

Land, Rights, Laws: Issues of Native Title



Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies

Contributing to the understanding of crucial issues of concern to native title

Editor: Jessica Weir

Volume 2

November 2002

Issues paper no. 19

In this edition of the NTRU Issues Papers series, two papers are presented which discuss the August 2002 Nharnuwangga, Wajarri and Ngarla native title settlement in Western Australia.

Abstracts

‘WINNING’ NATIVE TITLE: THE EXPERIENCE OF THE NHARNUWANGGA, WAJARRI AND NGARLA PEOPLE by Michelle Riley

This paper is a conference speech which follows the negotiation of the Nharnuwangga, Wajarri and Ngarla native title settlement from the perspective of one of the native title holders, Michelle Riley. Riley discusses the changing experiences and expectations of the native title holders during the negotiating process and after the outcome. She criticises the administrative obligations required by native title holders under the Native Title Act 1993 (Cth), the failure of government to fund the corporations responsible for these obligations, and a particular aspect of the agreement which requires native title holders to take out public liability insurance as a condition of accessing lands leased by pastoral stations.

PASTORAL ACCESS PROTOCOLS: THE CORROSION OF NATIVE TITLE BY CONTRACT by Frances Flanagan

In this paper, Frances Flanagan examines one aspect of the Nharnuwangga, Wajarri and Ngarla native title settlement: the pastoral access protocols. Arguably, in order to engender ‘certainty’, the protocols develop the ‘generalist statements’ of co-existence (as have been made in Federal and High Court decisions) into a discrete list of rules concerning the how, what, where, and when of exercising native title rights on land leased for pastoral purposes. Flanagan describes how the protocols treat native title rights compared to the rights of pastoralists. She also provides a brief reference to the historical relations between Aboriginal people and pastoralists in the pastoral industry.

Michelle Riley is a member of the Nharnuwangga, Wajarri and Ngarla people. Frances Flanagan is a Legal Officer with the Yamatji Land and Sea Council. Frances represents the Jidi Jidi Aboriginal Corporation, the Prescribed Body Corporate for the Nharnuwangga, Wajarri and Ngarla native title holders.

‘WINNING’ NATIVE TITLE: THE EXPERIENCE OF THE NHARNUWANGGA, WAJARRI AND NGARLA PEOPLE¹

Michelle Riley

My name is Michelle Riley. I am a member of the Nharnuwangga, Wajarri and Ngarla people. There has been a lot of talk about how to ‘win’ a native title claim. My people have had the experience of what it means to ‘win’ native title first hand.

Our people, our land and our claim

The Nharnuwangga, Wajarri and Ngarla people are three language groups. Our country is in the Upper Gascoyne region of Western Australia, about 700 kilometres from Perth. The three language groups came together in 1995 to lodge our claim with the WA Aboriginal Legal Service.

Our trial

Our claim was in mediation with the State of Western Australia between 1995 and 1998. Our claim went to trial in October 1999. We gave evidence on country for a number of weeks. The Judge told us to go back to mediation after we had given our evidence. We went back to mediation, conducted by the President of the National Native Title Tribunal, Mr Graeme Neate. There was no agreement, and so we went back to Court for a further hearing. We kept privately negotiating, though, and eventually reached agreement with the other parties.

‘Winning’ native title

On 29 August 2000, Justice Madgwick made an order that our people had native title in our claim area. That day was the end of a long struggle for our people to be recognised as the traditional owners of our country. We thought the time had finally come for our traditional rights and customs to be respected under the white law.

The newspapers reported it on the front page as a ‘Title Win’.² The National Native Title Tribunal said that the agreement was a ‘historic breakthrough’.³ Richard Court, the then Premier of Western Australia, said that he hoped the agreement could be ‘the model for negotiations over claims in other parts of the State’.⁴ Justice Madgwick gave his congratulations and said that the agreement ‘shows what mature and resolute people can do.’ He praised our lawyers, the Aboriginal Legal Service, saying that the result ‘shows the positive contribution lawyers can make’. He also praised Clarrie Smith, who, he said ‘impressed everybody with his honesty, charity, dignity and strength’.⁵ We all felt like we had won that day.

What had we ‘won’?

Under the terms of the determination, our people have:

- (a) the right as against any other Aboriginal group or individual to be acknowledged as the traditional owners of the land;
- (b) the right to hunt, fish and gather (including to gather ochre) for the purpose of satisfying their personal, domestic or non-commercial communal needs, including observing traditional laws and customs;
- (c) the right to have access to and camp on the balance of the determination area in order to:
 - i. exercise the rights set out in (b) above;
 - ii. travel through; and,

- iii. visit and care for places which are of cultural or spiritual importance.

These native title rights only exist where they have not been extinguished. The test for extinguishment follows the formula adopted by the Full Court in *Ward*: native title is extinguished over areas of some pastoral leases that have been improved or enclosed.⁶ That law has changed now because of the High Court's recent decision,⁷ but the old law still applies to our claim.

