Books/Journals

A number of monographs are available from Oceania Publications, including 'The Karajarri claim: a case-study in native title anthropology' by Geoffrey Bagshaw. Order forms are available at: http://www.arts.usyd.edu.au/publications/oceania/OceaniaMonos.pdf

Conferences

AIATSIS – Native Title Conference 2-3 June 2005. Papers from the conference are available at: http://www.aiatsis.gov.au/rsrch/ntru/conf2005/papers/papers.html

Additional papers will be added as they are received.

Training

A Native Title Law and Policy Short Course will be held at James Cook University from Saturday 18 June to Wednesday 22 June, 2005.

If you are interested in attending please complete and return the attached form.

Further enquiries can be directed to Katie Kiss ph: 07 40421198 email (katie.kiss@jcu.edu.au).

FEATURE

Plenary Address by Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma
Thursday 2nd June 2005

The Human Face of Native Title, Challenges and Opportunities In Times Of Change
Native Title Conference
Coffs Harbour, NSW

I would like to begin by acknowledging the traditional owners, [the Gum-bay-ngg-irr people] whose land we are meeting on and thank them for welcoming us to their country. I congratulate AIATSIS and NSW Native Title Services on organising this conference and thank everyone gathered here for your efforts to make this a successful conference. I am honoured to be invited to address you today.

My commitment to native title is both personal and professional. Personally, as a member of the Kungarakan tribal group I am involved in a native title claim over the township of Batchelor in the Northern Territory and my Iwaidja countryman were (and still are) involved in the Yarmirr and Ors v Northern Territory (1998) sea rights claim. I understand the processes, triumphs and frustrations of native title as I see my communities work for the common law recognition of our traditional rights.

Professionally, native title is a central focus of my role as Aboriginal and Torres Strait Islander Social Justice Commissioner. This position was created in 1993 in response to the Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into Racist Violence. It was created to ensure an ongoing, national monitoring agency for the human rights of Indigenous Australians.

The Social Justice Commissioner has responsibility for promoting awareness of, and compliance with, the human rights of Indigenous peoples. As part of this role, my office prepares two annual reports, the Social Justice Report to the federal parliament and the Native Title Report to the Attorney General. The *Social Justice Report* looks at the enjoyment and

exercise of human rights by Indigenous Australians and makes recommendations on what should be done to ensure that these rights are observed. The *Native Title Report* looks specifically at the impact of the Native Title Act on Indigenous peoples' enjoyment and exercise of human rights. I recently tabled my first *Social Justice* and *Native Title* Reports in federal parliament and will refer to their conclusions in this speech.

My speech today is about *challenges and opportunities in times of change*. 'Times of change' certainly describes our present situation where the dismantling of government and Indigenous structures and policies has occurred at an unprecedented rate. These changes present a window of opportunity to put in place structures that will represent and assist our communities over the next generation. But these changes are also embedded with substantial risks. The risk that what has been learnt (both the successes and failures) over the past 30 years could be lost and the risk that the rights that we have fought hard for, and have gained, will continue to be eroded as the enthusiasm for transformation takes hold.

We need to think carefully about what opportunities and alternatives for change we want to create, or seize, as the landscape shifts. We also need to decide what is worth holding on to and protecting and how we will do that. While there are lots of problems that linger in our communities as a result of a long history of dispossession, marginalisation and discrimination, we remain strong, powerful and visionary. But, we need to be organised and vocal about our goals, our aspirations and how we need to be in the driver's seat to achieve these outcomes.

There are 3 key issues I want to talk about today in light of this new and shifting landscape:

First, I will outline the government's new arrangements for Indigenous affairs and the particular issues emerging out of these that I see for native title parties and traditional owners.

Second, I will talk about economic development from Indigenous land and touch on the topical issue of alienability.

And third, I will briefly consider the challenges and opportunities in this new landscape for NTRBs.

What the new arrangements are and what I will be monitoring?

First, the new arrangements. At the outset let me assure you that I am not here to promote the changes or encourage you to sign on to them, or not sign on to them. But I will let you know what I understand the new arrangements are and how they may impact on native title claimants, holders and traditional owners.

So, what are 'the new arrangements'?

In April 2004 the federal government announced substantial changes to the way it will deliver services and how it intends to engage with Indigenous people and communities from 1 July 2004. The new changes include:

- The abolition of ATSIC;
- Mainstreaming of Indigenous specific services previously managed by ATSIC and ATSIS;
- The creation of the Office of Indigenous Policy Coordination (OIPC) and regional Indigenous Coordination Centres (ICCs);
- An emphasis on whole of government activity; and

- The establishment of shared responsibility agreements and regional participation agreements.

