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History Meets the New Native Title Era at the Negotiating Table



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A case study in rec

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Sue Jackson

COVER DESIGN

**Title: Rubibi-gun Bugarri-garra
or Rubibi Dreamings**

Designed by: Patricia Mamajun Torres

Language group: Yawuru

Skin group: Banaga

Aboriginal name: Mamajun, after a red
berry that grows along sand-dunes
north of Broome, WA

STORY OF DESIGN

The cover design depicts three important Dreaming histories of Broome, WA. The snake represents Bulany, the water-snake, 'bringer of rain'; the three-toed footprints of Marala, the Emu-man, a creator of laws for this area; the footprints of Yila Rayi, the Dog Spirits that protect Minyirr area. All are Yawuru histories from Broome, WA.

WHEN HISTORY MEETS THE NEW NATIVE TITLE ERA AT THE NEGOTIATING TABLE

**A case study in reconciling land use in Broome,
Western Australia**

– A Discussion Paper –

Sue Jackson

**NORTH AUSTRALIA RESEARCH UNIT
The Australian National University
Darwin**



First published in 1996.

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About the author

Sue Jackson is a Unit Visitor at NARU whilst enrolled as a PhD student in geography at Macquarie University in Sydney. Her PhD research on land use planning and coastal management in north Australia has taken her to Broome, where she has worked for Aboriginal organisations providing advice on land management and planning issues arising from the assertion of Native Title. Active in non-government conservation organisations, Sue is the Northern Territory Executive member of the Australian Conservation Foundation and a former Co-ordinator of the Environment Centre NT.

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Abstract

This paper argues there are inherent problems for Aboriginal people engaging in the mediation processes established by the Native Title Act. The assertion of Native Title, and the National Native Title Tribunal's attempt to accommodate Aboriginal people's social, economic and cultural aspirations in decisions affecting their land and resources, exposes the fundamental power imbalances within the Australian community. Strongly remembered historical experiences are integral to this imbalance and are relevant to the positions Aboriginal people take today; they inform their assessment of their capacity to influence today's decisions and to negotiate as equals.

As Aboriginal communities respond to the new processes under the Native Title Act, they will be challenged to formulate perspectives on the future use of land (and/or sea) held under Native Title, and to actively participate in debates about their community's role in future decisions over land use, economic opportunities, sustainable development and race relations in the region. This has been the experience of the Broome Aboriginal community. Aboriginal organisations seeking ways of providing their communities with strategies for greater control will require sufficient resources and time in which to formulate preferred community development paths. Unless the current structural problems and resource inadequacies facing Native Title holders are addressed the mediation process runs the risk of entrenching the current land use development paradigm and foreclosing alternative structures and processes which would accommodate Aboriginal aspirations.

The ability of the Tribunal process to convey understanding of Aboriginal society and to reconcile differing rights and interests in land/sea ownership, use and management in Broome, exposes the kinds of problems that will be encountered as the larger Australian community tries to embrace the goal of reconciliation. Broome's recent experience provides evidence of the difficulties of translating and implementing that national goal at the local community scale.

WHEN HISTORY MEETS THE NEW NATIVE TITLE ERA AT THE NEGOTIATING TABLE

**A case study in reconciling land use in Broome,
Western Australia**

Introduction

Immediately following the passage of the Native Title Act 1993, the prospects for reconciliation within the Australian community, public acceptance of indigenous land and sea rights, and the likelihood of meaningful participation by indigenous peoples in land use and land management decisions, were seized upon and talked up during an intense public debate about the future of relations between indigenous peoples and Australia's wider community.

But how do these predictions fare as the Native Title Act is applied to a particular region in which Aboriginal communities seek to advance their Native Title rights? In Broome, Western Australia, the Native Title process is currently placing immense pressure on the Aboriginal community asserting their Native Title rights. Notwithstanding the day-to-day demands of reviewing and intervening in local decisions about their country, the Aboriginal community is being challenged to formulate perspectives on the future shape and form of the township and to actively participate in debates about their role in future decisions over land use, economic opportunities, sustainable development and race relations in the region. The experience of acknowledging, mediating or disputing Native Title rights is also testing the ability of local government, sections of Kimberley industry, and the wider community generally, to support and commit themselves to reconcile competing, although not always conflicting, land use interests.

This paper attempts to provide an historical overview of the marginalisation of the Aboriginal population of Broome from development planning and land use decisions affecting their traditional country (see Jackson, in press). An historical background is crucial to an understanding of the contemporary degree of disaffection in the Aboriginal community and, above all, important because it is the experience of past events and the grievances suffered which people bring to the negotiating table when pursuing Native Title claims (Sullivan 1995b). The recent history of the

exclusion of Aboriginal people from plans and planning processes informs their assessment of their ability to influence today's decisions and to negotiate as equals. This history can not be dismissed as a thing of the past. If reconciliation is to be achieved and just outcomes arrived at through mediation, non-Aboriginal communities, or parties to the process, will have to accept some responsibility for these grievances.