As part of the finalisation of our claim, we also entered into three other agreements:

- an Indigenous Land Use Agreement, which sets out a procedure for how developments are dealt with in the areas of the claim where native title exists. The ILUA substitutes the 'right to negotiate' with 'the right to consult' if we can prove that the act affects our native title;
- a heritage agreement, which regulates heritage in the claim area in the areas of the claim where native title exists; and,
- pastoral access protocols between our Prescribed Body Corporate and each individual pastoralist, which regulate our access to pastoral stations.

What came next

In February 2001, we instructed the Yamatji Land and Sea Council to be our lawyers. Our ILUA was registered on 5 July 2001, and our determination has had effect since that date.

The law says that you must have a Prescribed Body Corporate to hold native title. Our PBC is called the Jidi Jidi Aboriginal Corporation. It does not have any income, assets or staff. We do not have an office, a fax, or a computer. We just have meetings under the bough shed at Yulga Jinna.

If you looked at our community before we got native title and after we got native title, you would probably think that it looks just the same. But there are a few very important differences.

What 'winning' native title actually means

For our people, 'winning' native title has meant a lot of pain, disappointment and sorrow. This is why:

- we have got drastically fewer rights now than we had before our claim was determined;
- we have a massive, unbearable burden of administration to protect the few rights we have;
- State Departments do not understand the agreements and are have not managed them properly so far;
- the State have failed to do things it promised to do under the agreements;
- our PBC and its members now have a lot of complex and conflicting obligations that the white law imposes on us, including fiduciary, trustee and statutory obligations. We do not have any funding for legal advice about what these obligations mean or any money for training for our PBC Governing Committee members; and,
- we have no financial support to make the agreements work. The land council does not get funding to assist PBCs and we have no independent source of income. We also are not likely to be receiving any money in the future because we no longer have the right to negotiate.

Native title rights we cannot afford to enforce

Our native title claim is funded to fail. The agreements that we entered into are very complicated. They require us to do many things before our native title rights are protected. We have found that we cannot protect our rights under these agreements because our PBC does not receive any money or assistance to do so. For example, our ILUA gives us the right to consult with miners who want to use our land. However, we cannot even access that right unless we can prove that we have native title over the area of the mining lease. This means paying for a native title survey of the land, which we cannot afford to do. It is as though we may as well not have the right in the first place. Another example is our rights to hunt, fish and gather. The Court found that we had those rights in the areas of our claim where native title has not been extinguished. However, we cannot exercise those rights because we cannot afford the public liability insurance policy we need to take out under our pastoral access protocols to access our land.

Because our Corporation has no staff, no resources and no income, we cannot protect the native title that we fought so hard for. We have tried asking the State for money to run our PBC, but they have not responded to us. We have also found that the State has not kept its side of the agreements that we entered into with it. Under the ILUA, the Department of Indigenous Affairs promised to set up a heritage register for us, which is a fundamental part of the heritage agreement. It has not done so.

We ‘won’ the native title right to take out insurance

There is only one aspect of the agreements that we entered into that seems to be working properly, and that is the right of pastoralists to demand that we take out public liability insurance as a condition of us going onto the stations.

The Pastoralists and Graziers' Association recently sent us a letter on behalf of most of the pastoralists on our claim. It says that, until we give evidence that we have taken out an insurance policy, we are not allowed to access any of their leases. Because we cannot afford to take out the policy, we are effectively stopped from going onto our traditional land. This has caused an unbearable sorrow for our people, many of whom spent their entire lives on stations. They built the fences that the Court now says extinguishes our native title.

What does ‘improvement or enclosure’ mean?

The State keeps changing its mind about what ‘improvement or enclosure’ means. When we settled our claim, we agreed that native title would be extinguished by ‘improvements or enclosures’ on pastoral leases. We were told that this meant that there would be no more native title on places that were fully enclosed by fenceline, such as bullock paddocks, or improved areas, such as the area around the homestead. Now the State is saying that other things are ‘improvements’ and ‘enclosures’. For example, a high ridge, a dry river bed, even an invisible administrative boundary can all be features which the State says can ‘enclose’ land and so extinguish native title.

We never agreed to this. The State promised to talk to us about how it would interpret ‘improvements or enclosures’ before it started to give out tenements to people on this land, and it has not.

How has native title changed our lives?

There are a lot of myths about what ‘winning’ native title actually means. ‘Winning’ native title certainly has changed our lives:

- we are sometimes discriminated against by other Aboriginal people, who assume that ‘winning’ native title means that you get a lot of money;
- we now have many more obligations under white law than we had before, and less money to assist us to meet them; and,

- we thought that native title would bring us recognition, but we feel more overlooked than ever before. The State will not fund us; ATSIC will not fund us.

The way forward

We have not given up hope. We know that it is this State Government's policy to make agreements with native title holders. We hope it is this State Government's policy to fund agreements to make them work. We have learned the hard way that a native title agreement without funding can be worse than no native title agreement at all.