Together, these changes are referred to as 'the new arrangements' and are reportedly based on lessons learned from the COAG trials.

So what I will be monitoring?

Since commencing in the Social Justice Commissioner role the key priority of my office has been to closely monitor the roll-out of the new arrangements. It is important to remember that the new arrangements began just 11 months ago. Key aspects have just been introduced or are still to be introduced. Accordingly, the *Social Justice Report 2004* identifies a number of challenges that the new arrangements raise, as well as some issues where I am concerned about the direction of the government.

At this stage, most activity has been at the federal government level and so my primary engagement has been at that level. I expect that this will change over the coming years as the new processes spread across different levels of governments.

There should be no doubt that these new arrangements will form the basis of most, if not all, service delivery at *all* levels of government over the coming years.

So we must make sure that we do not have our heads in the sand about these developments as they are going ahead regardless. Indigenous peoples and communities need to learn about the new processes and think about how we can engage in them to address our needs.

As I note in the *Social Justice Report:*

- *In theory, these new arrangements have much to offer* – they aim to coordinate and improve service delivery by mainstream agencies, which has been a longstanding problem.
- *There are also a number of potential benefits in the new arrangements*. These include the movement to three year funding cycles – a simple recommendation of the Royal Commission into Aboriginal Deaths in Custody that has taken nearly 15 years to implement. As well as the simplification of grant procedures with the proposal to introduce a single submission for the different programs that currently exist for Indigenous communities and groups.

But - and this is the crucial point - the commitments made through these new arrangements need to translate into action on the ground. Indigenous people have suffered at the hands of good intentions and worthy commitments from governments of both persuasions, for many decades. The *Social Justice Report* highlights those critical issues that must be properly addressed for the new arrangements to provide benefits and not to repeat or make worse any mistakes of the past.

In broad terms, these challenges include, although they are not limited to, ensuring that:

- Indigenous people are informed and empowered to effectively and equitably participate in the agreement making process;
- Indigenous people are able to participate fully in decision making, including through regional structures;
- Government does not introduce punitive funding models where communities are negotiating for the delivery of basic services and

citizenship entitlements enjoyed by all Australians; and
- Appropriate performance monitoring and evaluation processes are put into place so we know if the changes will have a positive impact on our people.

There are particular challenges and opportunities in the new arrangements for native title claimants, holders and traditional owners.

First, it is crucial that native title holders and traditional owners consider whether you wish to participate in the new arrangements, and if you do make this clearly known to government, through the Indigenous Coordination Centres.

The abolition of ATSIC has lead to an increased focus by the federal government on direct engagement with Indigenous peoples and communities. To facilitate this process, government has committed to engage with Indigenous peoples at a local and regional level, through Shared Responsibility Agreements (or SRAs) and Regional Participation Agreements (or RPAs). These agreements will set out the priorities of Indigenous people at a local and regional level and outline what obligations both the government and the relevant Indigenous group agree to in pursuit of these priorities. They are based on the principle of shared responsibility and involve mutual obligation or reciprocity for the delivery of services. Depending on how the government plans to develop RPAs, there might be an opportunity for the recognition or emergence of regional governance structures.

Now let me turn to *regional participation agreements*

RPAs may raise important issues for native title holders and traditional owners.

In explaining the operations of the new arrangements, the government describes the RPA process as setting the priorities for each region. It is thought that this will involve assessing Indigenous needs by mapping it against demographic factors such as projected growth of the population and mobility within the regions. These findings will then be mapped against the government expenditure and potential capital within the region.

Although it appears that SRAs are being negotiated by government first, it is expected that RPAs will follow. This may be a positive approach; that is, building regional agreements from the ground up. However, it could also mean that if native title holders and traditional owners are not engaged in the negotiation of SRAs for their area, they may be left out of the RPA process and any related regional structure that may emerge.

If a regional structure is to have any legitimacy and sustainability, native title holders and traditional owners must be included in the decision making process for their communities and regions. Traditional owners need to get involved to make sure their unique identities and concerns within Indigenous communities are recognised and reflected in SRAs and RPAs.

So, what about *SRAs and native title agreements*

Native title claimants, holders and traditional owners should also think carefully and strategically about what they can negotiate through an SRA.

While native title is about recognising existing rights in land, and not about mutual obligation for the discretionary benefits provided by government through SRAs, there may be things that traditional

owners want to do on their land that could be achieved by using an SRA.

