held and strategic research conducted to ensure that the strongest case could be put forward in each part of the region.

Ngadju is the first claim to be decided since that time, and its success is giving others a reason for optimism. GLSC research manager Craig Muller said that now 'other claim groups can see that it's possible to get native title in the region – the general mood has a bit of a feeling that there's some hope there'.

In the *Ngadju* decision, Justice Marshall found that there was and is a single 'Ngadju society' for the purpose of native title. Even though there was some evidence of a smaller group that held land in the area and that no longer exists, his Honour found that group was part of the same broad society as Ngadju and that those areas could be claimed by Ngadju. The state conceded that there was a contemporary Ngadju identity and that Ngadju people still engaged in some traditional practices, but argued that Ngadju people had not continuously observed and acknowledged traditional laws and customs, since they no longer recognised birth totems as part of their land-owning system, and no longer conducted initiation ceremonies as a basis for 'the Law'. The judge disagreed. He found that the state's submissions about totemism were based on very weak evidence, and that there had been a shift in emphasis on totems but no break with tradition. He found further that the role previously held by lawmen was now held by elders, who gained their authority from age and cultural knowledge rather than from ritual practice. This was a modification rather than an abandonment of traditional culture. Overall, the judgment found that Ngadju people had maintained their connection to their traditional lands and waters.

GLSC Principal Legal Officer Mark Rumler described the Ngadju judgement as a 'great win' and a 'good thing for the entire region'. 'The state government chose to vigorously contest this claim. However, the judgement shows that even in highly contested circumstances our claimants can win,' he said.

Despite the celebrations, there are no illusions about the difficulties yet to come. Dr Muller said 'We're very pleased with the outcome, but it's not as though we can now sit back and relax now – there still a lot of very hard work ahead of us.' Only one of the region's claims (Esperance Nyungar) is currently in consent determination mediation; the others are at earlier stages of mediation or else are being prepared for authorisation and lodging. The challenges of claiming native title in a resource rich and historically settled region remain formidable.

The state government has lodged an appeal against the *Ngadju* judgement, though this does not mean that work towards a determination is necessarily halted. In the meantime, Justice Marshall will go on to consider the 'tenure' evidence: the checking the native title findings against other forms of land title that exist within the claim area, such as freehold title and pastoral leases. This will decide those areas where native title might have already been extinguished, either wholly or in part. 'The judge's orders for the tenure proceedings remain in place, so stage two continues while the appeal is heard,' Mr Rumler said. 'Even if the state's appeal is successful, the Ngadju people will still have native title over the bulk of the claim area,' he said.

WATER RIGHTS, WATER DEALS & WATER REFORM

By Nick Duff

For years, many people in the native title sector have thought of 'water rights' as one of the next frontiers of native title, unexplored territory waiting for the right test case. A research project at AIATSIS is investigating the potential for native title to help traditional owners achieve their water-related objectives. Its preliminary conclusions are that purely rights-based approaches to water in the native title context are unlikely to produce significant results on the ground. Native title, however, can provide leverage that may be used to promote water-related priorities where these are important to traditional owners.

In Australia, a range of Aboriginal organisations and meetings have made public statements about the importance of water to Aboriginal people and Aboriginal peoples' adamant intention to protect their water resources and water-related interests. (Examples include the *Mary River Statement* (2009), the *North Australian Indigenous Water Policy Statement* (2009), the *Garma International Aboriginal Water Declaration* (2008), the *Murray and Lower Darling Rivers Indigenous Nations Echuca Declaration* (2008), and the First Peoples' Water Engagement Council's advice to the National Water Commission (2012) following a national summit held in Adelaide.) Important research and consultation work has also been done at regional and local levels around Australia, recording and articulating the meanings attached by Aboriginal people to water; the social, cultural, environmental, spiritual, economic values they hold in relation to water and the species and systems that depend on it; the ways in which they use or rely on water; their views of how well water issues have been managed by landowners and governments; and what priorities they would have for reform.

All of this work shows that there are a broad range of meanings, values,

priorities, aspirations, and grievances in relation to water held by Aboriginal people across the country. These present a challenge for analysis, both because there are multiple and potentially conflicting views, and because many Aboriginal people actively resist the attempt to categorise their unified and integrated understanding of country into the reductive language of modern water resource management. The approach taken in AIATSIS' *Water and Native Title* research project is to adopt the three-fold division employed by the First Peoples' Water Engagement Council, in which Aboriginal peoples' diverse interests and priorities in relation to water can be seen as relating to:

- The place of Aboriginal people in water planning, management, governance and decision-making structures and processes (and the extent to which these structures and processes reflect the knowledge, understandings and priorities of Aboriginal people);
- The protection of Aboriginal peoples' cultural, spiritual, social, and environmental interests; their physical and mental health; and those of their economic interests that depend on water being left in its natural state (things like fishing, collecting food-plants, hunting animals attracted to water; but also things like tourism ventures that depend on the intact state of the water environment) by limiting (or placing conditions on) the use of water by others; and
- The ability for Aboriginal people legally to take water out of water systems, for example for the purpose of irrigation or aquaculture projects (building weirs would also come within this category, since in legal terms it would have the effect of interrupting the flow of a river).

This division is the most useful basis for legal analysis of the interface between Aboriginal peoples' interests in water and the legal and bureaucratic systems of water planning and management used in Australia.