Further, the paper aims to describe the community planning initiatives and efforts of the Aboriginal community of Broome, particularly since the beginning of the Native Title era. Development planning for Broome has never advanced the view that it should have a part to play in redressing the imbalances in power, autonomy and socio-economic status between sectors of the community. Instead the over-arching objective of all land use plans, no matter what the scale, has been to provide opportunities for economic growth. It is assumed that the growth generated will translate into higher standards of living across the community. Yet this has not materialised, resulting in a significant level of discontent in the Aboriginal community. The assertion of Native Title and the Native Title Tribunal's attempt to accommodate Aboriginal people's social, economic and cultural aspirations in decisions affecting the land resources of the town, has exposed the fundamental power imbalances in the community and the impediments these pose. In response, Aboriginal community leaders in Broome are seeking ways of providing their communities with strategies for greater control of the economic, social, environmental and cultural elements of their lives.

It is argued that in Broome, the Native Title process and structures designed to recognise and protect the land and sea rights of indigenous people are fraught with substantial difficulties. The experience of the Native Title determination and mediation process in Broome to date, gives little hope for an equitable outcome. Arguably the rapid pace of economic development, the impatience and ignorance of parties declaring an interest in the negotiations, and the legacy of a high degree of disaffection in the Aboriginal community, may be viewed as inevitable impediments in any situation where a marginalised community attempts to come to terms with newly acknowledged entitlements. However, these features are currently playing a part in weakening the strength of the Native Title applicants' position at the negotiating table. Since parties are being informed by the Tribunal President that the substance of Native Title will be constructed during this process, it is critical that negotiating strengths are balanced. Perhaps of equal importance is the need to challenge the view that it will be

the Native Title determination process which constructs or creates Native Title; a view at odds with the High Court's determination that Native Title exists in the common law and now deserves recognition.

The inherent disadvantage facing Aboriginal negotiators pervades the mediation process, as does the desperate lack of resources facing the Native Title applicants. How is an already disadvantaged and under-resourced sector of the community to develop its negotiating position to ensure that it is representative of all Native Title holders and to evaluate a suite of trade-offs and their implications in a political climate of hostility and pressure on immediate outcomes in the name of certainty? In order to reconcile differences and to ultimately change power relations in a place like Broome, structures and processes of marginalisation require attention and reform. The haste with which the mediation process is progressing leaves insufficient time to address the underlying nature of the problems and to develop new structures and processes which will accommodate Aboriginal aspirations.

There are very obvious lessons from this process for Australia's efforts to address the place of Aboriginal people in Australian society in the near future. The Native Title Act was formulated with the view that the mediation process overseen by the Tribunal will, in itself, be an act of reconciliation. The ability of the mediation process to convey understandings of Aboriginal society, rights and current disadvantage and to reconcile differing land rights, interests and aspirations over land/sea use and management, exposes the kinds of problems that will be encountered as the larger Australian community tries to embrace the goal of reconciliation. The experience in Broome provides evidence of the difficulties of translating and implementing that national goal at the local community scale.

These features of the process must be acknowledged as a major impediment and acted on immediately. Until the Commonwealth and State governments accept responsibility for this and other weaknesses in the framework of the National Native Title Tribunal's mediation process, the Native Title rights of Aboriginal communities such as Broome's are likely to be diminished rather than fully enshrined and reflected in all future decisions affecting traditional country held under Native Title.

Land use history in Broome: relations between Aboriginal and non-Aboriginal people

The Broome Shire is one of four local government areas which make up the Kimberley region of north Western Australia (see Map 1). The Shire extends over the western most portion of the Kimberley covering an area of 56 000 sq km. Broome Shire has an Aboriginal population of 38.5% when census figures are adjusted to take into account visitors to the Kimberley recorded on census night (Crough & Christophersen 1993, 23). The Aboriginal population within the township of Broome is estimated at 21.2% according to 1991 Census figures.¹

Aboriginal people's aspirations for land and sea rights have not been met in Broome: they directly own very little land within the township and have been largely ignored by land use and marine resource decisions, except in instances where State or Commonwealth heritage legislation has demanded consideration of Aboriginal culture. Western Australian governments have consistently refused to introduce land rights legislation preferring to maintain paternalistic administrative structures such as the current one which sets aside mostly small land holdings to be held in trust by a government appointed state-wide body, the Aboriginal Land Trust.² Within Broome there are a number of 'town reserves' which are administered in this way.

For over a decade Broome has been the subject of considerable development pressure brought about by strong growth in the tourism industry and a consequent population increase. The WA government's current view of Broome, as both the future Gold Coast of WA and the 'gateway' to the Kimberley region, is directing government policy to intensify tourism development in the Broome Shire, for example there are plans to relocate and expand the newly internationalised airport. Value is also placed on diversifying and developing the economy with sustainable natural resource-based industries such as pearling and aquaculture.

Prior to the recent period in Broome's history there was far less competition for land and resources and less emphasis placed on the need to

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1. Both these figures are likely to be an underestimate because of the common numeration problems when conducting censuses in Aboriginal communities (Kimberley Development Commission 1993, 27).
 2. For a brief history of Aboriginal land rights in Western Australia see Pierluigi (1991).

co-ordinate and plan for Broome's development. The town grew with the pearling industry and its economic state was closely tied to the well-being of that industry. Largely absent from popular historical material relating to Broome is the devastating impact of settlement on the Aboriginal traditional owners of Broome and Aboriginal people within the broader region who maintained traditional connections to Broome. In negotiations with the pearling industry and the Shire under the auspices of the Native Title Tribunal's mediation process, Aboriginal negotiators often referred to the absence of an Aboriginal presence, or positive image, from the places and messages which signify the town's history, make-up, and character. Furthermore, many of the historical images or records, for example those held in the Broome Museum or the contemporary pearling references used to evoke a bygone era for tourism promotion, remind Aboriginal people of the brutal treatment they received at the hands of the pearlers or the pastoralists when their human rights were so systematically abused.