I am not proposing that native title be *resolved* through an SRA. The legal recognition of traditional rights, as well as statutory procedural rights like the right to negotiate, is an important asset of recognition and opportunity for Indigenous development. Legal rights ensure that meaningful negotiation occurs with Indigenous people and not simply consultation.

Rather, I am suggesting that once native title rights have been recognised through a determination, or an ILUA has been reached, SRAs may be a useful tool for native title holders to obtain funds and support from government to do things on their land.

Equally, the process of negotiating SRAs could benefit from the lessons learned through native title agreement making.

The catch cry of the native title system is – negotiate not litigate. As a result, agreements through consent determinations and ILUAs have become the principal way of settling native title issues. Just a few weeks ago the 100th native title ILUA was negotiated in Queensland. The experience and knowledge gained by Indigenous people and native title practitioners and experts negotiating agreements could provide important guidance on how shared responsibility agreements should be reached.

Importantly, one of the key features of the native title agreement making process are the legally enforceable rights that give Indigenous parties a seat at the table, bargaining power, and remedies for infringements. It means that native title agreements are based on negotiation, not just consultation, and they give native title claimants a say about what takes place on their land.

This type of negotiation gives limited expression to important human rights standards such as *the right to protection of culture,* prior informed consent and the right to self determination.

Despite the limitations of the native title system - the rights basis that it establishes for agreement making is an important principle that we must insist upon in the context of SRAs. Rights must underpin the process and outcomes of SRAs if SRAs are to achieve their objective; that is, of a community that is self reliant and capable of directing its own economic and social development.

Knowing your rights could help traditional owners and native title holders negotiate with ICCs to get meaningful and sustainable outcomes through SRAs.

The second issue I wanted to address today is economic and social development for traditional owners and their communities through native title. This is the focus of my *2004 Native Title Report* and one of the major themes of this conference. It is also becoming an important issue in political and public debate. Given this attention I would like to discuss the framework that underpins the type of economic and social development set out in my report. In doing so it is necessary to first consider one question - who is this model for economic and social development intended to benefit?

In addressing this question I would like to begin by reflecting on some of the history that has emerged through native title claims.

Justice Olney summarised in the Yorta Yorta decision that by the 1850s Aboriginal resistance to settlement had

ceased. The Yorta Yorta population had been drastically reduced: while the white population had grown dramatically - attracted by pastoral lands and gold. Government inquiries were held into the condition of Aborigines and addressing their 'absolute wants', so missions and reserves were established to address these needs. Later, 'half castes' were dispersed from missions and stations and families were split up or forced to move away from areas that had been their homes for millenia. In the twentieth century most of the reserve land had been leased to white farmers and employment for Aboriginal people became harder to find as the white population grew and soldiers returned home. Funding for reserves was reduced and Aboriginal peoples living on reserves were not eligible for unemployment benefits, nor were able bodied people, eligible for rations.

Indigenous peoples throughout Australia experienced similar events on our lands. These stories demonstrate how industry, agriculture and mining contributed to the growth of the Australian economy while at the same time, deprived Indigenous Australians of our economic resources and disrupted social, cultural and political structures. History suggests that economic growth in the broader economy does not translate into greater social and economic outcomes for Indigenous peoples.

It is on this basis that I have argued in my report that if the commonwealth government has a genuine commitment to addressing Indigenous disadvantage, then Indigenous social and economic development should be a priority for government.

But what does this amorphous term – economic and social development mean? It can mean different things to many different groups. In the past, under other names and with an assimilationist ideology it has been used to justify the worst possible treatment of Indigenous Australians. So it is with some caution and in good faith that I have used this term. Good faith that strategies for economic and social development will not become a smokescreen for reducing Indigenous land rights or imposing social and cultural change on communities. Because, I believe that economic and social development, based on and tied to human rights, can lead to better outcomes for Indigenous Australians.

Human rights encourages a social and economic development agenda. International human rights treaties state that:

All peoples have the right to self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

In 1986 the UN made a declaration on the right to development which expressly states that development is a fundamental human right that focuses on the human person who is the central subject and the active participant and beneficiary of the right.

The declaration states that development is a comprehensive economic, social, cultural and political process aimed at the constant improvement in the wellbeing of the entire population and the fair distribution of benefits. Development in Australia has not been enjoyed by the entire population as Indigenous Australians have been, and continue to be, marginalised from development outcomes on their lands. Prior to *Mabo*, Indigenous people had no rights to the fair distribution of benefits. Following Mabo we have limited rights but still no access to fair distribution.

