Wik Region - Aurukun Place, Aurukun, QLD, Australia.
Credit: M. Mulvaney & the Australian Heritage Photographic Library

THE 2012 WIK & WIK WAY NATIVE TITLE DECISION

By Pamela McGrath

In early October in the far north Queensland community of Aurukun, the Federal Court held a special hearing at which Justice Greenwood handed down a consent determination that marks the end of one of the longest running and most important cases of the native title era. The orders made by Justice Greenwood granted the Wik and Wik Way peoples title over an area of 4,500 square kilometers; taken together with four earlier decisions in 2000, 2004 and 2009, the Wik and Wik Way peoples are now recognised as having native title rights in an area of more than 20,000 square kilometers.

These two groups are now recognised by the Australian legal system as having a range of rights over much of their traditional estate, which runs from just south of Weipa to north of Pormpuraaw and east to almost Coen. The rights recognised include accessing and camping on Wik and Wik Way land; using and taking natural resources (although not for commercial purposes); maintaining and protecting places and sites of significance; and using water for a variety of purposes including ceremony and domestic use. There is a specific right to maintain springs and wells for the purpose of ensuring the free flow of water. The determination grants no rights or interests in relation to minerals or petroleum, and all of the rights and interests are non-exclusive.

The determination follows extensive negotiations between the native title claimants and the many respondent parties to the claim, which include the Queensland government, pastoralists, mining companies, local shire councils and an environmental protection group. With an agreement in place, it was possible for native title to be recognised without holding a court trial. Justice Greenwood described the event as a 'proud day for the Wik and Wik Way peoples', and paid tribute to the concerted efforts of all parties involved.

The history the Wik and Wik Way peoples' fight for recognition of their native title is a complicated but significant one. In 1993, inspired by the success of the Meriam people in the Mabo case and only months before the *Native Title Act* came into effect, representatives of the Wik people lodged their own common law native title claim with the High Court of Australia. Shortly afterwards, in early 1994, they brought an application to the Federal Court under the new *Native Title Act*. Progress on the mediation of their native title claim stalled for a number of years as significant matters of law were argued, decided and appealed. Just before Christmas in 1996, the High Court handed down a decision holding that pastoral leases on Wik land did not necessarily extinguish native title, although the Court did not make any findings about whether the Wik people did actually hold native title.

The 1996 Wik decision had a profound impact nationally and continues to be widely regarded as one of the most important decisions in the history of native title jurisprudence. The principle of co-existence it established vastly

extended the area where native title claims could potentially succeed, raising the hopes of many Aboriginal groups that they would no longer be locked out from traditional lands by inhospitable pastoralists. But the decision was seen by many as destabilising the nation's land use system and creating uncertainty for other interest groups.