For the purposes of this report, the recent history of relations between Aboriginal and non-Aboriginal people over land use and development planning is documented. This history focuses on the current period of intense change in the form and character of the Broome township. The period from 1930 onwards is referred to briefly. Archival material, oral histories and more detailed examination of secondary source material would be required to shed more light on the days of settlement through to the 1930s.

'They push us back...': government policy from 1930-60

Most significant during the period prior to the establishment of the Broome Shire Council in 1960, was the intense degree of regulation which Aboriginal people were subjected to in every aspect of their lives. During the period of 1930 to 1960 relations between local authorities and the Aboriginal community over land use were regulated by the State administration and were focused on living area policies. It appears that policies were formulated in the absence of Aboriginal people's views on matters directly affecting their welfare. The administration was concerned with the material condition of Aboriginal people whom they considered as transient to the town - hence the emphasis on reserves as camping areas. Government policy, including that of the local Broome Road Board, was extremely paternalistic.

Perhaps one of the most intrusive and well-remembered measures was the curfew which restricted the movement of Aboriginal people entering the town right up until the 1960s. Scougall, in his study of Mallinbar (Broome's Kennedy Hill town reserve - see Map 1), traces Aboriginal resistance to this period of control and the following era of assimilation. He identifies the former period as one in which the State government:

relied on racially discriminatory legislative provisions in an attempt to force Aboriginal people to live on town reserves. During this period almost every aspect of an Aboriginal person's life was subject to official control. The creation of town reserves was the primary means of achieving such control in and around country towns (Scougall, chapter 3).

The Native Administration Act (1905-1941) gave the Department for Native Affairs the power to control movement, residence and place of work. Section 13 was used to regulate the movement of people over town boundaries. There were other restrictions on residing in town; for example, businesses employing Aboriginal people were responsible for their housing. This regulation appears to have been widely abused according to primary sources. A memo from the Commissioner of Native Welfare to the Commissioner of Public Health in 1955 illustrates the failure of the administration to enforce local authorities, other State departments and businesses to meet their legal obligations:

The Commissioner [Native Welfare], during his visit to Broome last September expressed to at least two of the main employers of native labour, Messrs. Male (Chairman, Road Board) and Kennedy, his unqualified dissatisfaction with the accommodation of native employees in Broome. Presumably they are committing a breach of the regulations but then so also is practically every employer in Western Australia and it is somewhat late in the day now for prosecution (11 March 1955).

Records of the Native Welfare Department gathered by Scougall provide evidence of the appalling standard of living and state of health of Aboriginal people during this period. The Broome Road Board and other administrators appear to have wanted to regulate very closely Aboriginal living conditions and areas. For instance, in 1952 the Secretary for Local Government requested permission from the Commissioner of Native Welfare to pass a by-law which would stop Aboriginal people from residing on the foreshores. The request was refused.

By the 1950s the need for a town reserve had been identified by government departments. The concept of a reserve for Aboriginal people within 'convenient reach of the township where their mode of living could

be under some control' was mooted in a letter to the Broome Road Board from the Commissioner of Public Health (28 January 1955). Scougall maintains that town reserves were designed to physically segregate the Aboriginal population from the non-Aboriginal. They were to be built on land of little or no economic value to the growing town, ie. often outside the centre of town. This was a common feature of land use in the history of the settlement and development of towns and regions across Australia.

Scougall notes the way in which Aboriginal people in Broome attempted to defy regulation during this era:

In reality this proved to be wishful thinking. Many Aboriginal people chose to stay put in their camps rather than move to the outskirts of town. The makeshift camps adjacent to Broome's Chinatown, for instance, continued to defy the intention of government, much to the annoyance of most of the non-Aboriginal population. In 1955 the Commissioner of Native Affairs lamented that:

'The adult natives are most reluctant to leave their "homes" by the sea or mangroves which are very convenient to them' (Scougall, chapter 13).

Places that are occupied by groups of Aboriginal people today were Aboriginal camps during this earlier era: Kennedy Hill, Morgan's Camp, One Mile (which was an old drover's camp) and the 'Slaughterhouse Block' near the current Morrell Park area.

Broome's first reserve, Kennedy Hill, was declared in 1957 under the Native Welfare Act. In 1961, in response to the state of Aboriginal camps, a decision was made to establish a reserve 'one mile out of town, which would take care of the most difficult type of native' (Newspaper clipping headed 'Native Welfare Minister in Broome' held in Broome Museum).

Policies designed to restrict and control the movement of Aborigines in the town area are commonly referred to by the older members of the Broome Aboriginal community. Frank Sebastian, a member of the Rubibi Working Group (currently representing the Native Title holders in Broome), recalls this era in an interview I conducted with him last year:

FS: ...They push us back until people get a reserve at One Mile, they push us back because they want this for a hotel or for an office or something. One Mile (town reserve) used to be a drover's camp. It was full of bullshit and ticks - an old drover's camp... They want to push us to the creek (Dampier Creek).

SJ: Was that when people had to stay out of town at night?

FS: No that was earlier in the 40s and during the war. Anne Street was a reserve but they gave it to Homes West to build houses on. They plucked this person or that person and kept half-castes there and chucked the blacks out - more or less.