Economic and social development is also aimed at the full realisation of all human rights and fundamental freedoms. In relation to Indigenous Australians these rights include:

- The right to self determination
- The right to protection of culture
- Economic, social and cultural rights
- The right to prior informed consent
- And equality

Economic and social development based on human rights would aim for a broad range of outcomes:

- It would ensure Indigenous people control their own development goals and agenda.
- That development is not inconsistent with culture or ignorant of cultural issues.
- That better health, access to food, housing and a stable meaningful job would be just as important as increased incomes.
- That Indigenous people would be active participants in the process of building economic and social outcomes in their communities, and
- If Indigenous communities don't agree with government strategies or they don't want mining on their land – they would be able to say no.
- That Indigenous rights in land would be recognised as being of equal importance and as a result, have equal protection, and
- That the life chance indicators of Indigenous people would be better, much better, and closer to that of the rest of Australia, hence, a fair distribution of benefits.

In many ways what I have just said echoes comments from the commonwealth government – with one exception: because what I have said is based on rights. Indigenous Australians will now have an opportunity to test, through the negotiation of SRAs, whether the government's words are underpinned by the substance of rights. Indigenous Australians must now test if the government is genuinely committed to partnerships and participation that includes the right to prior, informed consent and self determination. Test whether the government is genuinely committed to building capacity in communities and supporting Indigenous governance and test whether the type of economic and social development that the government is promoting will respect culture, allow Indigenous people to control the process and outcomes and allow Indigenous people to say no to strategies that they do not agree with.

It has been reported this week that the mining industry is engaging in the process of SRAs. The rights I have just described apply equally to the activities of the mining industry. This should come as no surprise to the industry, particularly given their commitment to sustainable development which recognises and supports a strong commitment to human rights standards. Along with monitoring other SRAs, I will be taking a keen interest in the development of these agreements.

I believe it is necessary at this point, to stress the importance of rights to land within a human rights framework for economic and social development. Let me be very clear, when I talk about economic development for Indigenous communities, I am talking about development *that builds on and preserves rights to land,* whether these rights come from land rights claims, native title legislation or traditional laws and customs.

This brings me to the recent debate on alienating Indigenous traditional lands.

The very public and political discussion about how to achieve economic development has centred on the idea that the removal of traditional rights to land is necessary to kick-start economic development. In particular, there have been various proposals to shift the ownership of Indigenous land from community to individual control, and make it alienable, to further the economic progress of Indigenous peoples.

I am concerned that this approach pre-empts a focused, well-funded strategy to build economic and social development based on traditional rights in land. It relies on a singular view of economic development that focuses on the individual and presumes the market will deliver, no matter what. The idea of making aboriginal land tradable assumes that there is a market for it in the first place. Given the history of Indigenous dispossession in the pursuit of economic development in Australia, it should be no surprise that most Indigenous land has limited commercial value in the mainstream economy. However, we can be sure that developers will want coastal lands and islands, but highly unlikely that they will want desert lands.

There are also obstacles to economic development that have nothing to do with the tenure of the land.

In remote areas, the lack of basic infrastructure like decent roads and telecommunications, limited economies of scale and lack of Indigenous skilled or even semi-skilled workers undermines economic development. Many of these issues could be addressed by improved provision of services. Education, healthcare, good roads and sanitation are necessary to support and underwrite economic and social development. These are basic citizenship rights for which the government has responsibility - alienating Indigenous land will not improve outcomes in these areas.

However, even in urban areas like Darwin and coastal regions like the cape and the NSW central coast – it is unlikely that the creation of capital alone will transform Indigenous communities. If the purpose of alienating Indigenous land is to make a difference to our high unemployment rates, low incomes, poor health status and education participation, then capital must be used to produce ongoing, sustainable outcomes and these outcomes have to be linked to the community's needs. A comprehensive approach is needed, and this must include the development of our capacity to manage capital, to ensure effective governance and to make informed decisions.

Without addressing these issues, many Indigenous communities may lose their land to short-term gains or through foreclosure, and money generated by selling or mortgaging land won't address the underlying social and economic problems.

A better approach might be to build economic development from our existing assets without putting our land rights at risk; and would link community outcomes to successful enterprises. This is not to say that at a future time we will not consider creative ways to alleviate poverty, but at this time, we must take small steps and walk together and not have to run after another government "good" idea. We have to do it on our terms

Many Indigenous communities have already devised imaginative ways of generating economic development *from* traditional land and resources. This demonstrates that entrepreneurialism is not limited by communal ownership. Options include using traditional lands for tourism, natural resource management,

airstrips, animal husbandry, customary harvesting and small enterprises.