When we lodged our claim, we did not do it because we thought that we would get money or benefits. We did it because we thought it would provide a future for our children. We did it because we thought it would mean that they would receive more respect for our sacred land and our laws than we ever did.

For us, getting native title was never about money. But now that we have native title, we find that we are losing it because we do not have the money to protect it.

PASTORAL ACCESS PROTOCOLS: THE CORROSION OF NATIVE TITLE BY CONTRACT

Frances Flanagan⁸

One of the aspects of the Nharnuwangga, Wajarri and Ngarla (NWN) native title settlement that has attracted the most attention has been the requirement that native title holders take out public liability insurance before they are permitted to access pastoral stations in their traditional country to exercise their determined native title rights.⁹ The obligation arises from the pastoral access protocols that were executed between the NWN Prescribed Body Corporate and each pastoral leaseholder within the NWN determination area. This paper critically examines the nature of the pastoral access protocols that were agreed in the NWN settlement and the arguments that have been advanced about the desirability of including similar agreements in other native title settlements.¹⁰ As documents that purport to 'resolve' and bring 'certainty' to land use issues that have been the subject of embedded social conflict for over a century, it is also argued that pastoral access protocols merit close historical, as well as legal, analysis, before native title parties agree to them.¹¹

The NWN pastoral access protocols

The NWN pastoral access protocols are a set of identical contracts between the NWN Prescribed Body Corporate and the nineteen pastoral lessees within the NWN determination area. The protocols form part of the terms of settlement of the NWN native title claim and appear as an annexure to Justice Madgwick's reasons for decision in the NWN determination of native title.¹² The protocols regulate access rights to each pastoral station, irrespective of whether native title has been extinguished.¹³

To date, the NWN pastoral access protocols have received limited, but generally very positive treatment, from commentators. Lawyer Geoff Gishubl, while not suggesting that the protocols necessarily be considered as a template for other determination applications, has cited the protocols as examples of a 'practical and pragmatic approach to the resolution of competing interests' that has resulted in 'greater certainty for the participants.'¹⁴ Pastoralists and Graziers' Association's Native Title Director Henry Esbenshade has suggested that 'a lot of pastoralists might well be more than happy to arrive at a similar agreement ... this would be almost too good to be true.'¹⁵ The precedent

value of the protocols also received comment from Justice Madgwick himself, who, in his reasons for decision, characterized the protocols (among other things) as ‘a resource for the many people who will have difficult decisions to make about questions of native title’.¹⁶

As the first native title claim in Western Australia over pastoral leasehold to be the subject of a consent determination, there is no doubt that the NWN pastoral access protocols will have weight as a precedent in negotiations for the settlement of other claims over the same tenure type. Clauses from the NWN pastoral access protocols were included in a recent publication from the National Native Title Tribunal that were aimed at assisting parties who wished to negotiate pastoral agreements.¹⁷ The protocols have also been favourably described by the NWN Counsel Philip Vincent as being part of the exercise of ‘balancing the interests’ in the resolution of land use issues.¹⁸

A brief description of some of the key elements of the NWN pastoral access protocols follows. The protocols require any NWN person who wishes to access their traditional land to give the pastoral lessee 72 hours notice containing the following information:

- (a) the approximate number of people intending to enter the Pastoral Lease, the names of key contact people for that group and the names and details of any licensed firearms holder who intend to hunt in accordance with clause 8(f);
- (b) the approximate number of vehicles involved;
- (c) in general terms the places on the Pastoral Lease proposed to be visited;
- (d) the approximate length of stay on the Pastoral Lease;
- (e) if camping is proposed, the approximate camping locations;
- (f) whether it is intended to hunt with low calibre, low power firearms on the Pastoral Lease.¹⁹

The pastoral lessee may object to the proposed entry. If the objection is not resolved within fourteen days of notification, then dispute must be settled by arbitration.²⁰

Once an NWN person has obtained permission to access their traditional country, they must obey the following conditions:

- (a) not interfere with station facilities including vehicles, fences, watering points and other pastoral improvements;
- (b) keep any dog or other animal brought with them strictly within the control of the relevant NWN People at all times;
- (c) not interfere with stock;
- (d) not light fires except for the purpose of cooking or providing heat or light;
- (e) not camp within 1 km of or visit other than for the purpose of obtaining water any man made watering points (including windmills, bores and dams);
- (f) not camp or stay within 3 kilometres of the homestead on the Pastoral Lease;
- (g) only call at the homestead between 7am and 5pm unless in the case of emergency;
- (h) only use vehicles on station roads and tracks and public roads other than to access a camping location not serviced by any such road and then by the shortest agreed route from such road;
- (i) not leave any litter or rubbish on the Pastoral Lease;
- (j) leave gates as they are found, that is open if they are found open and closed if they are found closed;
- (k) not use high calibre or high power firearms on the Pastoral Lease;
- (l) not camp on or travel over those places declared by the Pastoral Lessee as an excluded area in accordance with clauses 28 and 29 of this Protocol;

