



FEATURE

The Tide Has Turned – The Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Consent Determination

Katie O'Bryan

Katie O'Bryan works at Native Title Services Victoria and was the instructing solicitor on the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk native title claim from April 2004 when she commenced work at NTSV. Prior to that she worked at the Goldfields Land and Sea Council in Western Australia and was the instructing solicitor on the Wongatha native title claim. During this time she has also been undertaking (and has just completed the requirements for) a Master of Laws in Environmental Law, focusing on indigenous issues.

On the 13th December 2005, the first positive determination of native title in Victoria was handed down by Justice Merkel. This determination was made by consent in favour of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk peoples. As noted by Merkel J, it is significant as it demonstrates the fact that:

“the ‘tide of history’ has not ‘washed away’ any real acknowledgement of traditional laws and any real observance of traditional customs by the applicants and has not, as a consequence, resulted in the foundation of their native title disappearing.”¹

The terms of the settlement involve a determination which recognises native title rights to hunt, fish, gather and camp for personal, domestic, and non-commercial communal needs along approximately 153km of the length of the Wimmera River (approximately 269 km sq), and a determination that native title does not exist over the remainder of the claim area.

In addition, the settlement of the claim involves the transfer in freehold of 3 parcels of culturally significant land to the native title holders, consultation rights in approximately 30% of the original claim area, being an area in which the native title holders have a close cultural connection (the core area), co-operative management arrangements in various state forests and national parks within the core area (amounting to approximately 20% of the original

claim area), funding for a cultural/community centre, and importantly, funding for the administration and operation of a Prescribed Body Corporate.

However this consent determination was a long time coming, and encountered many hurdles along the way.

The main Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk native title claim was first lodged in 1995. At that time, it was known simply as the Wotjobaluk claim. Although the claim's external boundary encompassed a large area in the Wimmera region (estimated to be 15% of the State), the claim only related to Crown lands and waters within that boundary. Thus the claim itself encompassed only around 4-5% of the State. The claim was bounded in the west by the South Australian border, Ouyen in the north-east and Ararat in the south-east. A couple of smaller associated claims were lodged in 1997 and 1999. Following amendments to the *Native Title Act* in 1998, the claims were accepted for registration, the main claim being referred to mediation in September 1999.


Following a number of years of intense negotiations with the Victorian Government, an in-principle agreement to settle the claim was reached in October 2002. After the in-principle agreement had been reached with the State Government, it was then necessary to get all of the other respondent parties (of which there were over 400) on board.

It took a further year of mediation before the Commonwealth Government agreed to lend its support to the in-principle agreement, which eventually occurred in November 2003. Once the Commonwealth Government had indicated that it would support the proposed Consent Determination, the other respondents gradually fell into line.

During this time, the Representative Body and legal representative for the claim, Mirimbiak Nations, had its Rep Body status withdrawn. Its replacement, Native Title Services Victoria, took over the role as the claimants' legal representative in August 2003.

Even once agreement in-principle was reached with all parties, the preparation of the documentation took up a substantial amount of time and resources. Draft documents were constantly going back and forth between the legal representatives of the parties for further comments and redrafting.

¹ *Clarke on Behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v Victoria* [2005] FCA 1795, [11].



In tandem with this process, the claimant group itself had to sort out numerous issues with neighbouring claimant groups, and with various subgroups within the claim itself. Many meetings were held to identify the issues and to facilitate discussion and resolution. The claim was then amended in April of 2005 to reflect the outcomes of those meetings. These amendments included a reduction in the area of the claim, an amendment to the claim group description, and an amendment to the name of the claim to more accurately reflect the subgroups within the claim. The resolution of the intra-indigenous issues also involved a restructuring and renaming of the organization which was proposed to be the Prescribed Body Corporate. This organization, the Barengi Gadjin Land Council, was incorporated in its restructured form on 16th March 2005.

By mid-March 2005, the consent determination documents and associated agreements were in substantially final form, and at a meeting on the 19th March 2005, the claimants authorised all of the documentation involved in the settlement of the claim.

On the 15th July 2005, the first of the agreements, an Indigenous Land Use Agreement (ILUA), was signed by the registered native title claimants, the Barengi Gadjin Land Council, the State Government and the Commonwealth Government. After the conclusion of the statutory three month notification period, the ILUA was finally registered on 11th November 2005. The registration of the ILUA was a significant step in the process leading to the Consent Determination, as registration of the ILUA had been made a condition precedent to the signing of the Consent Determination orders.

By the 24th November 2005, all of the parties had signed the proposed minute of Consent Orders, which were then filed with the Court in anticipation of the hearing.

The Consent Determination hearing was held on 13th December 2005 before Justice Merkel of the Federal Court. It was held on-country at Horseshoe Bend, located in the Little Desert National Park on the banks of the Wimmera River near Dimboola. The hearing was attended by the claimants, the Victorian Attorney-General, the Minister for Aboriginal Affairs, the President of the National Native Title Tribunal and numerous other invited guests. However it was unfortunate that the most senior member of the claim group (and a

registered native title claimant), William ("Uncle Jack") Kennedy, had passed away only a few months before the hearing of the Consent Determination.

