

**Parliamentary Joint Committee on
Native Title and the Aboriginal and
Torres Strait Islander Land Fund**

OPERATION OF THE NATIVE TITLE ACT

**Inquiry Into The Effectiveness Of
The National Native Title Tribunal**

Submission No:34

Received 15 April 2003

Ms Yvonne Stewart

Secretary

Arakwal Aboriginal Corporation

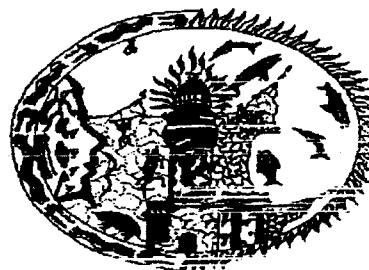
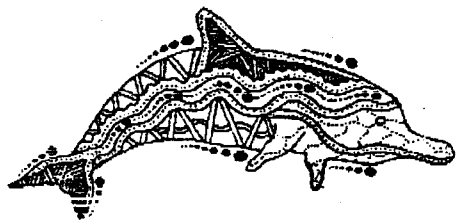
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Mr Peter Grundy
Secretary
Parliamentary Joint Committee on
Native Title and the Aboriginal and
Torres Strait Islander Land Fund
Parliament House
Canberra ACT 2600

Tuesday, 15 April 2003

Dear Mr Peter Grundy,

RE: SUBMISSION TO COMMITTEE
BUNDJALUNG OF BYRON BAY (ARAKWAL) NATIVE TITLE APPLICATIONS
N6010/98 AND N6020/01

The Arakwal Aboriginal Corporation is a corporation that represents the interests of the Arakwal native title holders. The Arakwal people currently have two native title applications N6010/98 and N6020/01 for land and waters in and around Byron Bay on the north coast of NSW.

Application N6010/98 was lodged in 1995 and we have negotiated a partial settlement of that application with the various parties to the application. Negotiations continue with the parties to both applications with a view to full settlement of the applications in the near future.

We have, therefore, had extensive contact with the National Native Title Tribunal (NNTT) over the years.

It has been our experience that the NNTT has been effective in performing its mediation role. Mr Kim Wilson, who was the Tribunal Member for our claim up until 2003, and the various case managers, has been effective in bringing the parties to the negotiating table and keeping the parties focused on the important issues and timetables.

Further, it is our view that still today there is a lack of understanding of the native title process amongst the indigenous and non-indigenous community (including parties to the applications). This lack of understanding can cause unnecessary friction within the community. The NNTT have been effective in managing this potential problem by providing an independent source of information. They have called meetings and have met with individuals and groups.

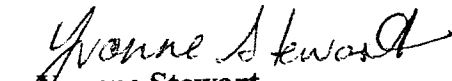
The NNTT has also been effective in settling intra-Indigenous disputes.

The NNTT has also assisted us in settling our claim boundaries and has provided assistance in the production of maps, which are essential for the wider community to fully understand the boundaries of our claim.

This submission has been authorised by the executive of the Arakwal Aboriginal Corporation.

If I can be of any further assistance please contact me at the above address.

Yours faithfully,


Yvonne Stewart
Arakwal claimant
Secretary

Features of the agreements reached

Agreements reached prior to the 1998 amendments to the Act

[580] On 3 April 1997 an agreement was reached under s.21 of the old Act between the claimants, the New South Wales Minister for Land and Water Conservation, the New South Wales Aboriginal Land Council and the Tweed Byron Local Aboriginal Land Council, authorising the creation of the Cape Byron State Recreation Area, and the grant of certain Crown land at Paterson Street, Byron Bay, to the Tweed Byron Local Aboriginal Land Council for a proposed Aboriginal interpretive centre. The Local Aboriginal Land Council was to hold the land in trust for the Arakwal People. This agreement did not involve any recognition of native title, and was made without prejudice to the existence or non-existence of the applicants' native title rights and interests.

[581] On 16 October 1998 an agreement was reached between the claimants and the Byron Shire Council providing for a consultation process in respect of developments by the council. Both of these agreements were reached within the framework of Tribunal mediation of the lead application.

Staged approach to negotiations and the Bundjalung of Byron Bay (Arakwal) ILUA

[582] In 1999 the state and claimants agreed to negotiate the resolution of the claims for native title under a two-stage process. Stage I of the process was to involve the following:

- agreement on the creation of the Arakwal National Park, with provisions such as joint management, training and job opportunities for members of the claim group;
- transfer of land at Ironbark Avenue to the Arakwal Corporation in freehold for the purpose of building residential premises for the claimants. Such a transfer would involve the surrender of native title in this land to the State of New South Wales;
- transfer of land at Paterson Street from the Tweed Byron Local Aboriginal Land Council to the Arakwal Corporation for the purpose of an interpretive Centre site. This transfer was the subject of an earlier agreement under s.21 reached on 3 April 1997, as mentioned above; and
- the development of a consultation process for determining how to deal with and protect Taylor's Lake.