- (m) not enter the Pastoral Lease with people not either members of the NWN People or immediate kin relations of members of the NWN People and not to purport to give any such people permission to enter the Pastoral Lease;
- (n) not erect any dwellings or other permanent structures on the Pastoral Lease
- (o) not commercially exploit any flora or fauna on the Pastoral Lease.²¹

Further, the pastoral lessee is entitled to make further directions about NWN people's conduct, including but not limited to reasonable directions about:

- (a) camping;
- (b) use (including closure) of station roads;
- (c) the lighting and extinguishment of fires;
- (d) control of any dog or other animal brought onto the Pastoral Lease;
- (e) where to hunt using firearms;
- (f) safety;
- (g) soil or other environmental conservation (including but not limited to feral animal control).²²

If there is any dispute about the pastoralist's directions, the dispute may be referred to arbitration. In the meantime, the NWN people must comply with the direction.²³

The pastoral access protocols do not oblige pastoralists to avoid or protect culturally significant sites. Rather, the obligation is on the NWN people to inform the pastoral lessee of the location of sites when the information is provided to the person responsible for maintaining the register of Aboriginal sites under s38 of the *Aboriginal Heritage Act 1972* (WA).²⁴ In addition, pastoralists may unconditionally exclude NWN people from accessing areas of the pastoral lease 'for the efficient operation of the Pastoral Lease as a pastoral enterprise.'²⁵ The NWN people are also required, on demand, to take out a public liability insurance policy that names NWN people as insured persons and provides coverage for at least \$5 million for each occurrence.²⁶ If the NWN people do not abide by all of the requirements prescribed in the protocol, or breach any law, the pastoralist is entitled to evict them from the pastoral lease.²⁷

'Balancing the interests'?

As well as being highly onerous on the native title holders,²⁸ the rights and interests contained in the NWN pastoral access protocols are profoundly asymmetric. The protocols bestow upon pastoralists near plenipotentiary power, and do not impose a single substantive obligation on them.²⁹ In contrast, there are a minimum of twenty separate substantive obligations imposed on NWN people.³⁰ The consequences for the pastoralist if they fail to comply with the protocol are nil.³¹ The consequences of a failure to comply for the NWN people are devastating: exclusion from their land.³² At the time of writing this article, the NWN people are excluded from all twenty pastoral leases within their determination area for failing to take out the required public liability policy as a consequence of this clause.³³

There are a number of rationalizations that may be advanced for the 'lopsidedness' of the NWN pastoral access protocols. One is that the legal rights of native title holders as against pastoralists are themselves lop-sided: according to the terms of the determination, the group's determined native title rights and interests must yield to the pastoralist's rights and interests.³⁴ According to this argument, then, the protocols are simply an exposition of the ways 'fragile' native title rights may be shattered 'in practice'. The exercise of transforming generalist statements about the ascendancy of pastoral rights into a list of actual 'rules' has invariably been given the positive gloss of providing 'certainty' to the parties.³⁵

The benefit of such ‘certainty’ (and the harmfulness of ‘generalist’ expressions of rights) should not be accepted uncritically by native title parties. Aboriginal people have, for as long as pastoral leases have existed in Western Australia, resided on their land under the auspices of ‘generalist’ statements about the relationship between Aboriginal and non-Aboriginal rights. The *Land Act 1933* (WA) reservation, for instance, did not provide an exhaustive taxonomy of the practical exercise of Aboriginal peoples’ statutory right to seek their sustenance in their accustomed manner. Similarly, there are numerous examples of parties maintaining good relationships with each other on the basis of ‘generalist’ statements about their relative legal rights as they are described in the *Native Title Act 1993* (Cth).³⁶ The imposition of codified ‘standard’ rules of access onto a large number of diverse pastoral leases may have the opposite effect to that intended, and adversely impact upon the ability of the parties to maintain satisfactory unwritten arrangements that already exist.³⁷

In any event, many of the rights awarded to pastoralists in the NWN pastoral access protocols are greater than any right that may be construed to exist under a ‘generalist’ statement of co-existence, such as the right to evict native title holders if they fail to ‘take the shortest route’ to camping locations from public roads. Not only do requirements such as these directly contradict the recognised NWN native title rights (such as the right to ‘travel through, visit and care for sites’³⁸) they cannot otherwise be sustained as a matter of law.

