APPLICATIONS

Victoria

Gunai/Kurnai People [NNTT Ref#VC97/4]

A native title application covering Crown land in the Gippsland region is the first in Victoria to pass the stringent new registration test under Commonweath native title laws. The Gunai/Kurnai application was lodged on 4 April 1997. The applicants are represented by the Mirimbiak Nations Aboriginal Corporation. Accelerated application of the test was triggered by the Victorian Government's intention to grant a mining lease within the application area in East Gippsland to Pacific Minerals Pty Ltd and ABC Resources Pty Ltd.

National Native Title Tribunal Regional Coordinator, Sue Kee, explained that the Gunai/Kurnai people have acquired the right to have a say over - but not veto - proposed mining, exploration and some other developments in the area while their native title application is pending. The Gunai/Kurnai application was the second Victorian application to face the test, but the first to pass. A further 37 Victorian applications would be tested over the next several months. (*NNTT Media Release, 6 Apr)*

Yorta Yorta People [NNTT Ref#VC94/1]

CONCERNED CITIZENS RESPOND

TO THE DETERMINATION BY THE FEDERAL COURT OF THE YORTA YORTA NATIVE TITLE APPLICATION

The authors of this contribution to Native Title News are members of Defenders of Native Title (DONT). Based in Victoria, they met regularly to write this summary of the Yorta Yorta determination. DONT is a grass roots movement comprising churches, community groups, organisations, unions and concerned individuals, who have taken a strong stand with Aboriginal and Torres Strait Islander people against the Howard Government's 'Ten Point Plan'.

DONT believes the key principles are:

- *a recognition that native title is a basic right and represents an opportunity for greater self determination for Aboriginal peoples;*
- *a confirmation of the existing rights of pastoralists and mining companies;*
- *a promotion of the need for coexistence and cooperation in a spirit of trust and good will;*
- *a respect for the property rights of all title holders on a non-discriminatory basis; and*
- *no changes to the Racial Discrimination Act.*

The Yorta Yorta people are the Indigenous people of the Murray, Goulburn & Ovens regions of south-eastern Australia.

Members of the Yorta Yorta community applied to the Federal Court in 1994 for native title rights over 'certain parcels of public land in the Murray Darling Basin of southern New South Wales and northern Victoria'. Their application was opposed by the governments of New South Wales, Victoria and South Australia, other government and private agencies, businesses and individuals totalling over 500 opponents.

In December 1998, their application was rejected in its entirety. Justice Olney of the Federal Court determined that, before the end of the 19th century, the applicants' ancestors had

'ceased to occupy their traditional lands in accordance with their traditional laws and customs' and that '**the tide of history has indeed washed away any real acknowledgement of their traditional laws and any real observance of their traditional customs**'.

We, as ordinary citizens of Australia, believe that natural justice has not been served by this decision. Not just because we believe that the Yorta Yorta people should be acknowledged as the traditional owners of their own land, but because it represents evidence of the continuing, legalised dispossession and marginalisation of the Aboriginal population.

The thinking that led in the 1780s to the incredible conclusion that Australia was *terra nullius* (i.e. land belonging to no-one) is still in evidence today. Is it fair and reasonable to ask Indigenous people to demonstrate continuity of occupation and traditional law and custom when it was government policy that forced the break-up and dispersal of their clans and families not once, but many times, over the past 150 years?

In response to these continual acts of dispossession, the Yorta Yorta people have been claiming recognition of their land rights under various governments since 1860. **This case was their 18th attempt.**

What is native title?

The *Mabo* (1992) and *Wik* (1996) High Court decisions were belated acknowledgement that the legal concept of *terra nullius* in relation to Australia was a lie. It was determined that native title rights are **pre-existing** rights (i.e. existing prior to non-Indigenous occupation) which had not previously been recognised in Australian common law. As a nation, we have subsequently embarked on a process of recognition of these rights.

The Yorta Yorta case was the first major test of native title following *Wik*, and the first ever in the more heavily populated south-east region of Australia. In accordance with the principles established by the High Court decisions and the resulting *Native Title Act* of 1993, the case followed a number of avenues of inquiry:

1. It was necessary to prove that the members of the applicant group were descendants of the Indigenous people who occupied the area under application prior to the 'assertion of Crown sovereignty'.
2. The nature and content of the traditional laws, and the traditional customs observed by Indigenous people in relation to their land, had to be established.
3. It had to be demonstrated that the traditional connection with the land of the ancestors has been substantially maintained.
4. The native title rights and interests had to be recognised by the common law of Australia.

