identify, amongst other things, the range of characteristics, conditions and forms.

We have written to many stakeholders to request their assistance with this project. Such assistance may, in the first instance, involve the provision of actual agreements or information relating to agreements for inclusion in our database. We continue to seek any individuals and organisations who are able to provide information on and/or make available agreements which contain information which could be made available in the public domain. At a later stage we may also seek to arrange interviews and obtain further information in relation to particular agreements.

If you can assist us with our research or if you would like further information about our project please contact Dr Lisa Palmer, Postdoctoral Fellow, on 03 8344 3462 or email: lrpalmer@unimelb.edu.au

Replies and/or information pertaining to agreements can be sent to:

Dr Lisa Palmer
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The University of Melbourne,Vic 3010

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FEATURES

Miriuwung Gajerrong: an invitation to understanding

by Wayne Bergmann, Executive Director, Kimberley Land Council

On Monday, 19 August 2002, the Miriuwung and Gajerrong peoples held a meeting in Kununurra to discuss the outcome of the High Court's native title determination. Many aspects of this complex decision were explained and options discussed.

The tone of the meeting was sad and tired and the question was asked, "After this decision, is there any more native title?"

In many ways this decision delivers the bucket-loads of extinguishment promised by Tim Fisher, then Deputy Prime Minister, following the 1997 *Wik* native title decision and before the 1998 amendments to the *Native Title Act 1993* (Cth) For example, native title on national parks and conservation reserves in WA is extinguished by this decision.

But, even though this extinguishment of our rights is deemed to have taken place in Australian law, it is not as if that part of Miriuwung Gajerrong peoples' traditional country has gone away. Nor have the people with responsibilities to care for that country gone away. People do not give up on their law and culture just because Australian law is incapable of recognising it. In this way, the decision changes nothing.

In other respects the decision is not as bad for Aboriginal peoples as it could have been – partial native title survives on pastoral leases and mining leases, providing those partial rights do not get in the way of those of the pastoral or mining lease-holders. If, however, the rights of the pastoral or mining lease-holder get in the way of the native title rights, then too bad. As someone else at the Miriuwung Gajerrong meeting said, "We're always going to be on the losing side." And, "All we get are the left-overs after everybody else has finished with the land – kartiya (non-Indigenous) rights will always come first and blackfellas get what's left."

This lesser status, this subordination, is a terrible position for the first peoples of this nation to be in. Each time we go back to court, we lose a little more. Those native title rights that survive extinguishment by State and Commonwealth legislation must be recognised by the courts in the Australian common law. This common law is based on

centuries old legal principles laid down in a vastly different culture from ours on the other side of the world. Given this, it is not surprising that the courts find it difficult to find a match between this common law and our law and custom, which comes out of the land and waters of our traditional country.

In this case, the High Court has said that more information on traditional law and custom is required; so that how law and custom can be recognised as rights in Australian law can be more specifically pinned down. This approach treats us like a dead butterfly to be pinned onto a board and exhibited as part of a collection – something that is admirable to look at from a reasonable distance, even to show to others, but that cannot grow and change, only fade and slowly decay. This has been called the frozen in time approach to traditional law and culture: it denies us our growth and cultural dynamism.

It also raises another fundamental issue for us as Aboriginal peoples, summed up in the following, also said at the meeting, "My law comes from that creation – that gives us our law, [tells you] what you gotta do. How much of that do we want to tell them, or write that down, so they can look at that and say 'that's rubbish law, we don't recognize your law'?" And, from another meeting participant: "You've got to ask the question whether they can understand us too."

Despite the best intentions in the world on the part of those involved, the answer to that question has to be, 'No'. Without that understanding, the Australian courts cannot and will not deliver justice to our people. This is because the fundamental issue is not understood and given legal recognition. We are the first peoples of this nation and as such we are unique and deserve substantive equality. Expressed simply, this issue is about the right to be ourselves and secure our children's futures. We are not you, and attempts at assimilation – to turn us into pale imitations of you – have not, and will not, work.

Regardless of the decisions of Australian courts, we will never feel any less for our traditional country, for our law and culture, or for our rights. We cannot give up – we have nowhere to go.

And it is clear that we cannot go back to court. It wastes taxpayers' money, and it exhausts our people. Too many of our old people die – taking their leadership, knowledge and experience with them – while the native title process grinds on.

Governments must find a way to accept the fundamental truth of who we are; and treat us accordingly. The nation must also accept that we have a contribution to make. We do not want any more special treatment; such as the separation of our children, and the subordination of our rights and interests in land to others. All we want is a fair go.

The Western Australian Government must negotiate with the Miriuwung Gajerrong peoples, as equals and with an attitude of mutual respect, and they must do it now. The time for well-intentioned rhetoric has passed; the time for meaningful negotiation and action is upon us.

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Summary of judgment – *Ward on behalf of Miriuwung Gajerrong v Western Australia* High Court of Australia (8 August 2002)

by Dr Lisa Strelein, NTRU

1. Central Issues

The High Court concentrated on the nature and principles of extinguishment in framing the decision. The two questions posed were: whether there can be partial extinguishment and the principles for determining extinguishment.

These issues were dealt with comprehensively and attempt to clarify the operation of the *Native Title Act 1993* (Cth). However, the orders state that both appeals are allowed. As Gleeson CJ stated when delivering the Court's judgment, no party was entirely successful in these proceedings. A number of issues were sent back to the Fed-