Proponents of the protocols have argued, however, that it is precisely the deviation from the parties’ strict legal rights that is their virtue, as it means that the parties are able to deal with issues that would not be dealt with by a bare determination of native title.³⁹ If it is acceptable for the pastoral access agreements to include rights that are greater than the strict legal rights available to pastoralists, it must be asked why there is a complete absence of similarly broad rights in favour of the native title holders? There is no reason why a pastoral access agreement could not, for instance, include clauses that enable native title holders to require pastoralists to control stocking levels, maintain fencing and other infrastructure, and carry out sound land management practices. Such clauses need not require pastoralists to do any more than they are currently obliged to by law,⁴⁰ but would enable native title holders to have a cause of action against the pastoralist in breach of contract about matters that directly impact the enjoyment of their native title rights.⁴¹

A second justification that has been advanced in favour of the NWN pastoral access protocols is, in glib terms, that they are ‘better than nothing’.⁴² In the NWN settlement, the parties consented to the principles of extinguishment articulated by the Full Court, resulting in the non-existence of native title over significant portions (possibly the majority) of land in the claim area. In this context, Philip Vincent has described the protocols as ‘addressing’ the ‘problem’ of extinguishment of native title by improvements or enclosures by preserving native title holders access to land. Needless to say, the ‘problem’ has since been addressed by another means, namely, the High Court’s reversal of the Full Court’s decision in relation to extinguishment.⁴³ Accordingly, any consideration of the NWN pastoral access protocols as a precedent for the settlement of other claims must take the unique bases for extinguishment that was applied in the NWN case into account. It should also be born in mind that native title rights are rights in and to the land itself, as opposed to the rights obtained under a pastoral lease, which are inherently precarious.⁴⁴

Finally, any assessment of the value of pastoral access protocols for native title holders cannot ignore the potentially devastating effect of the complete absence of resourcing for Prescribed Bodies Corporate.⁴⁵ Native title agreements, whether about pastoral access or anything else, cannot work fairly unless they are funded to work. In the case of the NWN protocols, a lack of funding to the PBC has directly resulted in the native title holders being excluded from the same country that the Federal Court has recognised they are entitled to access. Any pastoral access agreement that sets up a process where the native title party’s ability to enjoy their rights hinges on administrative procedures (such as written notice) is, in the context of a resources vacuum, bound to fail. It is therefore critical that

native title representatives be alert to the broader resourcing issue when recommending pastoral access agreements to their clients.

Negotiating co-existence

The NWN pastoral access protocols mark a new phase in the complex and shifting relationships that have existed between the NWN people and pastoralists over the last century. Their efficacy as tools for managing those relationships in a 'post-native title era' cannot be understood without an appreciation of the history of the relationships before native title. Most commentators on the NWN determination have made specific mention of the 'goodwill' that existed between the parties in the case. Anthropologist for the State of Western Australia, Ron Brunton, has described 'the obvious personal goodwill between the older members of the claimant group and a number of the contemporary pastoralists.'⁴⁶ Henry Esbenshade notes that 'from a historical perspective, one cannot get away from the fact that a very close relationship has developed between many of the pastoral leaseholders and Aboriginal people who have spent time on those leases. There was a huge amount of goodwill that developed while living and working close together.'⁴⁷ Similarly, senior NWN titleholder, Clarrie Smith, has said that 'the pastoralists were really good, we are really friends... we have worked on the pastoral leases for many, many years and that's why we are all sticking together.'⁴⁸

However, the existence of 'goodwill' (or otherwise) between the parties does not mean that the historic bases for the relationship should go uninterrogated. It cannot be forgotten that the pastoral industry developed on the basis of appropriated Aboriginal land and labour. There is ample evidence of pastoralists' historic economic dependence on Aboriginal people in what has been described as a 'bastardised parody of the convict labour system.'⁴⁹ Without their labour, their intimate knowledge of country, their understanding of weather patterns, their ability to locate water, their skills at hunting, gathering, tracking and identifying plants poisonous to stock, white pastoralists would not have been able to develop the pastoral industry in Western Australia.⁵⁰ In order to secure a compliant and dependent Aboriginal workforce, pastoralist employers engaged an elaborate web of social controls, including control of Aboriginal access to land and restrictions of the practice of traditional laws and customs.⁵¹ Pastoralists dictated where Aboriginal people lived, what they ate,⁵² when and where they were allowed to use their cultural knowledge in order to entrench a relationship of servility between black and white.⁵³ Aboriginal dependency was enhanced by the destruction to the landscape wrought by pastoralism.⁵⁴ This is not to suggest that Aboriginal people were the hapless victims of ruthless exploitation by pastoralists,⁵⁵ or that contemporary pastoralists are now seeking to revive the system of colonised labour that underwrote the industry for the greater part of the last century.⁵⁶ Rather, it is to notice that there are many ways in which the NWN pastoral access protocols embody continuities in the long and complex history of the relationship between Aboriginal people and pastoralists.⁵⁷

When seen in its historical context, the requirement that native title holders take out public liability insurance policies (and the implicit characterization of pastoralists as in need of legal protection against potential Aboriginal tortious litigants) seems particularly inappropriate. In 1940, the Fyfe Royal Commission stated that the incidence of serious injury to Aboriginal workers on pastoral stations was so high that 'actually we gave up recording them' and that medical patrols need to be retained to prevent the 'complete loss of this class of labour.'⁵⁸ Pastoralists have never been required by law to compensate Aboriginal people for these losses.