The trial

The case took 114 days, heard 201 witnesses, attended 66 locations, and resulted in 11 664 pages of transcripts.

Justice Olney made it clear in his judgement that the aim of the *Native Title Act 1993* is not to right the wrongs of the past, nor to produce an outcome based on modern notions of justice, or to be 'politically correct'. The *Native Title Amendment Act 1998*, including John Howard's '10 point plan', did not become relevant since the case had been heard and judgement reserved before it came into being. The case was heard under the original *Native Title Act* of 1993.

The Yorta Yorta people are descendants of the original inhabitants of the land under application prior to non-Indigenous occupation in the 1840s. They represent the language groups/nations of the Bangerang/Pangerang, Pinegerines, Waveroo, Calthaba/Kailtheban, Moira, Walithica/Wollithiga/Wollithigan, Ulupna and Ngooraialum/Ooraialum. Of over 4500 applicants, 278 were 'selected' to represent the wider group. A smaller representative group was called to give evidence.

Known ancestors

In the determination, Justice Olney clearly sets out that it is the issue of connection to the inhabitants of the area under application in 1788 that is at the core of the case.

While attempting to determine whether or not the applicants could prove direct lineage to 18 'known ancestors', and by inference therefore to the original 1788 inhabitants, Justice Olney demonstrated a clear preference for documentary evidence, particularly that of non-Indigenous settlers, as opposed to the predominantly oral tradition of the applicants. We consider this to be the first major injustice of the determination. Even though he considered that the oral evidence was dependable, and much of the documentary evidence contradictory and obviously incomplete, he still favoured the written word. Surprisingly, when (non-Indigenous) experts were called to give opinions as to the missing documentation, their oral evidence was accepted.

The crucial determination of this part of the trial was that a genealogical connection to the original inhabitants could only be 'proven' in relation to two of the applicant families, which meant native title rights could at best exist only in those parts of the area under application that comprised the traditional country of their groups.

Law and custom

This part of the trial dealt with the nature of traditional laws and customs and whether they had been continuously practised in the area under application.

Justice Olney determined that there was a lack of evidence to suggest that traditional laws and customs had been continuously practised by descendants of either of the two ancestors found to have originated from the area under application. In making this finding, he appeared to give great weight to a petition signed in 1881 by some 42 Aboriginal petitioners, including children of those ancestors, asking for land to be granted them. Arguably under the influence of non-Indigenous 'advisors', they stated in the petition that their culture had been overcome by settlement. Justice Olney concluded that occupation of their traditional lands and observance of traditional laws and customs had therefore ceased for the purposes of contemporary native title legislation.

More specifically, he found that the present practices of fishing, hunting and food gathering were conducted on a recreational basis rather then a subsistence basis. Using as a reference the observations recorded in Edward Curr's book, *Recollections of Squatting in Victoria*, Justice Olney concluded that they are conducted in a way that does not represent a continuation of the traditional practices.

Sites regarded by the Yorta Yorta people as sacred, while significant now, were determined (by Justice Olney) to be not significant in the traditional culture, which did not require them to be preserved. He also determined that present burial practices were inconsistent with the

traditional laws and customs handed down from the original inhabitants. The right to exclude people from entering the area under application was also 'no longer exercised', and evidence regarding secret men's sites was 'not conclusive'.

In short, Justice Olney determined that though many of the current practices of the Yorta Yorta people were 'useful' and 'commendable', in the absence of a continuous link back to the laws and customs of the original inhabitants, native title rights no longer existed.

It is our contention that, in asking native title applicants to prove continuous cultural connection in this way, we are requiring of Aboriginal people something we do not require of anyone else; that is, for their culture to remain static and their customs to never change.

Other issues

Justice Olney also commented on issues relating to extinguishment. He was highly critical of the amount of time and money expended by the governments of New South Wales and Victoria, as well as numerous government and private agencies, in presenting evidence aimed at proving extinguishment, even before native title had been established. He went on to question the suitability of adversarial litigation for determining matters relating to native title.