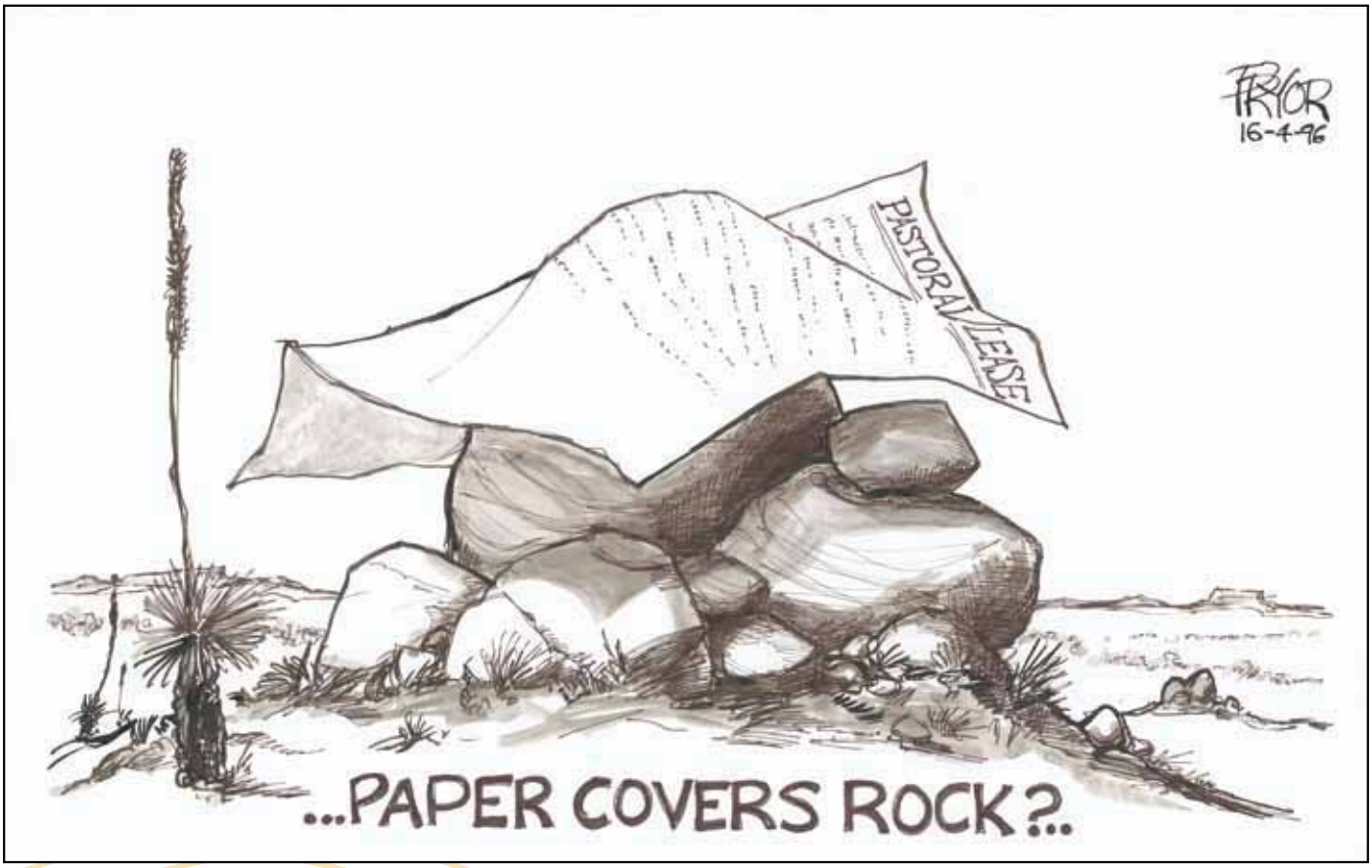
Without a majority in the Senate, it took Prime Minister John Howard's Coalition government two years of debate and political negotiation before it succeeded in passing a legislative response to the Wik decision. As one commentator wryly observed at the time, 'A Wik is a long time in politics'. The 'Ten Point Plan', as the 1998 amendments to the *Native Title Act* were known, was criticised by many for eroding the rights of native title holders and shifting the balance of legal power back towards non-Indigenous interest groups, in particular pastoralists.

The Wik and Wik Way peoples' fight for recognition has been won in stages through a protracted process of mediation and agreement making that has taken untold amounts of time, passion and intellectual effort. This has been an intergenerational struggle. Many older people provided crucial leadership and evidence, generously giving of their knowledge and energy; most of these individuals did not live to see the final outcome of their efforts. They were supported by younger family, many of whom were born in the closing years of the twentieth century when this legal action had only just begun. This young cohort of traditional owners has never known a world without the native title system and its attendant bureaucracy: courts, lawyers, anthropologists, endless meetings, community politics and conflict. Their familiarity with legal processes may well prove crucial to enabling Wik and Wik Way peoples' future strategic management of their traditional estate.

The fortitude and flexibility demonstrated by the Wik and Wik Way peoples in achieving this final agreement is remarkable, and they indeed have much to be proud of. But it is unlikely they have seen the last of the lawyers and the bureaucrats. The future governance and administration of their newly recognised rights will involve considerable and unavoidable administrative burdens, the bulk of which will be borne by their Prescribed Body Corporate (PBC), the Ngan Aak-Kunch Aboriginal Corporation.

This small organisation has a board of six Aboriginal directors, a membership of over sixty individuals, and represents many more native title holders. The PBC is assisted in their efforts by their long-standing solicitor Philip Hunter. Running a registered native title body corporate such as Ngan Aak-Kunch involves considerable time as well as specialist knowledge and skills. Governance and reporting structures must comply with the regulatory regime set out in the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. Meetings must be convened, rule books drafted, records kept, finances acquitted and negotiations and agreements facilitated. In some instances, PBCs are also required to undertake land management activities such as weed control. Large memberships, often scattered across vast distances, must be kept informed. Ngan Aak-Kunch currently manages all this and more on a reported annual income of less than $10,000.