A favourable determination of native title involves the recognition of Aboriginal ownership of country. It provides the opportunity for pastoralists to re-forge the basis of their relationships with Aboriginal people. Native title holders may thus be seen, not as threats to industry or property, or employees, or welfare bludgers, but as *owners* of the land, who, like pastoralists, have obligations in relation to the land (as well as rights) that must be discharged in accordance with their laws. In this context, there is a perversity in the inclusion of pastoral access protocols as part of a native title claim settlement. Far from being innovative mechanisms for the protection of native title,⁵⁹ pastoral access

protocols of the kind agreed in the NWN settlement entrench and perpetuate colonial relationships between pastoralists and Aboriginal people. They reinstate pastoralists' historic rights to unilaterally determine where, when and upon what conditions Aboriginal people may exercise their traditional laws and customs. There is some irony in the promotion of pastoral access agreements as a panacea to the 'uncertainty' of native title determinations. 'Uncertainty' is inherent in the notion of change. The recognition of native title is arguably the biggest change to the foundation of pastoralist and Aboriginal relationships since their inception. Pastoral access protocols of the kind agreed in the NWN claim corrode the transformative potential of native title determinations because they impose the 'certainty' of the colonial past onto an unfamiliar post-native title future.

¹ This paper was delivered by Michelle Riley at the *Native Title Conference 2002: Outcomes and Possibilities*, Native Title Representative Bodies Conference, 3-5 September 2002, Geraldton, WA.

² 'Title Win', *The West Australian*, 30 August 2002, p.1.

³ National Native Title Tribunal Media Release, 'WA Recognises Native Title in Historic Breakthrough', 29 August 2000.

⁴ 'Record Native Title Deal Agreed', *The Australian*, 30 August 2002, p.3.

⁵ *Clarrie Smith v State of Western Australia* [2000] FCA 1249, at [31] – [33].

⁶ *Western Australia v Ward* (2000) 170 ALR 159.

⁷ *Western Australia v Ward* (2002) 191 ALR 1.

⁸ I would like to acknowledge the assistance of Sarah Knuckey in the preparation of this paper.

⁹ See C. Wilson Clark, 'Native Title Fails Its People', 1 July 2002, *West Australian*; Riley, M. 'Winning Native Title', this issue of *Land Rights Laws: Issues of Native Title*, Native Title Research Unit, AIATSIS, Canberra.

¹⁰ The author does not seek to criticise the NWN people's decision to enter into the pastoral access protocols. Their decision was made in the context of confidential mediation that took place after a part-hearing of their case. Rather, the arguments in this paper are directed to highlighting the limitations of the NWN pastoral access protocols as precedents for other native title settlements. The views expressed in this paper are those of the author, and not necessarily those of the Yamatji Land and Sea Council or the NWN people. However, the paper has been written with the knowledge and consent of a number of members of the NWN community.

¹¹ See G. Gishubl, 'Land Access Issues as Part of Resolving Claimant Applications "Getting on Together"', *Native Title News*, August 2001, vol 5, no. 4, 2001. The question of why the non-Aboriginal parties felt the need to congratulate themselves also merits further critical attention. The heavy praise from Justice Madgwick is redolent of the 'trophy moments' described by Deborah Bird Rose in 'Aboriginal Life and Death in Australian Settler Nationhood', *Aboriginal History*, Vol 25, 2001, p.159.

¹² *Clarrie Smith v State of Western Australia* [2000] FCA 1249. For a background to the *Smith* determination, see Ritter, D.L. The Long Spoon: Reflections on Two Agreements with the State of Western Australia, conference paper, *The Past and Future of Land Rights and Native Title*, Native Title Representative Bodies Conference, Townsville, 27-31 August 2001; and Ritter, D.L. and F.N.A. Flanagan 'The Difference between Lawyers and Rats: recasting the role of Lawyers in the Native Title Process and Critical Legal Theory as a Possible Framework for Inter-Disciplinary Understanding' conference paper, *Crossing Boundaries: Anthropology, Linguistics, History and Law in Native Title*, 19-20 September 2000, University of Western Australia (publication in a Melbourne University Press anthology pending).

¹³ Notwithstanding the High Court's subsequent rejection of the Full Federal Court's view of extinguishment, the terms of the current determination are that the NWN people's native title was extinguished by the enclosure or improvement of historic pastoral leases in accordance with the Full Federal Court decision in *Western Australia v Ward* (2000) 170 ALR 159 (the *Ward* case).

¹⁴ Gishubl, op. cit., p.69.

¹⁵ Esbshade, H. 'The Pastoralists Perspective on Mediating Native Title Claims', *Native Title News*, Vol 5, No. 4, 2001, p.63.

¹⁶ *Clarrie Smith v State of Western Australia* [2000] FCA 1249 at [31].