We believe Justice Olney's criticisms highlight the need for a better understanding by the public of native title. Indeed, Justice Robert French, in stepping down as inaugural President of the National Native Title Tribunal, urged State and Commonwealth governments, as well as schools, to take a greater role in educating the public about native title, so that mediation could more often provide a more effective method of resolution.

Conclusion

The cultural connections of the Yorta Yorta people have **not** been washed away; they are still in evidence today in a modern context. If they have been diminished, it is not 'the tide of history' which has done it, but rather government policies, the deliberate acts of individuals and the inevitable impact of invasion. To pretend otherwise is dishonest. The use of such language perpetuates the myth of benign colonisation of the continent.

The Federal Court in the Yorta Yorta case has, in effect, acknowledged the systematic disempowerment and the attempted dispossession and genocide of the Yorta Yorta people. Remarkably, and against all odds, the evidence presented illustrates the strength and depth of their connection to land and continuity of presence in the area under application, from the first incursions of squatters until today.

Given that this is not a 'black armband' view of history but a Federal Court summary of Yorta Yorta history, we believe that the Olney decision does not provide justice. If this

judgement is in fact a correct reading of the law, it clearly indicates that the existing native title regime in Australia needs to be changed, in order to provide justice and equity for Indigenous people.

The full determination is available on the World Wide Web at
http://www.austlii.edu.au/au/cases/cth/federal_ct/1998/1606.html

Felicity Say, Grace McCaughey, Doug Falconer, Jacqui Turnbull, David Perry, May 1999

Queensland

Central Queensland – Registration Test

Five native title applications in Central Queensland have passed the new registration test, which was introduced with the amendments to the *Native Title Act 1993* last year. Passing the test ensures that applicants have the right to negotiate on mining projects in Central Queensland.

The Barada Barna Kabalbara and Yetimarla people (QC97/59) and the Darrumbal people (QC99/1) now have the right to negotiate over the Marlborough Nickel project. The Iman people (QC99/3), the Western Wakka Wakka people (QC99/4), and the Barunggam people (QC99/5) have gained the right to negotiate about the Kogan Coal Mine. The National Native Title Tribunal applied the test six applications. The applications are the first to undergo the new test in Queensland. Five were successful in achieving registration; one was unsuccessful.

Tribunal Registrar Mr Chris Doepel said the application of the registration test to these applications was fast-tracked because of the Queensland Government's notice of intention to grant mining tenements to Marlborough Nickel and the Kogan Coal Mine. The Tribunal will apply the registration test to a further 155 Queensland applications this year. Over 600 native title applications will undergo the test nationwide. (*NNTT Media Release, 4 Mar)**

Dalungdalee People

In a letter to the Noosa Council, the Dalungdalee people informed the Council that it should have consulted with them over a ferry lease contract. The letter said that under the NTA commercial dealings with traditional lands and waters could not be carried out without input from the traditional owners. Council accountant, Mr David Thomas, said that he understood there was no native title application before the NNTT, although he believed there was a common law claim over the area. Mr Thomas said the Council's legal advice was that even if there were a valid native title application with the NNTT, the road to the ferry that goes right to the watermark, which would extinguish native title. Dalungdalee elder, John (Dalungda) Lee Jones, said that the Council's advice was wrong. (*Coolum and Noosa Citizen, 17 Mar, p3)**

Meriam People

The Meriam people will use recent archaeological finds in a native title claim over waters surrounding the Murray Islands. Shellfish found in diggings of rubbish dumps were dated to confirm human occupation of more than 3200 years ago. (*CM, 27 Mar, p17)**

Kangoulu People [NNTT Ref#QC99/6]

A second Kangoulu people's application has been lodged in the Federal Court in response to two Section 29 notices. It covers parcels of land around Emerald in Central Queensland. (*QNT, Apr, p1)*

Juunyjuwarra People [NNTT Ref#QC99/7]

The Juunyjuwarra people's application has been lodged in the Federal Court in response to a Section 29 notice. It covers areas within the Munburra Resources Reserve, near Hopevale, Far North Queensland. (*QNT, Apr, p1)*

Wanggumara People [NNTT Ref#QC99/8]

A third Wanggumara people's application has been lodged in the Federal Court in response to a Section 29 notice in the Keeroongooloo area. It covers lot 3000 on Pastoral Holding 762, also known as Cooma Holding, in the Shire of Quilpie, south-west Queensland. (*QNT, Apr, p1)*

