



# The Brisbane native title claims: history, law and justice

Dr Jonathan Fulcher, Partner  
Resources and Energy





## Today's presentation

- ▶ A brief history of time immemorial
- ▶ Mabo: 3 June 1992
- ▶ The Brisbane groups in the 1990s
- ▶ The Turrbal People's claim: 1998
- ▶ The Yugara/Yugarapul people's claim: 2011
- ▶ The judgment of Justice Jessup: 27 January 2015
- ▶ Determination or dismissal?



## A brief history of time immemorial

- ▶ That there were Aboriginal people living on this spot and its surrounds in 1824 is not in doubt
- ▶ There is also no doubt that Aboriginal people have lived on this spot for millenia
- ▶ It is a remarkable feat of civilisation: to have lived generation after generation for so long a time
- ▶ It is worth acknowledging this: we seldom do



## Oxley: 1824

- ▶ But when John Oxley alighted at the spot now known as North Quay, the next 150 years was to prove devastating to that civilisation
- ▶ Regulations were passed early on to try to move Aboriginal people out of the Moreton Bay settlement, which became a settled policy when the police station was built at the Ann Street end of Roma Street in the 1870s
- ▶ The policy was largely unsuccessful in keeping Aboriginal people out of the city at night
- ▶ But the various Boundary Streets around the edge of the city even to this day attest to the existence of it



## Mabo: 3 June 1992

- ▶ This judgment did not have an instant or immediate effect on Governments or Aboriginal people
- ▶ Governments took until 1 January 1994 to pass complementary State and Commonwealth legislation to
  - validate potentially invalid Government actions (grants, licences and the like),
  - recognise and protect native title from further uncompensated and adverse Government actions and
  - set up a process for making and determining claims for native title



## Mabo

- ▶ On Aboriginal people, the effect was one of initial hope
- ▶ Hope that things might now change at last for the better
- ▶ Hope that justice may finally be served for people to assert and be recognised as landowners
- ▶ So people started to look back to rediscover their ancestors and to undertake research in order to lodge claims

## Brisbane indigenous people in the 1990s

- ▶ The claims process was initially quite simple
- ▶ The High Court determined that, based on a reading of the first iteration of the *Native Title Act 1993* (**NTA**), once a claim was lodged with the National Native Title Tribunal it had to be accepted for registration
- ▶ Registration gave native title claimants important procedural rights to negotiate about mining and compulsory acquisitions of native title for development projects
- ▶ Since 2004, registration has also given valuable cultural heritage rights under the *Aboriginal Cultural Heritage Act 2003 (Qld)*

## Brisbane groups in the 1990s

- ▶ Native title had the unfortunate consequence of dividing people up as well
- ▶ When I assisted the Port of Brisbane in the late nineties in trying to reach agreement with the various native title interests in Brisbane, we spoke to:
  - The Turrbal people
  - The Jagera People
  - The Yuggerah People (now the Yugara Yugarapul people)
  - The Quandamooka People, who claimed Stradbroke but also part of the mainland directly across from the island
- ▶ No agreement was capable of being brokered, and no one had at that stage lodged a fully-fledged claim





## The Turrbal people

- ▶ Ms Connie Isaacs and her daughter Maroochy Barambah
- ▶ Maroochy's husband Ade Kukoyi a Nigerian man
- ▶ Claimed north and south of Brisbane only from the "Duke of York" a law man from the early days of European settlement
- ▶ Lodged and registered a native title claim in 1998
- ▶ Maroochy has been an opera singer and conducts welcomes to country at State occasions



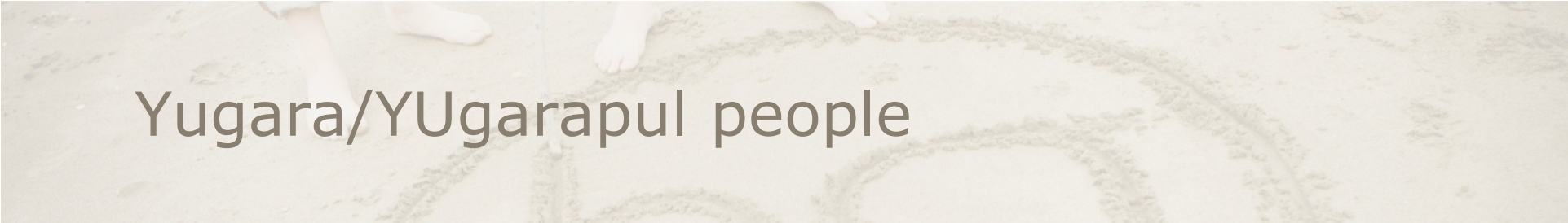
## The Jagera people

- ▶ Main family is the Bonners, related to Neville Bonner the first indigenous member of the Commonwealth Parliament
- ▶ Still active in running a cultural heritage clearance business south west of the city, but no longer have a formal claim lodged
- ▶ Commercially savvy family members whose business acumen is impressive



## Quandamooka people

- ▶ Now have a determination of native title over Stradbroke Island
- ▶ Still claim part of the mainland, although they do not have a formal claim in over the mainland
- ▶ Eddie Ruska claims a native title interest in the area north and south of what is now the Brisbane CBD
- ▶ Chairperson of their prescribed body corporate which holds their native title is Valerie Coombs, who is a member of the National Native Title Tribunal



## Yugara/YUgarapul people

- ▶ Des and Pearl Sandy, brother and sister
- ▶ Ruth James
- ▶ Descendants of 6 main apical ancestors and claimed the same claim area as the Turrbal people
- ▶ Opposed the Turrbal claim as they did not believe the Isaacs were from Brisbane