Commonwealth and state governments should explore opportunities to provide commercial or special licences to traditional owners to utilise resources on their lands - in recognition of our connection to country and our rights at international law to own, control and dispose of our natural resources.

This brings me to my final point, the challenges and opportunities for NTRBs.

To support innovation and improved economic and social outcomes through native title and traditional ownership of land, NTRBs must be better equipped.

They need more resources and flexible funding regimes that will allow them to meet their statutory obligations and support a holistic approach to land related issues such as cultural heritage, land management and economic development.

The same can be said for local, state and commonwealth government agencies dealing with native title. These agencies need to explore strategies, in consultation with NTRBs, for a 'whole of government' approach when it comes to land related issues. Cultural heritage, land management and third party use of the land will, in all instances, require native title stakeholder participation. Governments need to consider ways in which these matters, as much as possible, can be streamlined and managed through one agency, or at least, in close collaboration with departments and agencies who have a native title policy or responsibility.

To effectively address land related issues through one agency or in a coordinated manner, bureaucrats and lawyers need to see native title not as a legal process but as a tool for meeting traditional owner goals.

It has been said so often and by so many different organisations that NTRBs need more funding – even mining companies are saying this. In fact mining companies do go a step further and provide funding for some rep bodies, while the commonwealth continues to deny that NTRBs need extra funding. The recent budget has provided a slight increase in NTRB base level funding, and extended the capacity building program that was due to end in 2004-2005 financial year. But slight increases are not sufficient to address the shortfall in NTRB funding.

The structure of NTRBs must also support a responsive, flexible and innovative approach to native title through representation and effective participation of traditional owners in the activities of the NTRBs both at a regional and national level.

The representative structure of NTRBs is important to ensure Indigenous participation in the operation of these organisations. Participation is crucial in developing strategies for addressing broader outcomes.

Participation of Indigenous people is a recognised human right and an important strategy for achieving community outcomes. The government has adopted this approach in the new arrangements and should ensure that the ongoing participation of Indigenous people is maintained through the NTRB structure.

I see a great potential in this annual conference for traditional owners and their representative organisations to address Indigenous land issues. Following the demise of ATSIC, this is one of the last remaining forums for Indigenous groups to organise and speak with a single voice. I encourage conference organisers and

attendees to use the conference as a mechanism through which to set the Indigenous agenda on land issues and make recommendations to government.

To close, I encourage traditional owners and claimants to think about whether you want to be involved in the new arrangements. If so, then you must step forward and make this clearly known to government through the ICCs. The government's focus on developing SRAs *before* RPAs means that traditional owners need to be involved at the beginning of the process to ensure your particular goals are reflected, and concerns are addressed, in both mechanisms. Otherwise, traditional owners risk being marginalised in this new mode of Indigenous service delivery. My message in the *Native Title Report 2004* was that native title should not be closed off from other Indigenous policy initiatives that are directed at social and economic development for our communities. This was a message chiefly directed at government, but it is equally important for native title claimants, traditional owners, PBCs, NTRBs and other native title stakeholders.

My office has made commitments to monitor the new arrangements and follow up problems with the government. We want to hear from you about how the new arrangements are working for you and how traditional owners are, or are not, being included in representative structures. We also want to know how native title is being dealt with in this new landscape – whether flexible, locally driven outcomes are reflected in how the government deals with native title issues. You can make comments on our new arrangements website or talk with me or my staff, Yvette and Sarah, over the coming days.

I wish you all the best of success at the conference and in achieving positive outcomes for you and your peoples, through the native title system.
Thanks you

NATIVE TITLE IN THE NEWS

National

This year's National Native Title Conference co-organised by The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and the NSW Native Title Service will be in Coffs Harbour. Numerous Indigenous leaders from across the country are expected to attend and will include addresses from native title holders, claimants and researchers. The conference will commence with a smoking ceremony and dance performance by the local Gumbayngirr group. Senator Aden Ridgeway will conclude the conference by giving a keynote address on the economic impacts of native title. ABC Online, ATSI Online - Message Stick. 02-Jun-05.

Northern Territory

Native title issues have been settled over 27 national parks and reserves in the Northern Territory, in the biggest simultaneous negotiations of Indigenous Land Use Agreements (ILUAs) in Australia. A total of 31 ILUAs will be negotiated paving the way for co-operative planning and co-management between Indigenous groups and the Northern Territory Government. The first four agreements will be notified by the National Native Title Tribunal during mid May by form of advertisement. NNTT Media Release. 17-May-05.