[583] It was agreed by the claimants and the state government that the mechanism for delivering the above outcomes would be an ILUA, which would be negotiated within the framework of Tribunal mediation of the lead application. This ILUA was significant because it was the first ILUA registered in Australia to authorise the

creation of a new national park, and also dealt with a number of complex land tenure issues.

[584] Stage II of the negotiations, which is currently underway, is aimed at resolving the remaining land use issues relating to the traditional lands of the claimants. Current negotiations aim to conclude an agreement which will provide for a comprehensive settlement of all native title and related matters. The agreement will include:

- the final settlement of the native title applications filed by the Byron Bay Bundjalung People;
- recognition of native title by consent;
- a simplified future act scheme;
- the future management of land and waters in which native title continues to exist;
- the doing of future acts in respect of the land and waters in which native title exists; and
- the settlement of other matters, such as compensation.

[585] Most ILUAs negotiated to date have provided for the undertaking of future acts or have provided for the partial settlement of a native title application. This is the first 'whole of country' agreement being considered in New South Wales, and one of only a very small number being worked on elsewhere in Australia.

[586] The two-stage approach was adopted to enable the New South Wales Government to realise its desire to create the Arakwal National Park within a set timeframe and provide for its future management. It also enabled the applicants, who are elderly, to obtain some of the benefits arising out of the negotiated agreement within the short term, rather than have them wait for the settlement of all issues concerning the entirety of their traditional boundaries. The staged approach was also beneficial to the government because it enabled them to start negotiating while still undertaking the land status searches that would be required to settle the area covered by the traditional boundaries of the claimants.

Issues

[587] A range of issues needed to be addressed as part of the negotiations for Stage I of the negotiation process. The issues included the following:

- Preparation of a connection report to satisfy the New South Wales Government's credible evidence requirements. Some delays were experienced in the preparation of this report due to resource and issues and challenges created by gaps in continuity of personnel within parties.
- Issues surrounding the creation of the Arakwal National Park, in particular the creation of a plan of management, as well as agreeing on aspects of the involvement of the claimants in this new park, such as opportunities for training and employment. There were a number of incidental issues, such as

negotiation on the term of a lease at a cottage at The Pass and the repair of this cottage to make it fit for occupation.

- Intra-Indigenous issues. In particular, two overlapping native title determination applications were filed by neighbouring claim groups. These issues focused on Taylor's Lake.
- Implementation and resources issues in relation to the proposal to declare Taylor's Lake an Aboriginal Place under National Parks and Wildlife legislation. This involved mediation with the Jali Local Aboriginal Land Council, which had lodged a land rights claim over the site.
- The transfer of land at Ironbark Avenue, Byron Bay, to the claimants in freehold created unique issues. A mechanism for this transfer was needed, and most likely a surrender of native title would be required before the land could be transferred to freehold. This was the first time that the issue of such a transfer arose in New South Wales. Issues of land-use rezoning also came into play.
- The issue of Stamp Duty payable on the transfer of land under the agreement. It was agreed during mediation that the state government would regard the transfer of land at Ironbark Avenue as being exempt from stamp duty and that the government would write to the Commissioner for Stamp Duty in relation to Paterson Street in support of the claim that the Commissioner should exercise his/her discretion to waive stamp duty.
- The transfer of land at Paterson Street, Byron Bay, from the Tweed-Byron Local Aboriginal Land Council. An issue which arose was the sufficiency of a surrender of native title or whether a determination of native title would be required. (A consent determination that native title does not exist was made.)ⁱⁱ
- The need for the applicants to provide an accurate map of the boundaries of their traditional country in order to allow the state government to complete land status searches in relation to the lands identified in Stage II.

Tribunal mediation and negotiation assistance practices and strategies

Mediation strategy for the Northern Rivers region of New South Wales

[588] The Bundjalung People's application was at one stage part of a broader mediation strategy of the Tribunal aimed at trialling a regional agreement for native title determination applications in the Northern Rivers region of north-eastern New South Wales.

[589] In March 1998 the Tribunal commissioned the Northern Rivers Project, which sought a directed and proactive approach to the management of native title applications in the region. At the time there were 18 applications within this region. The main objective of the project was to assist native title claimants and stakeholders to consider an agreement-making process on a claim or regional basis.

[590] The project was initially endorsed by the New South Wales Aboriginal Land Council (NSWALC), the representative body for New South Wales at the time, and supported throughout the course of 1998. State and local government agencies responded positively to preliminary discussions and were open to discussing alternative ways of managing and resolving the applications in question and the land management issues associated with them. Discussions were in progress in relation to the adoption of a framework agreement which would provide a procedural tool under which state government agencies and claimants could more effectively progress and resolve native title claims. In October and November 1998 workshops were conducted with key state agencies, claimants and their representatives aimed at canvassing matters seen to be holding up the progress in resolving applications. A set of draft operating principles for the conduct of negotiations under the framework agreement were developed.