(Field Work Interview 25 July 1994)

When asked about their views of Broome's recent history, many Aboriginal people will cite the 'curfew' policy as evidence of the regulation and harassment of their relatives and communities which occurred until the 1960s. The following quote illustrates how events of some decades ago are seen in relation to very recent occurrences. The historical power relationships between sectors or groups in the community are seen to have changed very little in the eyes of many Aboriginal people. Theresa Barker of the Yawuru Women's Centre, Jarndu Yawuru, describes the recent physical changes in Broome:

When you talk about describing the changes you talk about the development of the town. If we can go back twenty years there's been a great change, and where the change has been it hasn't had any Aboriginal people involvement in it. We have had no say to this planning. The change has been very quick since the seventies and once again we've been left behind through this process. Some of us are thinking that we should have been involved. And we're aware that with this process, with past government policies, Aboriginal people had no say, we had no say, so therefore we couldn't be involved with the development. At the Shire level, the Shire planning, they have a planning system which doesn't accommodate the Aboriginal people's views. If we can go back twenty years ago, most of us lived in camps, lived on reserves, lived behind other people's houses. And it's been very, very hard to live under those conditions where you're expected to go to work and look after your family, and also have this barrier that stops you doing what you want to do for the better of your families. I honestly feel sometime that if the Aboriginal people had been more involved in this process there would have been an understanding between developers, Shire and Aboriginal people...

The last couple of years it's been really a great struggle simply because we're not allowed to do any of our normal hunting and gathering. Traditional values and traditional gathering is slowly deteriorating from this continual development. Once again people aren't talking to the traditional owners, the natives of this country, they are just going ahead and buying land, building houses, with no consultation, they don't talk to people, so it's very hard for the Aboriginal people (from Field Work Interview 23 March 1995).

Land use decisions of the 1960s were taken with a view to ensuring the smooth administration of a settler township and to maximising its growth opportunities. For example, within the Department of Native Welfare there was opposition to Aborigines purchasing land or leases in Port Hedland according to Scougall. Private leases would 'retard the growth of the town' and limit the government's ability to control people and their lives. The Welfare Department, unwilling to acknowledge that Aboriginal people would continue to live in Broome in distinct communities, gradually resigned itself to assimilating the Aboriginal population into the larger township. Scougall says:

with the policy on 'control' exposed as a blatant failure, the 1960s saw a new policy direction: 'assimilation'. Now the official view was that the town reserves should be developed to prepare residents for life in the mainstream of the towns. The idea was that these reserves would be phased out as residents gradually integrated into the towns (Scougall, chapter 3).

The practice of building 'transitional' housing of a lower standard than other public housing in which Aboriginal people were to be trained in the ways of urban living before progressing to 'normal' standards was an essential arm of the assimilation strategy. For example, a 1968 planning report, referred to in the next section, recommends 'transitional housing' for Aborigines as it is:

both embarrassing and necessary, not only for initial training in the use of sanitary and other domestic equipment, but also to accustom aborigines (sic) to life amongst neighbours of European race (Johnson et al. 1968, 28).

Phillip Matsumoto, a past employee of the Broome Aboriginal Resource Agency, Mamabulanjin, recalls this era of poor standards, government regulation and neglect:

PM: Housing for Aboriginal people was very poor. If you go back ten or fifteen years ago housing was very bad. Homes West had an idea of just taking people out of communities, putting them in a sort of transitional home which is no better than coming out of the community, putting them there as a training area, and then shift them out of there and put them into a real European type of house. But they never worked [the policy]. They left them in there, you know, to live, to live the rest of their lives.

SJ: And where were those transition houses?

PM: Guy Street, some put into Frederick Street, Robinson Street, and the rest of them were put into Anne Street.

SJ: And how were those transition houses different?

PM: Poor quality, corrugated iron, they were supposed to be in a two bedroom unit but they also had cooking and dining in the same bedroom, almost in the bedroom area. People weren't trained to cook with gas, they cooked outside with wood stoves

(Field Work Interview 8 August 1994).

Local government for Broome

The town of Broome was the focus of an early planning exercise conducted in 1968 by researchers from the University of Western Australia. This study gave some attention to the social composition of the township, identifying residential segregation according to ethnicity or race. However, they preferred to leave the resolution of emerging and potential social problems to other professions:

The sheer size of the 'coloured' (non-European) sector of the community - fifty percent of the total population - demands that adequate provisions be made for the needs of these people. Broome is populated by a community unique in Australia. It is a highly complex one and whilst being of absorbing interest to the sociologist, it does not ease the problem of the planner. It must be emphasised here that any proposals that are put forward are done so in the full knowledge that they could stand or fall on an understanding, or otherwise of the delicate social balance of the town. At the same time, it is realised that to profess such an understanding would be pretentious: if not downright foolish (Johnson et al. 1968, 18).

The University of WA study predicted a heavy reliance on the tourism industry and its steady growth in Broome. The twin problems of a small population base and remoteness from large population centres were identified. It was claimed that Broome could only flourish if:

living conditions in the north-west can be made attractive enough to encourage permanent residents. This means not only the adequate provision of schools, hospitals and community facilities, but the creation of a pleasant environment and comfortable housing in the settlements (Johnson et al. 1968, 4).