Yulluna People [NNTT Ref#QC99/9]

The Yulluna people's application has been lodged in the Federal Court in response to a Section 29 notice. The application covers specific lots (including pastoral leases, reserves, unallocated State land and other State land) south of Mt Isa in north-west Queensland. (*QNT, Apr, p1)*

Kalkadoon People [NNTT Ref#QC99/10]

A fifth Kalkadoon people's application has been lodged in the Federal Court. It covers an area north and south of Mt Isa in north-west Queensland, including the towns of Malbon, Dajarra, Duchess and Gunpowder. (*QNT, Apr, p1)*

Maiwali and Karuwali People [NNTT Ref#QC99/11]

A second Maiwali and Karuwali peoples' application has been lodged in the Federal Court. The application covers specific lots (including pastoral leases, national parks, State forests, State land and reserves) in Winton, Diamantina and Barcoo Shires in north-west Queensland. (*QNT, Apr, p1)*

Western Yalanji People [NNTT Ref#QC99/12]

A fourth Western Yalanji people's application has been lodged in the Federal Court in response to a Section 29 notice. It covers an south of Laura and south-west of Cooktown in Far North Queensland. (*QNT, Apr, p1)*

Ewamian People [NNTT Ref#QC99/13]

A second Ewamian people's application has been lodged in the Federal Court in response to a Section 29 notice. It covers an area around Georgetown in Far North Queensland. (*QNT, Apr, p1)*

Woolgar People [NNTT Ref#QC99/14]

The Woolgar group's application has been lodged in the Federal Court. It covers Middle Park Pastoral Holding north of Richmond in Central Queensland. (*QNT, Apr, p1)*

South Australia

Coulthard-Adnyamathanha [NNTT Ref#SC94/1]

A 72 000 square kilometre native title application in the Flinders Ranges has become the first in South Australia to pass the registration test under new Commonwealth native title laws. National Native Title Tribunal Senior Officer, Mr Hugh Chevis, said the Adnyamathanha people lodged a united native title application in January this year, bringing together five overlapping applications in the region.

The first Adnyamathanha application was lodged in October 1994 and was accepted by the Tribunal in May 1995. Amendments to the application made in January 1999 included changes to the native title rights and interests claimed. The Tribunal will apply the test to a further 31 applications in South Australia this year. (*NNTT Media Release, 30 Mar)**

Western Australia

Wongatha People [NNTT Ref#WC94/8]

A 220 000 square kilometre north-east Goldfields native title application has become the first in Western Australia to pass the stringent registration test under new Commonwealth native title laws. National Native Title Tribunal Registrar Chris Doepel said the Wongatha application, which was created last month through the combination of 20 separate native title applications, had met all the test criteria.

Mr Doepel said the applicants, assisted by the Goldfields Land Council, had put considerable effort into meeting the requirements of the test. The decision of the applicants to unite in a

single application had eliminated many overlaps and was likely to make native title negotiations more manageable for all parties. (*NNTT Media Release, 26 Feb)**

Ngadju People [NNTT Ref#WC99/2]

A 100 000 square kilometre southern Goldfields native title application has passed the registration test under new Commonwealth native title laws. The Ngadju people will retain the right to negotiate. Due to the State Government announcing its intention to grant some mining tenements in the area, the process was accelerated. (*Kalgoorlie Miner, 9 Mar, p3)*

Miriuwung Gajerrong #1 [NNTT Ref#94/2]

The Western Australian and the Northern Territory Governments' application to have their appeal against the Federal Court's Miriuwung Gajerrong decision heard in the High Court, has been rejected. (*Age, 13 Mar, p15)**

Goldfields

The out-going acting director of the Goldfields Land Council, Mr Chris Marshall, said the State Government should move towards a consent determination of native title in areas where native title applications had satisfied the requirements of the registration test. (*Kalgoorlie Miner, 24 Mar, p7)*

Koara People [NNTT Ref#WC95/1]

A group of six native title applications in the north-west Goldfields which combined to form the single Koara application, has passed the new registration test. National Native Title Tribunal senior officer, Hugh Chevis, said the application - encompassing Leonora and Leinster - met all criteria in the registration test.