## ACHA 2003

- ▶ Registered claim status gave primary status for cultural heritage
- ▶ Turrbal claim registered in 1998, and therefore they have done the cultural heritage work for the period from 1998 to the present
- ▶ There are reasonable sums of money in conducting welcomes to country, and for State occasions there is great *kudos* in providing a welcome, publicity and community standing
- ▶ Cultural heritage clearance work also provides financial benefits to registered claimants



## The Turrbal people's claim

- ▶ This languished in the court list for many years
- ▶ The State attempted to strike it out for want of prosecution
- ▶ Federal Court case management eventually required the case to come to trial
- ▶ In 2011, the Yugara people sought to join the case as indigenous respondents to the Turrbal claim
- ▶ They were ordered instead by Justice Reeves to put a claim in for themselves

# One interpretation from the Turrbal perspective





## Yugara People's claim

- ▶ Despite having no money and no resources, the Yugara people lodged a claim with the help of several volunteers including Katharine Wiltshire and a well-known anthropologist Dr Fiona Powell
- ▶ To lodge a claim you need to authorise the applicants to lodge the claim on behalf of the native title group, the descendants in this case of the 6 identified apical ancestors
- ▶ Authorisation meetings or a meeting have to be held and quite some case law has developed around what a properly authorised claim looks like





## Funding

- ▶ A system of representative bodies is funded by the Commonwealth to assist claimants to make native title claims and move them towards determination
- ▶ For Brisbane, that body is Queensland South Native Title Services (**QSNTS**)
- ▶ QSNTS acted briefly for the Yugara people, but eventually withdraw support because of their concern that the claim lodged by the Yugara people was not properly drawn up, and because they wanted to do more research over the Greater Brisbane region



## The trial

- ▶ This was held over two or three weeks in late 2013 and for a few more days in 2014
- ▶ The Yugara people spent about 50% of their trial effort in opposing the Turrbal people's claim
- ▶ This paid off, as the judgment handed down on 27 January this year made it clear that the Turrbal people could not claim a continuous and unbroken genealogy back to the Duke of York, nor from the Duke of York down to them



## The judgment

- ▶ But in the judgment the Yugara people fared only a little better than the Turrbal people did
- ▶ Unlike the Turrbal people, his Honour found that the Yugara people could claim back to apical ancestors that lived in the greater Brisbane region, but those ancestors were not from the area of the claim
- ▶ Last Wednesday, his Honour asked for submissions as to what final orders he should make in the case
  - Determination
  - Dismissal
  - Continuation to gather more evidence



## The main parties

- ▶ The State seeks a determination that native title does not exist
  - Their case derives from the decision of the High Court in *Yorta Yorta*
- ▶ The Yugara people and the Turrbal people asked for more time and sought the dismissal of the other's claim but not their own
- ▶ Eddie Ruska sought to be heard as a possible native title holder, but really just wanted to preserve the position by seeking dismissal of both claims but for there to be no determination



# QSNTS

- ▶ QSNTS intervened to argue that the Court had no power to make a determination and for the claims to be dismissed so that further research could be undertaken
- ▶ His Honour has reserved his judgment and has given more time for the indigenous applicants to appeal



## The sadness in Des and Pearl's eyes

- ▶ The real sadness of this case for me is that Des Sandy a gentle, kind Aboriginal man with an unrivalled knowledge of the Aboriginal places and stories of the greater Brisbane region was cross-examined during the trial
- ▶ The State's counsel asked questions which would set up the Yorta Yorta argument that the State competently ran throughout the trial
- ▶ *So Des are you saying you only rediscovered your Aboriginal history in the 1990s when your started researching it?* Yes, I guess that's right, murmured Des from the witness box: right there, out of his own mouth, is "substantial interruption"



## Last claim standing

- ▶ Despite the fact that the Turrbal people have not been able to establish to the Federal Court's satisfaction, they will remain the benefactors of the State cultural heritage laws
- ▶ “Last claim standing” rule
- ▶ This is an unusual and less than optimal result, if his Honour's judgment is not successfully overturned by the Turrbal people on appeal (should they decide to do so)

# The ALRC Native Title Enquiry

- ▶ This is looking into aspects of native title law and trying to work out ways to improve access to justice for Aboriginal people, and to try to move beyond a colonial attitude to native title
- ▶ This means ameliorating the effects of the judgments like *Yorta Yorta*, and making this area of legal practice less daunting and expensive for indigenous claimants
- ▶ Authorisation, principles of continuity of connection and the characterisation and nature of native title under the definition in section 223 of the NTA were all issues in this case, and are being examined by the ALRC



## The Victorian and NZ solutions

- ▶ May be we need to think of another way
- ▶ Victorian legislation recognises traditional ownership and provides justice, recognition and respect for those people in that State who, like the Yugara people, cannot make their claims stick in native title
- ▶ Justice McHugh said at the end of *Western Australia v Ward* that a tribunal might be better than the High Court to hear and make recommendations about claims
- ▶ This is what the Waitangi Tribunal in NZ is like



Let Des have the final word ...

- ▶ In the transcript of his evidence at trial, Des said:

*Because if I don't come and be a party to this native title procedure, then I will become obsolete or disenfranchised. I wouldn't be Uncle Des Sandy any more; I don't know who I'd be. I don't want to gain riches or anything like that; its about a connection to country and just what I've been doing for – for my whole life. You have your rights already, your personal rights. But take that away, taken away maybe by a native title claim made by someone else, and then you don't exist any more. So that's it.*



Thank you

Dr Jonathan Fulcher, Partner

Phone +61 7 3024 0414

Email [j.fulcher@hopgoodganim.com.au](mailto:j.fulcher@hopgoodganim.com.au)

[www.hopgoodganim.com.au](http://www.hopgoodganim.com.au)