Moreover, navigating the complex legal definitions and relationships that sit



Geoff Pryor, 'Paper covers rock?', 1996, National Library of Australia, vn3524549.

behind the determination's deceptively simple expression of native title rights will very likely require ongoing specialist legal advice, particularly when those rights intersect with those of other interest groups. (For example, the definition of 'Natural Resources' in the determination relies on definitions of 'Plants', 'Animals' and 'Forest Products' that are in turn defined by various interdependent sections of the *Forestry Act 1959* (Qld) and the *Nature Conservation Act 1992* (Qld).)

Given such bureaucratic and legal burdens, managing native title rights and interests into the future may prove to be as much if not more of a challenge than the process of achieving recognition in the first place. At the moment many PBCs receive crucial administrative support from local native title representative bodies. Others generate income through agreements with mining companies and other parties who conduct activities on native title land. Strategic economic development is encouraged by organisations such as IBA, but in many areas there are few viable business opportunities. Many PBCs are going to require alternative income streams if they are to effectively govern and manage their peoples' native title rights in accordance with the expectations of Australian law. It is for these reasons that Ngan Aak Kunch are in the process of negotiating a Memorandum of Understanding with Aak Puul Nganttam Cape York, an incorporated community-owned company based in Aurukun which aims to provide support to the PBC, and is developing innovating programs to manage the Wik lands south of the Archer River.

Many individuals volunteer their time in roles such as PBC directors in order to assist with the management of their group's native title rights. But such involvement comes at a cost. Time spent in meetings is time not spent with family, out on country, enjoying its benefits and imparting knowledge to younger generations. It is also time not spent in a paid job. In short, time spent on governance of rights is time denied to the pursuit of customary activities or profitable employment. The obvious irony is that native title law requires traditional owners to maintain traditional law and custom if they are to continue to be recognised as native title holders into the future.

So while there is much to celebrate in the Wik and Wik Way peoples' recent achievement, crucial questions remain about the long-term future of the post-determination native title system as it currently exists. The federal government is not indifferent to these issues. The Minister for Families, Community Services and Indigenous Affairs recently announced a review of native title organisations, which will pay particular attention to the needs of groups following a determination of native title. The review, due to commence in 2013, will seek the opinions of a range of stakeholders and communities including NTRBs, PBCs, the National Native Title Council, the Office of the Registrar of Indigenous Corporations, and state and territory governments. This will be an important opportunity for groups to speak frankly about the challenges and burdens of managing their native title rights and to provide some input into designing better policies. At the time of writing, a reviewer has yet to be appointed.

JOINT MANAGEMENT PARTICIPATORY WORKSHOPS

By Gabrielle Lauder & Toni Bauman

Joint management and/or co-management of conservation areas is a major, sometimes the only, native title outcome for many traditional owners. It is also an important means for incorporating Indigenous knowledge into land management and conservation strategies. Although the *Native Title Act* provides traditional owners with a negotiating position for entering into joint management agreements, native title groups face ongoing challenges in negotiating joint management, including implementation issues on the ground. Traditional owners in the post-determination landscape have to contend with the general inflexibility of the *Native Title Act* and the lack of institutional and resource support for PBCs, or Registered Native Title Bodies Corporate (RNTBCs) as they are more formally known. Participatory workshops such as the 'Traditional Owner Corporation Joint Management Workshop' held in Melbourne on 12 October 2012 and 'The Workshop on Indigenous Co-management and Biodiversity Protection' held in Cairns on 17 October 2012 provide an opportunity to address some of these issues by building a base of Indigenous knowledge and resourcing traditional owners to drive the joint management agenda.

Image: Joint management workshop for delegates of Victoria's Native Title PBC.

L-R: Ray Ahmat, Yorta Yorta Nations Aboriginal Corporation; David Lucas & Sarah Jones , NTSV; Jeremy Clark, Eastern Maar Aboriginal Corporation; Gabrielle Lauder, AIATSIS; Michael Stewart and Jim Golden-Brown, Barengi Gadjin Land Council; Toni Bauman, AIATSIS; Barry Kenny and Lloyd Hood, Gunaikurnai Land and Waters Aboriginal Corporation. Credit: Drew Berick