The emphasis on growth and the encouragement of conditions conducive to increased settler migration is a theme or objective common to all

development planning studies since carried out in Broome. The attention given to making the town attractive to outsiders - non-residents and holiday-makers, seasonal workers, and those who move to Broome for a few years of work in the north - is a feature of the current debate driving land use decisions. Making the needs of transients and outsiders a priority is frequently at the expense of the original and permanent inhabitants the traditional owners and many of the Aboriginal people who have moved to Broome over the past decades since they were dispossessed of their land within the Kimberley region.

During the 1970s period the influence of the Broome Shire Council expanded and as the most local of government authorities it continued to impact directly on Aboriginal people's lives in a negative way. Broome is not an isolated case according to Rumley, whose work on relations between WA local governments and Aboriginal people shows how unresponsive local government has been to the needs of its Aboriginal constituents within their jurisdiction:

in many local authority areas in Western Australia since the turn of the century, the Aboriginal population has at best been ignored or neglected and at worst segregated, excluded and restricted. Aborigines have been treated as marginal people in every sense of the word and as a result have rarely had the opportunity or inclination to participate in local government affairs (Rumley 1986, 1).

The historical pattern of exclusion and discrimination by local government authorities against Aboriginal people still persists in a number of ways to the present (Rumley 1986, 4).

It is worth noting that until May 1985 only rate payers and, hence, owners and occupiers of rateable land, were able to vote in local government elections (Department of Local Government 1984). This practice would have discriminated against Aboriginal people who rarely owned property or lived in rateable housing (Phillip Cox, pers comm, 10 August 1994). Rather than providing the services which were rightfully expected by any member of the community, the Shire established a different and oppositional relationship with the Aboriginal community who were residing in the town reserves.

Scougall's report documents a legacy of poor service delivery, intolerance to differing domestic standards, and hostility to the occupation of valuable land by the Kennedy Hill Reserve in particular (Scougall, chapter 1). In the early 1970s the Broome Shire Council supported the vacating of the Kennedy Hill Reserve for tourism purposes. Pressure was exerted to close

the town reserve, however, the absence of alternative accommodation prevented the State government from doing so, as a letter to the Council shows:

Thus it can be seen that my Department can make no firm commitment as to the abolition of Reserves in Broome, but will be closely watching the situation, and will close down Reserves whenever it is made possible by the provision of alternative accommodation (Letter from Minister for Community Welfare dated 13 November 1973).

With the establishment of the Broome Shire came the administrative structures to facilitate greater planning effort, particularly under the guidance of the Town Planning and Development Act 1926 (WA). The current Town Planning Schemes were developed during the mid to late 1970s in the midst of the failing 'assimilationist' period. It is hardly surprising that the new planning documents failed to address the marginalised position of Aboriginal people when the very existence of Aboriginal living areas within the town had been so opposed by local government. A Department of Community Welfare file note is critical of the town planners in preparing the current Town Planning Scheme. It says:

In the development of this town scheme, the Town Planners have made no attempt to:

a) consult with Aboriginal groups, organisations or agencies (such as the Department of Aboriginal Affairs, Department for Community Welfare or the National Aboriginal Conference).

b) take into account existing legislation which protects Aboriginal interests, specifically the Aboriginal Heritage Act 1972-80 [WA].

Consequently, the interests of Aboriginal groups and their future aspirations have not been accommodated, and in fact, conflict with a number of proposed developments within this Town Planning Scheme.

The current town planning scheme provides no specific provision to accommodate the land needs of an expanding Aboriginal population within the Broome Town Boundary (WA Department of Community Welfare).

The Department of Community Welfare was also critical of the failure to seek public comment on the seven coastal management areas adopted under the Town Planning Scheme, and of the scheme's silence on the principle of public access to all foreshore and coastal areas within the town. Furthermore the Department emphatically objected to the 'total lack of consultation between the Shire of Broome and the town planners and

Mallingbar Community (Kennedy Hill) in relation to the re-zoning of this land and the proposed development which will follow' (WA Department of Community Welfare). (The re-zoning was to facilitate a tourist development discussed below.)

Broome boom

During the late 1970s property values were affected by the growth in tourism. The competition for coastal land for tourism development intensified resulting in a significant flashpoint between tourist developers, the Broome Shire Council, and the Aboriginal community over the Kennedy Hill Reserve. Conflict similar to that expressed over Kennedy Hill was to become a lasting feature of most land use debates. A letter from the Mallingbar Community to the Minister for Lands in 1984 illustrates how vulnerable the community felt to property speculation and the fears they held for protection of their sacred sites:

Although the Wedge Industries Tourist Development project was not approved, our Community is still concerned about future development of this sand dune area by the local Shire and other developers...

It is because of this constant threat from the Shire and other business interests that we would like to apply to your Department for an extension of Kennedy Hill Reserve No. 25790. This will ensure absolute protection of the Site Complex in both the short and long term future of the Kennedy Hill sand dune area. ...

We want control over this land so that we can protect it from future development by business interests and the Shire. Already, this area has been interfered with, by the establishment of the first tank for Broome's Water Supply (15 February 1984).

Scougall's account of the Kennedy Hill dispute details the growing pressure from tourism on land occupied by Aboriginal people:

Tourism is the dominant industry on Broome. With the rapid growth of the town from the late 1970s onwards, what was once regarded as waste land on Kennedy Hill, increasingly came to be seen as prime real estate because of its commanding views over Roebuck Bay and its close proximity to Chinatown. With the growth of the tourism industry, it was inevitable that the 'undeveloped' reserve site would eventually attract the attention of the developers (Scougall, chapter 3).

