What is AIATSIS doing?

Since 2007 an Indigenous Women's Talking Circle has become a permanent part of the annual Native Title Conference. The Circle gives Indigenous women the opportunity to meet together to discuss their perspectives and roles in the native title process and in the sustenance of culture and nurturing indigenous identities. Discussions have centered on indigenous representation, leadership, economic development and mining agreement negotiations.

Participants from the Talking Circles have called for an increase in Aboriginal women's leadership roles. This would create greater equity in the native title process. Key themes from the Talking Circles include:

- Women's leadership comes from their confidence in knowing country and culture.
- Women feel their role is undervalued and want a greater say in what happens in their country.
- Women want to encourage younger women to be involved with native title processes.
- Women leaders need support, respect and recognition from their families as well as from the community.

Specific recommendations have also been made to AIATSIS about how it can increase women's involvement in native title. These include:

- AIATSIS to hold a national interim Native Title Conference dealing specifically with Aboriginal and Torres Strait Islander women on issues within the Native Title Framework.
- AIATSIS to establish a special fund to increase participation of Indigenous women at all future Native Title Conferences.
- AIATSIS to consider the importance of discussing the role of Aboriginal and Torres Strait Islander women in Prescribed Bodies Corporate as part of the Native Title Conference.

Conclusion

There is a clear need for much more research into Indigenous women's participation in native title. It is important that this research does not over generalise and recognises that each woman may have a difference experience. It is also important to investigate Indigenous women's own perceptions about their involvement in native title. Would they characterise themselves as being excluded?

More broadly, further research is required on the participation levels of a range of interest groups involved in native title. For example, do native title negotiations involving discussions about health and wellbeing initiatives include or consult health workers? Another example is the involvement of youth. A key concern in native title is capacity building for future generations and succession planning, but does the native title process allow for the inclusion of youth representatives?

Aboriginal and Torres Strait Islander women are undoubtedly an integral part of their communities and it important to ensure that they are given the opportunity to participate in all areas of native title.

Section 223: Thoughts of an Intern

By Madeleine Rowley, Aurora Intern

Section s223 of the *Native Title Act 1993* (Cth) has been twisted into a barbed wire fence that most native title applicants can not surmount. Judicial interpretation of the section has led to the development of an increasingly onerous and complex test that all litigated native title claims must pass to be successful.[8] Section 223 provides a definition of native title, stating that native title rights and interests are those rights and interests that are 'possessed under the traditional laws acknowledged, and the traditional customs observed' by the Indigenous claimants.[9] The courts have held that this requires claimants to prove that the laws and customs currently acknowledged and observed have been continually practised, without substantial interruption, since sovereignty.[10] This places an impossibly heavy evidentiary burden on native title claimants.[11]

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[8] Kent McNeill *Emerging Justice: Essays on Land Rights in Canada and Australia*(2000), 80; see also Simon Young 'The Trouble with Tradition' (2001) 30 *Western Australia Law Review,* 48.
[9] *Native Title Act 1993* (Cth), s223(a).
[10] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [45]-[47], [50], [58]-[61], [79].
[11] Richard Bartlett 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: Yorta Yorta' *Western Australian Law Review* 45 (2003),

Furthermore, the court is unwilling to make allowances for the devastating impact of European colonisation on Indigenous societies. The majority clearly stated in *Bodney v Bennell*[12] that if there has been a substantial interruption in the practice of traditional laws and customs, the reason for the interruption is irrelevant to the decision of whether or not native title rights and interests exist.[13] Consequently, those who have lost the most as a result of colonisation, are the biggest losers under the current statutory regime.[14]

As the current Chief Justice French has stated, our native title legislation is in need of reform.[15] He recognises the overly onerous evidentiary challenge faced by claimants and suggests the implementation of presumptions to lessen the burden of proof.[16] Indeed the Canadian approach may provide guidance for a more just statutory test for native title. In Canada for example, Lamer J in *Van Der Peet* held that it is not necessary to show an 'unbroken chain' of observance of traditional laws and customs.[17] It's presumed that if an indigenous society exists and has its roots in pre-sovereignty society, its laws and customs are traditional.[18]

Even from my humble position as an intern in Canberra, it is clear that reform is overdue. A strict requirement of continuity, as demanded by the Full Court's position in *Bodney v Bennell*,[19] risks perpetuating the historical injustice inflicted upon Indigenous people.[20]

45; see also H. Patrick Glenn 'Continuity and Discontinuity of Aboriginal Entitlement' (2007) 7(1) *Oxford University Commonwealth Law Journal*, 26, 29,31; see also Kirby J and Guadron J's minority judgement in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
[12] *Bodney v Bennell* [2008] FCAFC 63, [74], [97]. See also *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46], [47], [50]. [87]. The test of change is quite stringent, see *Bodney v Bennell* [2008] FCAFC 63, [80] where the Full Court rejects Wilcox J finding that the expansion of Boodjas is an acceptable change.
[13] Ibid.
[14] McNeill, above n 1; Young, above n 1.
[15] Chief Justice Robert French,'Lifting the burden of native title: Some modest proposals for improvement.' (2009) *Reform,* 93.
[16] Ibid.
[17] Glenn, above n 4, 17.
[18]*Calder v Attorney – General (British Colombia)* (1973) 34 DLR (3d 145, as cited in Richard Bartlett 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: Yorta Yorta' *Western Australian Law Review* 45 (2003), 18, 41-42; see also Glenn, above n 4.
[19] [2008] FCAFC 63.
[20]McNeill, above n 1; see also Young, above n 1.

Negotiating Native Title Settlements

By Anna McGlennon, Aurora Intern

During my internship in the Native Title Research Unit I have come to realise that there are numerous compelling reasons why native title settlements should be resolved through negotiation rather than litigation.

Litigation can place substantial stress on individuals and on entire communities. The adversarial system tends to polarise opponents' during the trial, and this can adversely affect relationships long after the litigation has ended. Additionally, there is no guarantee that the outcome of litigation will be satisfactory. Native title cases are commonly appealed to higher courts adding further costs. Even when a native title determination is reached by litigation, parties still need to negotiate about the practicalities of exercising coexisting rights and interests.

Reaching an agreement through negotiation may provide a solution to some of these issues. Of course, certain issues may be common to both litigation and negotiation. For example, both can be complex and lengthy, often requiring legal and other staff to be employed for long periods of time and requiring large numbers of people to be housed, fed and moved across often remote areas.

In addition to these general problems of settling native title issues, certain difficulties are unique to negotiation. It is critical that negotiators are aware of these problems and are equipped with the skills necessary to manage them. Several elements of the negotiation process must be addressed in order to minimise obstacles:

- Understanding each party's underlying needs, goals, hopes, motivations and concerns;
- Building constructive and sustainable relationships;
- Addressing communication issues to allow parties to articulate their interests and negotiate with each other;
- Brainstorming a number of different options;
- Clear and manageable commitments and agreements; and
- Parties must be equipped with adequate resources and skills, experience and training.