¹⁷ The NNTT's 'notes' about pastoral access agreements purported to be 'fairly simple and designed to initially deal with matters that are not too contentious.' The notes contained 'sample clauses' which, notwithstanding the notes' disclaimer, were highly contentious. After a vociferous response from native title representative bodies, the notes were withdrawn from publication after three days. This paper does not, therefore, attempt to respond to the notes, however many of the criticisms made of the NWN pastoral access protocols and the assumptions underlying their promotion are highly apposite to the arguments put in the Tribunal's notes. It is understood that a considerably longer document is currently in an advanced stage of preparation by the NNTT which includes the NWN protocols as a 'resource'.

¹⁸ Vincent, P. 'Nharnuwangga, Wajarri and Ngarla People's Claim: Consent Determination? Balancing the Interests', conference paper, *Crossing Boundaries: Anthropology, Linguistics, History and Law in Native Title*, 19-20 September 2000, University of Western Australia.

¹⁹ NWN pastoral access protocol (NWN protocol), clause 1 7-8. The NWN protocol may be found annexed to *Clarrie Smith v State of Western Australia* [2000] FCA 1249.

²⁰ Clauses 9-12, NWN protocol.

²¹ Clause 13, NWN protocol.

²² Clause 15, NWN protocol.

²³ Clauses 15-18, NWN protocol.

²⁴ Clause 36, NWN protocol.

²⁵ Clauses 28-29, NWN protocol.

²⁶ Clauses 21-27, NWN protocol.

²⁷ Clause 20, NWN protocol.

²⁸ The usual conditions of remote community life mean that it is often impossible for many NWN people to follow the notification procedure imposed by the protocols for getting permission to access pastoral leases. There are any number of cultural and practical reasons why it may not be possible for NWN people to predict when, where and how entry onto a pastoral lease will be required three days in advance of when the need arises. In relation to a number of the NWN protocols, pastoralists have imposed further directions obliging native title holders to provide *two weeks* notice in certain circumstances. In practice, such notification requirements have meant that native title holders' ability to practically exercise their rights is dramatically reduced.

²⁹ The only obligations on pastoralists are procedural. A representative of the pastoral lessee must meet with representatives of the body corporate approximately every six months to discuss employment, training and contracting opportunities (clause 38), and must attempt to resolve any dispute pursuant to the dispute resolution process (clauses 39-42).

³⁰ Minimum, because clause 15 enables pastoralists to make further directions that must be complied with by the NWN people at any time. There is no concomitant clause enabling the NWN people to make any directions that must be adhered to by the pastoralist.

³¹ Clause 15 provides for an arbitration process if the NWN people challenge a direction made by the pastoralist. Given the absence of any source of funding for the PBC, it is highly unlikely that such a clause will be of any practical use in protecting NWN interests.

³² Clause 20, NWN protocol.

³³ Prescribed Bodies Corporate, such as the Jidi Jidi Aboriginal Corporation, do not receive any external source of funding. See Michelle Riley's paper in this edition of *Land Rights Laws: Issues of Native Title*, Native Title Research Unit, AIATSIS, Canberra.

³⁴ *Clarrie Smith v State of Western Australia* [2000] FCA 1249, para 8.

³⁵ Gishubl states that 'unless land access issues are addressed in a practical manner as part of the determination process, there is a risk that the making of a 'generalist' form of determination will create as much uncertainty as it resolves and in may case fail to accommodate the real (as opposed to strict legal) interests of the parties' [*sic*]. G. Gishubl, *op. cit.*, p.68.

³⁶ See, for instance, s238, s44H, s15 of the Native Title Act.

³⁷ I have been informed about a number of instances where the existing good relationship between members of the NWN community and particular pastoralists has been damaged by the existence of a pastoral access protocol and the enforcement of its terms.

³⁸ *Clarrie Smith v State of Western Australia* [2000] FCA 1249, para 3(c).

³⁹ Gishubl, *op. cit.*, p.69.

⁴⁰ Section 111 of the *Land Administration Act 1997* (WA).

⁴¹ The NWN pastoral access protocols endow pastoralists with the same cause of action in relation to any breaches of the law by the native title holders pursuant to clause 14.

⁴² Vincent, *op. cit.*

⁴³ Cf. the approach taken in the Karajarri native title determination, where decisions about extinguishment were postponed pending the High Court decision in the *Ward* case.

⁴⁴ In *Western Australia v Ward* (2002) 191 ALR 1, at [170], the majority noted that pastoral leases gave no right to the soil, and could be forfeited for non-payment of rent or failure to comply with its terms and conditions. It may therefore be suggested that Aboriginal rights, as rights in the land itself, are at least as equal to those of the pastoralist, and possibly stronger.

⁴⁵ For an examination of the significance of resourcing to the effective operations of prescribed bodies corporate, see Mantziaris, C. and D.F. Martin, *Native Title Corporations: a legal and anthropological analysis*, Federation Press, Sydney, 2000. See also <http://www.mpr.wa.gov.au/news/governmentreviews/bowler.html>, p.88.

⁴⁶ R. Brunton, 'Landmark Native Title Agreement an Eye-Opener', *Courier Mail*, 9 December 2000.