This was an important time for Aboriginal people in Western Australia, as they demanded land rights, protection of sacred sites and areas, and greater security of tenure for their living areas. During this period the Aboriginal

Heritage Act (WA) was called upon to assist Aboriginal people to protect sites of cultural significance. For example protection under the Act was sought for the ceremonial sites at Kanin and protected area status for the site complex at Kennedy Hill was recommended by the Museum in the late 1970s (see Map 1 where Kanin is referred to as Fisherman's Bend). After considerable lobbying of government the Mallingbar community, the National Aboriginal Conference and the Kimberley Land Council were successful in preventing the re-zoning of Kennedy Hill resulting in a Ministerial direction to the Shire to designate the Aboriginal reserve appropriately within the Town Planning Scheme. Unfortunately, over the following years the Shire's reluctant recognition did not evolve into respect for Aboriginal people's right to reside in a distinct community on prime coastal land in the town. In fact over a year after the Shire had been directed by the Minister for Planning to zone the Kennedy Hill area to allow for the continuation of the Aboriginal Reserve, the Shire was writing to the prospective developers reiterating their support for a tourist development:

I advise Council's policy has not changed and it has recommended that the site be zoned as a special site for tourist development. I have enclosed details of Council's deliberation on the objection to the proposed development which we understand is still waiting a formal decision from the Hon. Minister for Planning (Letter from Broome Shire Clerk dated 19 October 1984 cited in WA Hansard 21 November 1984, 4381).

The following debate in the WA Legislative Council records the Shire's determination to facilitate tourism development at the expense of the Aboriginal community:

So, as at 19 October, the Shire still supported the proposition that the Lookout Hill (neighbouring Kennedy Hill) site be developed. The Shire advised the Minister for Planning that it would not budge on the question of changing the zoning. If Members recall, I said that Mr Farker (Planning Minister) told the Council that, if it didn't agree to change the zoning of the area back to Aboriginal reserve, he would not agree to the Council planning scheme. The Shire has rejected that proposition, and is insisting that the land be rezoned (WA Hansard, 21 November 1984, 4381).

Evidence of the on-going lack of respect for the community living at Kennedy Hill can be found in the newspaper accounts of numerous bulldozing incidents in the Kennedy Hill area by the Broome Shire over the

years following the re-development controversy (see Broome News,, July 1986, and correspondence to Kimberley Land Council, 4 June 1986).

Further research is required to accurately document the history of the other reserves in the Broome area. What is clear, however, from interviews with older members of the Aboriginal community is the pattern of resumption of reserves as the town expanded. Aboriginal people in Broome today speak of the Native Hospital Reserve site, the reduction in the Airport/Djaigween Road reserve to accommodate the airport and One Mile's reduction to allow for the Broome Road re-alignment (see Map 1). Many people also recall the loss of the Anne Street Reserve to public housing.

Conflict over land use decisions and the government response

By the early 1990s clashes between developers and Aboriginal people had reached a sufficient level to focus attention on the impediment Aboriginal people and their heritage 'claims' posed to further economic growth. The Broome Shire Council formed the view that Aboriginal people were using or manipulating the Aboriginal Heritage Act (WA), which afforded their sites/places some degree of protection, as a 'de facto' planning tool (Minutes from Special Meeting of Broome Shire Council, 24 October 1991). Although this view discredits the integrity of the land and heritage claims of Aboriginal people, it indicates an implicit understanding of the powerlessness of Aboriginal people to influence land use and management within the region. Until the current Native Title applications were lodged by the Aboriginal community of Broome, the Shire had given little attention to addressing the foundations of that powerlessness. Although consistent efforts were made to identify the appropriate Aboriginal representatives to consult with and to document the location of sacred sites in the area, there has always been a reluctance to devolve power and involve Aboriginal people in the decision-making process as a community with equal rights to have their values recognised and aspirations met. In the few years prior to the implementation of the Native Title Act a greater effort was made to consult with Aboriginal people, although this did not involve accepting the part that negotiation should play in ensuring effective participation - rather it assumed that consultation was sufficient.

There is little doubt that the conflict between various Aboriginal groups played a part in obstructing Shire Council efforts to consult with the Aboriginal community. However, as will be shown later, the approach

taken by the Shire has failed because it played on divisions and, until recently, did not actively support Aboriginal people's initiatives to establish their own representative structures which empowered the appropriate people under Aboriginal law. Claims that the Shire behaved mischievously in regard to consultations with Aboriginal people during a long-running dispute over the declaration of the Lurrurjarri Heritage Trail along Broome's northern coast (a proposed Protected Area under the Aboriginal Heritage Act) were made by Broome's Mamabulanjin Aboriginal Resource Centre in 1989:

It is with great dismay that my committee read your Shire Clerk's letter of the 5 May 1989 to the Site Documentation Officer of the West Australian Museum. This organisation strongly disagrees with the claims made about [a particular person's] status. In fact we acknowledge [this person] as one of the most important Custodians for this area. Also the way your Shire went about this matter has been divisive and has caused disharmony. We trust this is a coincidence and not a deliberate attempt to divide the Aboriginal Community³ (Correspondence from Mamabulanjin Aboriginal Community dated 2 November 1989 recorded in the Broome Shire Council Minutes of 14 November 1989).

