NNTT has invited interested parties to enter into negotiations over land covered by 10 native title claims mainly covering pastoral leases in the Victoria River district and Barkley Tablelands. Nine of the claims have already passed the registration test, giving claimants a right to negotiate over future land use. (Border Watch Mt Gambier 20 September 2001)

TAS

A 5000 ha Bruny Island farm has been bought by the Indigenous Land Council (ILC) for the Aboriginal people of Tasmania. An ILUA was negotiated after native title could not be established. The ILC paid more than $4 million for the Hazel Brothers sheep grazing property Murrayfield. ATSIC Tasmanian Commissioner Rodney Dillon said that the property would be managed by a committee to be formed according to the wishes of the local Aboriginal community. (Mercury Hobart 30 October 2001)

List of abbreviations

Note: *Where an item also appears in other newspapers, etc, an asterisk* (*) *will be used. People are invited to contact the NTRU for additional references. We will try to provide copies of recent items on request.*

Ad = Advertiser (SA)	CT = Canberra Times	IM = Illawarra Mercury
Age = The Age	DT = Daily Telegraph	LE = Launceston Examiner
Aus = Australian	FinR = Financial Review	LR News = Land Rights News
CM = Courier Mail (QLD)	HS = Herald Sun (VIC)	LRQ = Land Rights Queensland
CP = Cairns Post	KM = Kalgoorlie Miner	Mer = Hobart Mercury

NTN = Native Title News
SC = Sunshine Coast Daily
SMH = Sydney Morning Herald
TelM = Telegraph Mirror (NSW)
WA = West Australian
WAus = Weekend Australian

APPLICATIONS

The National Native Title Tribunal posts summaries of registration test decisions on http://www.nntt.gov.au. The following decisions are listed for September and October 2001.

Gubbi Gubbi People #2	accepted
WA Mirning People	accepted
Kalaluk	accepted
Birri People	accepted
Spring Creek No. 3	accepted
Spring Creek No. 4	accepted
Mandingalbay Yidinji People #1 (Combined Application)	accepted
Nathan River	accepted
Mataranka	accepted
Gunn Pt Gas Pipeline	accepted

The decision indicates whether an application has met or not met each of the conditions of the registration test against which it was considered. If an application does not pass the registration test it may still be pursued for determination through the Federal Court.

APPLICATIONS CURRENTLY IN NOTIFICATION

Notification period is 3 months from the Notification start date.

NEW SOUTH WALES

Closing date	Application no	Application name	Location
21 November	NC97/8	Darug Tribal Aboriginal Corporation	NSW
	NN01/9	NSW Government #59	NSW
04 December	NC98/17	Nucoorilma Clan of the Gamilaaroy Aboriginal People	NSW
	NN01/6	Norva Investments Pty Ltd	NSW
	NPA97/4	Barkandji (Paakantyi) People # 11	NSW
18 December	NN01/10	NSW Govt #60 (Kembla Grange)	NSW
	NN01/11	Mogo Local Aboriginal Land Council	NSW
	NN01/12	NSW Government #61 (Port Macquarie)	NSW
02 January	NN01/7	Darkinjung Local Abriginal Land Council (Warnervale)	NSW

SOUTH AUSTRALIA

Closing date	Application no	Application name	Location
18 December	SC00/1	Kaurna Peoples Native Title Claim	SA

	SC00/3	Kujani	SA

QUEENSLAND

Closing date	Application no	Application name	Location
21 November	QC01/17	Bar-Barrum People #2	QLD
	QC01/18	Bar-Barrum People #3	QLD
	QC97/21	Darumbal People	QLD

NORTHERN TERRITORY

Closing date	Application no	Application name	Location
04 December	DC01/13	Urapunga #2	NT
	DC01/14	Goondooloo - Moroak	NT
	DC01/15	Proposed Lot 9192 Alice Springs	NT
	DC01/16	Larrimah	NT
	DC01/17	Kurundi	NT
	DC01/18	Bonrook	NT
	DC01/19	Chatterhoochee	NT
	DC01/20	Calvert Hills No.2	NT
	DC01/21	Ban Ban Springs	NT
02 January	DC01/22	Gunn Point Road	NT
	DC01/23	Douglas North	NT
	DC01/24	Kiana Calvert	NT
	DC01/27	Koolpinyah South	NT
	DC01/28	Fish River	NT
	DC01/29	Humbert-VRD	NT
	DC01/30	Dalmore Downs	NT
	DC01/31	Brunchilly	NT
	DC01/32	North Calvert Hills	NT
	DC01/33	Dungowan	NT

*A non-claimant application (marked with an *) is one made by someone who is not claiming native title themselves but who has an interest in the area which is not a native title interest and they want the Federal Court to determine whether anyone has a native title interest in the same area. The location is meant to be indicative only.*

For further information regarding notification of any of the applications listed contact the National Native Title Tribunal on 1800 640 501 or www.nntt.gov.au

RECENT PUBLICATIONS

Brock, P (ed.) 2001 *Words and Silences: Aboriginal women, politics and land*, Allen & Unwin, Sydney.