⁴⁷ Esbenshade, *op. cit.*, p.62.

⁴⁸ 'Title Win', *West Australian*, 30 August 2000, p.1.

⁴⁹ Castle R. and J. Hagen, 'Settlers and the State: the Creation of an Aboriginal Workforce in Australia', *Aboriginal History*, Vol 22, 1998, p.27. For descriptions of pastoralists' dependence on Aboriginal labour, see Collier, J. *The Pastoral Age in Australasia*, Whitcombe and Tombs Ltd, London, 1911, p.120-121; Jebb, M.A. *Blood, Sweat and Welfare: A History of White Bosses and Aboriginal Pastoral Workers*, University of WA Press, Perth, 2002; William C. and B. Thorpe, *Beyond Industrial Sociology: the work of men and women*, Sydney, 2000, p.96; Foster, R. 'Rations, Coexistence,

and the colonisation of Aboriginal Labour in the South Australian Pastoral Industry, 1860-1911', *Aboriginal History*, 2000, vol 24, 17; Dagmar, H. 'Land and Fringe-Dwelling Community: A Case Study from Western Australia', in Peterson, N. and M. Langton, (ed.) *Aborigines, Land and Land Rights*, Australian Institute of Aboriginal Studies, Canberra, 1983, p.180; Smith, P. 'Station Camps: Legislation, Labour Relations and Rations on Pastoral Leases in the Kimberley Region, Western Australia', *Aboriginal History*, 2000, vol 24, p.78; Broome, R. 'Aboriginal Workers on South-Eastern Frontiers', *Australian Historical Studies*, vol 26, 1994-1995, p.211.

⁵⁰ Hawke, S. and M. Gallagher, *Noonkanbah: Whose Land, Whose Law*, Fremantle Centre Arts Press, 1989, p.68.

⁵¹ Ann McGrath evocatively describes some of the other control strategies that were used, including bestowing the title of 'king' on favourite employees (appointing Aborigines to positions of authority), segregation of eating, giving ridiculous or condescending names to Aboriginal workers, speaking pidgin English (even though workers could understand ordinary English), non-payment of cash wages, corporal punishment, being 'sent bush', abusive language, inducements in the form of recreational activities or being allowed to travel, in *Born in the Cattle: Aborigines in Cattle Country*, Allen & Unwin, Sydney, 1987, pp.100-108.

⁵² See McGrath, op cit., pp.102-3 for a description of the rigid segregation that existed between black and white for sleeping and eating.

⁵³ Jebb describes how control of food was integral to the enforced relationship of dependence between Aborigines and pastoralists. Workers were rewarded in rations, rather than pay. On 'holidays,' the 'dignity of controlling food and openly expressing cultural knowledge was restored', op. cit., p.195.

⁵⁴ 'Waterholes which had previously only been used by Aborigines during winter were used all year for watering stock and soon became polluted and dried up. The sharp hooves of sheep destroyed the fragile semi-arid grasslands and made the countryside prone to widespread erosion which compounded the effects on native game. Even in the drier areas, Aboriginal groups became increasingly dependent on the good-will of individual station owners and managers and had to survive on the fringes of the white economy', Castle and Hagan, op. cit, p.31.

⁵⁵ The proper characterisation of the impact of the pastoral industry on Aboriginal society has been the subject of extensive historiographical debate. The Berndts have described the relationship as 'a one-sided and gross misuse of human resources' (R.M. and C.H. Berndt, *End of An Era*, Australian Institute of Aboriginal Studies, Canberra, 1987, p.265). McGrath, by contrast, has argued convincingly that 'Aboriginal society was not truly colonised' by the pastoral industry but, rather, was able to negotiate the terms of its involvement in it. She writes that 'generations of Aboriginal station dwellers co-operated with the white people.... like the land itself, their relationships with it were being transformed. They incorporated different animals, technologies, skills and kin into their cultural landscape, but it remained *their* country, their world. In their lives, they knew, and continued to know, great pride and strength.' op. cit., p.175.

⁵⁶ Thorpe has suggested that Aboriginal pastoral labour was 'a related but distinct form' of slavery, which he termed 'colonized labour'. Colonized labour derives from 'the seizure of a territory and its people by a major power... in order to dominate and exploit the colonized territory and its people economically, politically and culturally.' Thorpe, B. 'Aboriginal Employment and Unemployment: Colonised Labour' in William and Thorpe, op cit., p.96.

⁵⁷ Jebb has recently summarised that history in three words: 'Blood, Sweat, and Welfare', op. cit.

⁵⁸ W.V.Fyfe, *Report of the Royal Commission Appointed to Inquiry into and Report upon the Financial and Economic Position of the Pastoral Industry in the Leasehold Areas in Western Australia*, Perth, West Australian Government Print, 1940, p.630, quoted in Jebb, op. cit, p.180.

⁵⁹ Vincent, op. cit.

ISSN	1326	-	0316
ISBN 0 85575 436 2			

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