Moreover the Shire's approach was based on the misguided view that Aboriginal heritage can be accommodated or protected by identifying 'sacred sites', mapping them and clearing the remaining land for development. This policy is reflected in the Shire's response to a major land use planning strategy conducted by the State's planning department where it said:

Given the importance of Aboriginal heritage matters within Broome, the Shire Council should provide clear guidelines on how to handle development proposals which may be affected by Aboriginal heritage matters. Aboriginal sites should be immediately identified and documented to enable any developer or the community to know what land is unencumbered (Broome Shire Council 1992, 1).

Patrick Sullivan, an anthropologist who has worked in the Broome area for many years, is critical of the approach taken in Broome and calls for a better understanding of Aboriginal heritage; one which recognises the value of cultural practices and relationships amongst people instead of isolating objects or places from those relationships:

3. I have not included the custodian's name in the interests of privacy.

Perhaps, then, the word 'heritage' should be banned from any discussion of Aboriginal culture as it doesn't at all do justice to this living reality. Certainly there are places and objects of great value that need respect and protection. But concentrating on these and neglecting living breathing people carrying out their religious, family, economic and social obligations is an absurdity. Unfortunately, this is the approach underlying the planning of development around Aboriginal interests in Broome today. It is a short-sighted approach as a living Aboriginal culture could be as much an attraction of Broome as is the recreation of an Asian past (Sullivan 1995a, 1).

Aboriginal people's resistance to development decisions made with no regard for their rights or welfare had, by 1991, reached a peak considered unacceptable by tourist developers, the Broome Shire and some quarters in the State government. A draft report prepared for the Minister for Aboriginal Affairs in 1991 titled 'Impediments to Development Proposals in Broome, Western Australia', succinctly describes the political imperatives driving the resolution of conflict over land use in Broome in its opening paragraph:

Concerns have been expressed over difficulties in getting new tourist development projects approved for Broome. The concerns have been raised by members of parliament, councillors and officers from the Shire of Broome, business people from Broome as well as developers proposing to undertake tourist resort and associated tourism developments. The constraints arising from Aboriginal heritage and cultural values of sites under consideration for tourist facility developments were seen as a major concern (Marlborough & Waterman 1991, 1).

This report made a series of recommendations which were designed to address the root causes of conflict: lack of Aboriginal participation in the planning process, flaws in the land use planning and acquisitions processes which exclude Aboriginal heritage assessments and the Department of Aboriginal Sites, and the absence of Aboriginal involvement in social and economic development initiatives. The report blamed government processes **not Aboriginal people or their cultural practices** for the situation which had developed. For the first time the analysis of the problem had gone beyond racist assessments that Aboriginal people were anti-development. However, in what was to turn out to be a bitter disappointment to Broome Aboriginal people, the government's response to this analysis and recommended course of action was pitiful.

There is no evidence that any of the inter-governmental reform measures were implemented, especially those relating to early assessments of heritage values of land prior to re-zoning, sale, and development approval. Similarly the proposal to develop consultative mechanisms to enable all parties to discuss issues arising from tourist development proposals was not acted upon. Instead the Lawrence government established a planning taskforce to develop a strategic land use plan, the Broome Planning Strategy. Though this taskforce demonstrated a willingness to consult and made concerted attempts to address Aboriginal concerns through the drafting and plan formulation process, it failed to reconcile different interests because it avoided the land use politics which result from an imbalance in power relations. For instance the Broome Planning Strategy side-stepped the critical issue of Native Title which will markedly alter land ownership and use patterns in the Shire of Broome, especially within the township:

There are additional matters that fall outside of the responsibilities of a planning strategy, but which may have implications for the future implementation of the Town Planning Scheme. In recent years native title claims have been widely considered in the Kimberley region, and these are likely to affect the Broome area (Broome Planning Taskforce 1993, 23).

A similar example can be found in the way the Strategy addressed the future use of Gantheaume Point, an area of considerable importance to the Aboriginal community. It failed to identify any means of equitably resolving the inevitable conflict over development of the site (see Map 1). The Strategy discusses the future development of Gantheaume Point at some length:

This issue is a reflection of the fact that Gantheaume Point is possibly the most prized coastal development site in the north west... A complex situation exists with respect to resolving the planning issues arising from proposing a tourism development site near to Gantheaume Point... There is a basic conflict to be resolved. Taskforce negotiations with some representatives of the Aboriginal community suggested that development could be accommodated at Gantheaume Point without impacting upon significant sites. On the other hand, the Kullari Regional Council, when expressing views held by local Aboriginal people, opposed any tourist development in the Gantheaume Point area. Similar differences over the use of Gantheaume Point for tourist development purposes have been expressed within the broader Broome community (Broome Planning Taskforce 1993, 33).

Although acknowledging the opposition of the Aboriginal community it naively assumes that the complexity of cultural attachments to the site (both Aboriginal and non-Aboriginal) can be resolved by technical and other creative means - the area will be carefully re-zoned and a Development Quest will be considered to attract and reward a suitable design for the development.