The Hindmarsh Island Bridge conflict captured in the public eye the controversy which surrounds Indigenous women and property rights in Australia. The ridicule of sacred women's knowledge as a basis for making decisions over land is brought up by many authors in this book to exemplify what people are faced with when asserting their land rights. This publication explores in a political and legal context the dilemmas of operating in a gendered cross-cultural environment: the invasive legal system, the legacy of male dominated institutions and sources of female authority. Deborah Bird Rose talks of 'silences', of the importance of understanding what is not being said and of the desecration of sites of significance. Heather Goodall discusses the experience of colonisation and dispossession in north and far west New South Wales and introduces women who are relearning their history and culture. Whatever the community, the editor suggests that 'no Aboriginal communities have been able to avoid the need to reconceptualise and adapt cultural understandings to the realities of the politics of the late twentieth century.' There are seven papers in this book. Other papers are by Pat Baines, Diane Bell, and Hannah McGlade, and Sandy Toussaint, Myrna Tonkinson and David Trigger have published in collaboration.

Litchfield, John. 2001 *Mabo and Yorta Yorta Two approaches to history and some implications for the mediation of native title issues*, NNTT Occasional paper no. 3/2001.

Abstract This paper focuses on the specific challenge that the fluid character of native title is making to institutions that are obliged to grasp an historical understanding of native title. It is argued that positivist modes of historiography, such as occurred in the *Yorta Yorta* trial are inadequate for the task of developing a concept of native title. Hermeneutics, by contrast, provides a constructive way forward, as was demonstrated in the use of its principles in *Mabo (No.2*). It is also argued that the *Yorta Yorta* appeal outcome went some way to realigning *Yorta Yorta* with the *Mabo* decision. In concluding this paper, some of the implications for the mediation of native title claims are considered in the context of the legal developments that are discussed.

NATIVE TITLE RESEARCH UNIT PUBLICATIONS

The following NTRU publications are available for purchase from AIATSIS. Please phone (02) 6246 1186, fax (02) 6246 1143 or email: sales@aiatsis.gov.au

Native Title in the New Millennium A Selection of Papers from the Native Title Representative Bodies Legal Conference, 16-20 April 2000: Melbourne, Victoria, (includes CD of complete proceedings) Bryan Keon-Cohen editor, Native Title Research Unit, AIATSIS, 2001.

A Guide to Australian Legislation Relevant to Native Title 2 volume set, Native Title Research Unit, AIATSIS, 2000.

Native Title in Perspective: Selected Papers from the Native Title Research Unit 1998-2000 Edited by Lisa Strelein and Kado Muir, 2000.

Land, Rights, Laws: Issues of Native Title, Volume 1, Issues Papers Numbers 1 through 30, Regional Agreements Papers Numbers 1 through 7 1994-1999 with contents and index.

Regional Agreements: Key Issues in Australia – Volume 2, Case Studies Edited by Mary Edmunds, 1999.

A Guide to Overseas Precedents of Relevance to Native Title Prepared for the NTRU by Shaunnagh Dorsett and Lee Godden, 1998.

For a full list of past Native Title Publications please consult our web site.

Land, Rights Laws: Issues of Native Title

Papers from the series are available free of charge: phone (02)6246 1161, email ntru@aiatsis.gov.au:

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No 10 ***Review of Conference: Emerging Issues and Future Directions*** by Graeme Neate

No 9 ***Anthropology and Connection Reports in Native Title Claim Applications*** by Julie Finlayson

No 8 ***Economic Issues in Valuation of and Compensation for Loss of Native Title Rights*** by David Campbell

No 7 ***The Content of Native Title: Questions for the Miriuwung Gajerrong Appeal*** by Gary Meyers

No 6 ***'Local' and 'Diaspora' Connections to Country and Kin in Central Cape York Peninsula*** by Benjamin R Smith

No 5 ***Limitations to the Recognition and Protection of Native Title Offshore: The Current 'Accident of History'*** by Katie Glaskin

No 4 ***Bargaining on More than Good Will: Recognising a Fiduciary Obligation in Native Title*** by Larissa Behrendt

No 3 ***Historical Narrative and Proof of Native Title*** by Christine Choo and Margaret O'Connell

No 2 ***Claimant Group Descriptions: Beyond the Strictures of the Registration Test*** by Jocelyn Grace

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This newsletter was prepared by NTRU staff

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Promoting knowledge and understanding of Australian Indigenous cultures, past and present

Native Title in the New Millennium
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Native Title in the New Millenium Native Title Representative Bodies Legal Conference 16-20 April 2000: Melbourne, Victoria, Bryan Keon-Cohen, editor. This publication presents 31 papers from a conference jointly sponsored by the Mirimbiak Nations Aboriginal Corp., ATSIC and the Native Title Research Unit of the Australian Institute of Aboriginal and Torres Strait Islander Studies. Bryan Keon-Cohen describes the book in his introduction, saying, 'The conference ... highlighted a real need for a regular forum where information and experience can be exchanged between all players, and better ways identified to progress the varied and often complex processes required by the NTA. Hopefully this book, and the accompanying CD, can service that need, and record a valuable range of contributions to this ongoing debate.' The CD contains additional papers, maps and information

The book has sections on constitutional issues, the federal court's case management, State and Territory alternative schemes, economic development, alternative approaches, issues related to particular claims and methods, Indigenous Land Use Agreements, Indigenous land claims in Canada, New Zealand and South Africa and the application of international law and conventions in Australia.

(2001) 480 pages, indexes of cases, statutes and topics, bibliography, maps, 25 x 17.5 cm, paperbound with CD of the complete proceedings. ISBN 0 85575 376 5. Price $59.95 (incl. GST and shipping).

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Publishing by Aboriginal Studies Press