The Koara application was the fourth Goldfields application to face the test. The Wongatha application in the north east and the Ngadju application in the south had also been successful. The Bullenbuk Noongar application in the southern Goldfields recently failed the registration test. (*NNTT Media Release, 25 Mar)**

Wong-goo-tt-oo [NNTT Ref#WC98/40], Yaburara & Mardudhunera People [NNTT Ref#WC96/89]

Two Pilbara native title applications have passed the new registration test, retaining the right to negotiate about mining projects in the region. The National Native Title Tribunal has applied the test to the Wong-goo-tt-oo application in the Fortesque River area, and to the Yaburara and Mardudhunera peoples' application in the Dampier area of the Pilbara.

The 13 940 square kilometre Yaburara and Mardudhunera peoples' application was lodged in August 1996. It was referred by the Tribunal to the Federal Court for litigation in November 1997 when a mediated outcome could not be reached. The 20 240 square kilometre Wong-goo-tt-oo application was lodged in July 1998. (*NNTT Media Release, 13 Apr)*

South West Boojarah [NNTT Ref#WC98/63]

The Boojarah native title application, which unites 14 Aboriginal groups, has passed the registration test put in place by recent amendments to the NTA. (*WA, 14 Apr, p30)*

Perth region

The Federal Court has accepted a new native title application, formed from an amalgamation of applications by Robert Bropho, William Warrell, Gregory Garlett and Richard Wilkes, in the Perth region. The application will now face the new registration test. (*WA, 14 Apr, p30)*

Pandawn Descendants [NNTT Ref#WC96/83]

One of Western Australia's largest native title applications has been unsuccessful in retaining the right to have a say on mining projects. National Native Title Tribunal Registrar, Chris

Doepel, said the Pandawn application had been unsuccessful in meeting all the criteria in the registration test.

The application failed on six grounds including that it did not demonstrate traditional physical association with the area under application and did not show that the applicants had maintained native title in accordance with any traditional laws and customs. Mr Doepel said the test, introduced as part of amendments to the *Native Title Act* in 1998, determined which native title applicants had the right to have a say over proposed mining, exploration and some other developments in the area where their native title application was pending.

To date, the registration test had been applied to 28 native title applications in Western Australia, 15 of which had passed and 13 were unsuccessful. Mr Doepel said the applicants could appeal the Tribunal's decision. (*NNTT Media Release, 28 Apr)**

Mullewa Wadjari Community [NNTT Ref#WC96/93]

A native title application in the mid-west of the State has passed the registration test under the amended NTA. National Native Title Tribunal Registrar, Chris Doepel, said the Mullewa Wadjari application, extending east from Geraldton, met all criteria in the test. Mr Doepel said this means that the Mullewa Wadjari people will maintain the right to have a say over - but not veto - proposed mining, exploration and some other developments in the area while their native title application is pending. (*NNTT Media Release, 30 Apr)*

MINING AND NATURAL RESOURCES

Commonwealth

Notification of Mining Rights

The Commonwealth has notified the public about intermediate period acts consisting of the creation of a right to mine or the renewal and/or extension of the period for which such a right has effect. Intermediate period acts are those which took place between the period 1 January 1994 (commencement of the NTA) and 23 December 1996 (the *Wik* decision).. Under the NTA as amended, these acts are validated. Details of grants and renewals can be found on the following website: http://www.dpie.gov.au/resources.energy/nativetitle/index.html. For further information, contact the Department of Industry, Science and Resources through Mr John Thompson on phone (02) 7272 4456, fax (02) 6272 4890; or Mr Peter Smith on phone (02) 6272 5707, fax (02) 6272 4137. (*QNT, Apr, p3), (DPIE website)*

Beverley Uranium Mine

A media release organised by the Jabiluka Action Group and Nuclear Issues Coalition, states that the Adnyamathanha community of the Northern Flinders Ranges have consistently opposed uranium mining in the Flinders Ranges since the 1950s. According to the Chairperson of the Adnyamathanha Native Title Management Committee (ANTMC), native title agreements over the area were signed under duress in August 1998. The Chairperson says that the process of consultation was denied to the native title applicants throughout the Environmental Impact Statement because Heathgate Resources were threatening court action if the ANTMC failed to sign an agreement half way through the two month public consultation period. (*Media Release, 19 Mar)*

Commonwealth Environment Minister, Senator Robert Hill, has responded to concerns raised by the Adnyamathanha community about the Beverley uranium mine, saying he would like the mine to proceed. He said the agreement that Heathgate Resources secured with