The legal analysis in the AIATSIS research project is not yet complete, but the preliminary conclusions are as follows:

- Difficulties of proof, common law limitations, and pre-1975 statutory extinguishment mean that many native title determinations only provide for very limited rights in respect of water.
- Section 211 of the *Native Title Act* may potentially allow native title holders to 'gather' water in small volumes for personal, domestic, or non-commercial communal needs without the need for a licence.
    - It is not clear whether 'gathering' would be broad enough to include, for example, irrigation for community gardens.
    - Current High Court litigation is addressing the question of whether regulatory legislation extinguishes native title (such that there would be no remaining native title rights for s 211 to preserve).
    - In any case, most of the state and territory water regimes already provide for personal and domestic water use without the need for a licence.
- The law does not offer any mechanism for compelling state and territory water planners to issue water licences or entitlements to native title holders, though theoretically there may be scope for challenging the validity of particular water plans that do not make provision for native title holders.
    - Again, the limited nature of the recognised native title rights, and the complexity of the decision-making process mean that such challenges would rarely succeed.
- The granting of water licences or entitlements to *other* people is not something that native title holders are able to legally challenge: s 24HA provides that legislation about water management and licences granted under such legislation, are valid (and while they do not extinguish native title, they prevail over any native title rights). Section 24HA gives native title holders a limited right to 'comment', but no way of challenging the validity of the legislation or other decisions.
- Native title holders with exclusive possession can prevent certain developments from occurring on their land (such as intensive agriculture) by withholding permission to enter. They can also use this power to impose conditions on how developments on exclusive possession land proceed.
- Exclusive possession rights, however, do not allow traditional owners to simply withhold permission to mining projects on their land – these must go through the future acts process, in which the chance of the project *not* going ahead is very slim. (Native title holders, even non-exclusive possession holders, may have stronger rights in relation to carbon-farming projects – some of which may have important effects on hydrology.)
- Where developments (whether on native title land or not) have the potential to negatively affect native title holders' enjoyment of their water-dependent rights, native title holders may potentially be able to sue other land users under the old common law actions of 'nuisance' or 'trespass'. For example, on this argument a native title right to fish in rivers would be harmed by activities that depleted or polluted those rivers. Or potentially, the rights to protect sites from harm and to conduct ceremony could be affected by developments that interfere with the water table. This legal avenue, however, is untested and is subject to considerable doubt (for example, if the land users have a statutory licence to extract water or statutory environmental clearance, then this may provide them with a defence to the action).
- Native title holders may have standing to object to projects under environmental legislation.

The effect of these initial findings is that native title does not provide clear rights-based pathways to achieving any of the three types of interest listed above. Even where native title determinations actually contain rights that directly or indirectly relate to water, native title's relatively weak position in the Australian legal system means that there are very limited options for translating those rights into reality. Native title does not guarantee traditional owners a seat at the table when water plans are being

Fivebough Wetland, Leeton NSW. Credit: Jessica Weir

developed and implemented; other than non-mining developments on exclusive possession land, it does not allow traditional owners to decide whether or not a development should be allowed to impact on the water resources of an area; and native title does not provide a right to extract water for commercial ventures (though it could potentially be used for irrigated community gardens).

This does not mean, though, that native title is of no help to traditional owners when it comes to water. Native title provides forms of leverage that can be employed to achieve some of what traditional owners would want, in terms of decision-making, protecting water resources, and even accessing consumptive water for enterprise developments. The ILUA negotiations that often lead up to consent determinations, and negotiations under the future acts process, are two important points at which native title can be deployed in indirect way. For example, in determination settlements parties may agree on co-management arrangements for important water systems (such as those created under the Miriuwung-Gajerrong Ord Final Agreement). If traditional owners valued the ability to engage in commercial water-dependent developments such as agriculture (or the ability to control an entitlement and earn ongoing income from it) they could seek to negotiate entitlements under an ILUA (this did not happen in the Miriuwung-Gajjerong agreement). In future act negotiations (or broader ILUA negotiations for large projects) native title holders may seek to impose conditions on mining developments to ensure that particular sites, or the water table in general, are not adversely affected.

There are creative ways of deploying the leverage ability of native title in relation to water. For example, in one recent case a native title party agreed to a mining development on the condition that the miners would pay a 'water royalty' – a per-volume payment that would both recognise the importance of water to the traditional owners and encourage the minimisation of waste. Another idea might be to seek the in-kind assistance of a development proponent in setting up a water-dependent enterprise – this could include the administrative and financial requirements for obtaining water licences, or engineering and infrastructure assistance. In 'comprehensive settlement' negotiations, states and territories could also provide for guaranteed traditional owner representation (or employment and training) in water planning and management bodies.

This model of 'leveraged water rights' is not unproblematic, however. In any situation where traditional owners are gaining something in an agreement, it must be assumed that they are giving something else up. It is important to consider carefully what is being traded to achieve the desired water outcomes. In the case of 'comprehensive settlements', claimants will often be required to disclaim any future right to compensation, or may be under pressure to settle for a weaker set of rights than they would otherwise claim. Claimants ought to consider whether (for example) gaining consumptive water entitlements through a settlement is a 'better deal' than simply purchasing them from the mainstream market (though there may be other symbolic considerations). Further, there are problems in the idea of giving up legal entitlements (such as compensation) to achieve moral entitlements that ought to be enjoyed in any case (such as access to water and decision-making). Not only can this be seen as unfair to those traditional owners who are striking the bargain, it can also be seen as undermining the ability for others to argue for legislative change. For Aboriginal people who are unable to prove native title, their political leverage may be reduced as a result.

To conclude: the *Native Title Act* places native title rights in a comparatively weak position within the Australian legal system. That position appears to be at its weakest in the context of water planning and management. Accordingly, there are only very limited ways in which native title holders can *directly* rely on their rights in order to prevent harmful developments, gain access consumptive water allocations, or demand a role in water decision-making. There are, however, creative ways of achieving these objectives using the general leverage afforded by native title, though these are subject to their own difficulties. Ultimately, the maximum achievement of the moral rights of Aboriginal people in relation to water are likely require a combination of legal action, negotiation and political advocacy.