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.

Critically, all negotiating parties must feel confident in the negotiation process and be committed to achieving successful native title outcomes.

If these elements of negotiation are adequately addressed, negotiation can potentially provide the greatest opportunity for sustainable social, cultural and economic benefits for Indigenous stakeholders.

Book Launch - Murray River Country

NTRU would like to congratulate Research Fellow, Dr Jessica K. Weir on the recent publication of her PhD thesis *Murray River Country: An Ecological dialogue with traditional owners*.

The publication was launched by John Doyle and Yorta Yorta woman Monica Morgan at the Melbourne Writers' Festival on Saturday 29 August.

Murray River Country discusses the water crisis from a unique perspective – the intimate stories of love and loss from the perspectives of Aboriginal people who know the inland rivers as their traditional country.

These experiences bring a fresh narrative to contemporary water debates about living in the Murray-Darling Basin, and how we should look to more sustainable ways to live in Australia as our approach to water is changing in the face of water scarcity, drought, climate change, and water mismanagement. This book brings new insights to these issues by focusing our attention on what Indigenous people from along the Murray are experiencing, saying, and doing.

This information was taken from the Aboriginal studies Press website. More information about the book, and purchasing, is available here: http://www.aiatsis.gov.au/asp/aspbooks/murrayriver.html

NTRU Project Reports

NTRU Publications

Toni Bauman and Cynthia Ganesharajah, 'Second National Meeting of Registered Native Title Bodies Corporate, Melbourne 2 June 2009', *Native Title Research Report*, 2/2009.

This report outlines the discussions, recommendations and commitments of the representatives who attended the second national meeting of registered native title bodies corporate (RNTBC). A key outcome of the meeting was the resolution to establish a national body to represent RNTBCs.

Dr Kingsley Palmer, 'Societies, Communities and Native Title', *Land, Rights, Laws: Issues of Native Title*, vol.4, no.1, 2009.

This paper examines the use and meaning of the terms 'community' and 'society' in native title cases. The author considers this use from an anthropological point of view but situates it within legal contexts relevant to native title law. Further, the author explores whether there is a difficulty for anthropologists in the way these terms may be used in the context of native title processes and if this be the case, how such difficulty may be alleviated or circumvented.

Simon Young, 'Native Title in Canada and Australia post-Tsilqhot'in: Shared Thinking or Ships in the Night?', *Land, Rights, Laws: Issues of Native Title*, vol.4, no.2, 2009.

The Canadian decision of Tsilhqot'in Nation v British Columbia (BC Supreme Court, 2007) was a significant step in the resolution of a long-running timber dispute in western Canada, and the most important judicial exploration of Canadian 'Aboriginal title' since the watershed 2002 decision of Delgamuukw. This paper examines the Tsilhqot'in decision against the backdrop of the Canadian legal history, and attempts to explain its significance from both the Canadian and Australian perspectives.