[591] The Tribunal was a key driver in the process of bringing state agencies together with claimants and their representatives. The Tribunal contracted a consultant to engage actively with claimants and the representative body and build stronger links with state agencies. The consultant was also active in intra-Indigenous mediation in this area, a necessary step in preparing claimants for negotiations with the state. The state government also provided assistance through the Premier's Office, by coordinating the various state agencies in question. However by 1999 the NSWALC declined to participate further in the project or provide financial assistance to enable the participation of claimant groups which had commenced negotiations with the state.

Assistance in the early stages of mediation (1995–1998)

[592] In 1995 the Tribunal made contact with all of the interest holders who had become parties to the lead application. Preliminary meetings were held with individual parties prior to the convening of a plenary conference of all parties. The Tribunal's role at this stage was to discuss the issues raised by the parties and to ensure that they understood the native title process. The work done at this stage had a positive effect in both reducing the number of parties to the application and in enabling the claimants to better understand the issues raised by the remaining parties. A process of bilateral mediation involving the claimants and individual parties ensued, resolving most of the issues concerning non-government parties. This set of outcomes cleared the way for negotiations to occur with the state government and the Byron Shire Council.

[593] The agreements between the claimants and the Byron Shire Council, the state government and Tweed Byron Local Aboriginal Council were negotiated under s.21 of the old Act within the framework of the Tribunal mediation process. The Tribunal's role involved convening meetings between these parties, assisting the discussions which resulted in the agreements, as well as assisting with the formatting and content of the agreements.

Summary of application information¹

Claimant applications

[REDACTED]						
22/12/1994	<u>Byron Bay Bundjalung People #1</u>	Claimant application	Active	New South Wales	NC95/1	NG6010/98
1/07/1996	<u>Arakwal People #2</u>	Claimant application	Finalised Discontinued	New South Wales	NC96/23	NG6040/98
12/12/1997	<u>Byron Bay Bundjalung People #2</u>	Claimant application	Finalised Full Approved Determination	New South Wales	NC97/36	NG6088/98
5/12/2001	<u>Byron Bay Bundjalung People #3</u>	Claimant application	Active	New South Wales	NC01/8	N6020/01

Related ILUA

Tribunal file no.

Name

Type

State/Terr.

Reg. date

Subject matter

NIA2001/001

Bundjalung of Byron Bay (Arakwal)

Area agreement

New South Wales

28 August 2001

Development

Background and chronology

[572] The lead application was filed on 22 December 1994. During the notification period a substantial amount of work was done by the Tribunal in providing information to the local community and potential parties to the application. This work included the provision of large maps to the local council and the provision of information sessions

to the council, community and interest groups and individual organisations that had developments planned for the area.

[573] Following notification of the application, 38 individuals and organisations were accepted as parties, with a range of interests including government, indigenous interests, recreation and commercial fishing.

[574] From May 1995 the Tribunal held a series of mediation meetings and public information sessions with the claimants, parties and interested groups. Considerable goodwill between the claimants and various parties, and within the community was developed over the course of these mediation meetings and information sessions, as evidenced by the agreement reached with the state, the Tweed Byron Local Aboriginal Land Council and the Byron Shire Council under s.21 of the old Act.

[575] During the run-up to the 1999 state election the present government made a commitment to establish 24 new national parks in New South Wales, including a park in the Cape Byron area. After the election, discussions were held with the New South Wales State Government in relation to the creation of a national park and the handing-over of material by the applicants to satisfy the state's requirement for credible evidence of the applicants' traditional connection to the area.

[576] The Tribunal organised a project team for management of the negotiations, including a Tribunal member, a consultant working on various applications within the region that includes Byron Bay, and staff members. Negotiations focused on a range of matters, including the preparation of connection material, tenure searching by the state government, the creation of the Arakwal National Park, intra-Indigenous mediation and negotiations for the creation of an Aboriginal Place at Taylor's Lake.

[577] In late 1999 the applicants provided the state with evidence in support of their traditional connection with the area claimed in the lead application, as well as in relation to a broader area. The state indicated a preparedness to accept that the evidence satisfied its guidelines for the settlement of native title claims, subject to an agreement being entered to address issues such as the rights and interests comprising the native title, the exercise of such rights, and compensation for past and future acts.

[578] Following the state's response, a two-stage approach to the negotiations was developed with the first stage concentrating on negotiations towards the Bundjalung of Byron Bay (Arakwal) ILUA. The ILUA was registered on 28 August 2001 and was a partial settlement of the lead application. While the ILUA did not formally recognise native title, and in fact required a surrender of native title, the ILUA did result in transfers of land to the claimant group and management involvement in the Arakwal National Park.

[579] Negotiations are currently underway for Stage II of the process.