But, as Merkel J noted in his judgement, Uncle Jack, despite not being there to see the Consent Determination handed down:

"had, in a practical sense, achieved 'what the elders expected of [him]' by, as was stated in his eulogy, 'fighting for this little piece of country for his ancestors and for future generations."

That Uncle Jack did not live to see the Consent Determination being handed down is one of the major regrets of the lengthy process taken to achieve recognition under the *Native Title Act 1993*. Sadly, it is a situation that is not unique to this claim.

Like all claims settled by agreement, the WJJWJ determination involved compromise, and it is the traditional owners who have borne the brunt of that compromise. As one of the senior elders noted in her speech to the crowd assembled at the hearing:

"We have made a very big compromise to you Europeans within a system that is your own, not ours."


In an imperfect system we are forced to trade off, agree over long disputed boundaries. We do this because we believe in a future for our children. Our past gives us this strength."

We will never give up our identity, histories and cultures as long as one of us lives and breathes, however there is a terrible trade off in terms of gaining realistic resource outcomes and cultural capacity for our endeavours."

However notwithstanding the compromises involved, this determination has shown that despite the devastating impact of the High Court's decision in *Yorta Yorta*,² there is still scope for native title to be recognized in Victoria.

The Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk peoples, throughout their ten year struggle for recognition, showed enormous

² *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58



strength, patience and persistence, and in doing so managed to succeed against the odds. As a result, not only did they achieve a positive determination of native title for their people, but:

“Uncle Jack Kennedy and his supporters have demonstrated something of even greater importance, namely, that the tide of history has not washed away all entitlements to native title in the South-Eastern part of Australia.”³

Hopefully the tide has turned.

[Back to contents](#)

WHAT'S NEW

Legislation

NTA Reforms

Information about the proposed NTRB reforms is available at the OIPC website at http://www.oipc.gov.au/NTRB_Reforms/QA_NT_RBarrange.asp [Questions and Answers - Changes to Native Title Representative Body \(NTRB\) Arrangements](#)

Attorney-General's Dept. Claims Resolution Review homepage (Review to improve the Resolution of Native Title Claims) Just added: [Guide to Making Submissions To The Claims Resolution Review](#) Please visit <http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWP4DD89B50F9EB64A8CA2570A> for more information.

See also the [Attorney-General's](#) site at <http://www.ag.gov.au/nativetitlesystemreform> for:

Technical amendments to the Native Title Act 1993 Discussion Paper; and Guidelines on the provision of financial assistance by the Attorney-General under the Native Title Act 1993: Consultation draft

Other

[Aboriginal Heritage Bill \[FINAL\] Exposure Draft/Victoria](#) is available for download from http://www1.dvc.vic.gov.au/aav/heritage_bill/Final%20Exposure%20Draft%20for%20distribution%20071005.pdf

Recent Cases: Australia

[Sampi v State of Western Australia \(No 3\) \[2005\] FCA 1716](#) ABORIGINES – native title

determination – final determination following contested proceedings – determination covering mainland area, offshore intertidal zone and adjacent reefs and islets

[Wakka Wakka People # 2 v State of Queensland \[2005\] FCA 1578](#) The application to be joined as a party in these proceedings be dismissed.

[Henry & Ors v Shellharbour City Council & Ors \[2005\] NSWLEC 600](#)

Aboriginal :- whether alleged disturbance of artefacts amounts to a breach of the National Parks and Wildlife Act - not proved

[Sampi v State of Western Australia \(No 2\) \[2005\] FCA 1567](#)

French J, 4 November 2005, Perth. NATIVE TITLE - determination of native title rights and interests - application for joinder of additional respondents post-hearing and judgment - application for separate and additional determination posthearing: proposed terms of draft determination - definition of Determination Area - offshore areas; intertidal zone - areas beyond intertidal zone; definition of native title rights and interests; definition of other interests.

[Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v State of Victoria \[2005\] FCA 1795 \(13 December 2005\)](#)

FEDERAL COURT OF AUSTRALIA
Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v State of Victoria [2005] FCA 1795

[Walker \(Eastern Ku - Ku Yalanji People\) v State of Queensland \[2005\] FCA 1517](#)

Allsop J, 2 November 2005, Sydney. From the judgment: " On 20 September 2005, I published my provisional views in reasons for judgment on a notice of motion brought by Rodney George Parker to be joined as a party to these proceedings under s 84(5) of the Native Title Act 1994 (Cth) (the "Act").

[Peter Hillig in his capacity as administrator of Worimi Local Aboriginal Land Council v Minister for Lands for the State of New South Wales \[2005\] FCA 1712](#)

Bennett J, Sydney, 28 November 2005. NATIVE TITLE – non-claimant application – unopposed – no native title exists in relation to the land

[Peter Hillig in his capacity as administrator of Worimi Local Aboriginal Land Council v](#)

³ *Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v Victoria* [2005] FCA 1795, [12] (Merkel J).