Of greater immediate concern to the Aboriginal community was the way in which the government refused to support and finance meaningful Aboriginal participation during the preparation of the Broome Planning Strategy. A Discussion Paper released in December 1991, listed as its objectives: to establish an appropriate consultative mechanism to involve Aboriginal people in the planning process, to integrate cultural, social and economic factors in the planning process, and provide opportunities for local investment in tourism, etc (Broome Planning Taskforce 1991, 1). The Taskforce acknowledged that 'to assist the functioning of this Committee (the Interim Aboriginal Consultative Committee), particularly in its formative period, resources need to be allocated to employ a facilitator/administrative officer' (Broome Planning Taskforce 1991, 3).

The Interim Aboriginal Consultative Committee (IACC) was formed at a meeting of key Aboriginal people organised by Mamabulanjin Aboriginal Resource Agency in November 1991. For some time, there had been a proposal from Mamabulanjin to establish a consultative committee: which would co-ordinate and facilitate Aboriginal representations on planning and heritage matters to relevant governments and departments. This was an initiative of Aboriginal people who sought to retain control over the method of consultation and to ensure that their views were accurately conveyed to government. According to Kevin Puertollano, a key actor in establishing the Committee, the Broome Shire and the Minister for Aboriginal Affairs were supportive of the initiative and had promised funds to enable it to function. It was suggested that the Committee seek funding from the State government.

The Draft Planning Strategy, released for public comment in late April 1992, referred to consultations with the IACC: to date it 'has been effective in advising the Taskforce on planning within the townsite' (Broome Planning Taskforce 1991, 19). In the Shire's submission to the Draft Planning Strategy the importance of Aboriginal heritage matters was emphasised and 'formalisation' of the IACC was supported. A request was made of the Taskforce to provide clear guidelines on how to handle development proposals. The delays in granting funding assistance had a real

impact on Aboriginal representations: the IACC, in its funding submission, noted that its ability to respond to the draft report had been limited due to a lack of resources.

For the six months following the request for funding the WA government avoided making a decision during which time it turned to the ATSIC Kullari Regional Council for advice on consultative mechanisms and land matters. In November 1992 the Minister for Aboriginal Affairs wrote to the Planning Minister in response to a request from the Department of Planning and Urban Development (DPUD) as to who should be advising them on Aboriginal issues:

My advice is DPUD should now be liaising with the Kullari ATSIC Regional Office in the West Kimberley... The Interim Aboriginal Advisory Committee initially used by DPUD should be commended for their contribution to the Planning Strategy (Correspondence from Dr Judith Watson, Minister for Aboriginal Affairs to the Minister for Planning, 17 November 1992).

In early December the Planning Minister, patronising the Aboriginal community, informed them as to who should represent Broome Aboriginal interests, stating 'that my office has been advised that the Kullari Regional Council should represent Aboriginal people... it can be concluded that funding will not be available to your Committee' (Correspondence from David Smith, Minister for Planning, to the Convenor of the IACC, 9 December 1992). It is widely held amongst Aboriginal people actively involved in this issue that the Kullari Regional Council was a funding body only and had no mandate to speak on land matters. As a result the Broome Planning Strategy remains unendorsed by key Aboriginal organisations and individuals in Broome.

The Taskforce had identified the IACC as crucial to its objectives, and the Shire had been supportive – indeed for years had claimed that such a group would be invaluable, as had the Department of Aboriginal Affairs, their Minister, and the WA Museum. And yet none would fund the group to carry out its work. Furthermore the Shire and Minister for Aboriginal Affairs chose to work through ATSIC – a body that the State, at least, had been reluctant to acknowledge. Perhaps the State and the development interests it supports feared a united and articulate Aboriginal group which could influence the Broome Taskforce – yet allowing Aboriginal people a part in influencing the planning process was in fact the solution advocated by the government's own report. On the surface it appears that a representative group is what governments want yet the experience of the

IACC demonstrates that they will be reluctant to support the **degree or quality** of participation and control of the process which many Aboriginal people in Broome have been demanding.

The WA government's negligence in this area has resulted in relentless pressure on Aboriginal people and their culture in Broome. As the conflict continued subsequent government investigations identified the same causes and there have been no satisfactory responses. Why is it that successive State governments have been unable or unwilling to even attempt to address the causes of the problem despite clear and consistent evaluations and proposals for resolution or, at least, improvement? Is it that it's not in the government's interests to involve Aboriginal people and to support their empowerment? Though the tourism industry bemoans the Aboriginal heritage laws and the alleged restrictions on development, there is little evidence that the industry is suffering in Broome. In fact the contrary is the case if the growth in tourist numbers, dollars spent and length of stay, is any indication of the industry's health. In fact, according to very recent statistics from the Broome Shire, the region can boast a very rapid turn around in development applications (Broome Shire Building and Development Committee, July 1995). In 1995 the average for six other Shires in Western Australia was thirty days versus Broome's rate of only sixteen days per development application.

Two other government assessments of the Broome 'problem' are worth citing for emphasis. The first is drawn from a 1994 Cabinet document on Native Title in Broome:

Commonwealth intervention over the Broome Crocodile Farm extensions⁴ has highlighted the need for an effective strategy to integrate Aboriginal land interests - including heritage sites - into general town and regional planning in the Broome area.

In the past the only pathway for Aboriginal people to establish recognition of local land interests in Broome was under either the Western Australian Aboriginal Heritage Act or the Commonwealth Aboriginal and Torres Strait Islander Heritage Act. In the current atmosphere, it is possible that some heritage claims have served as an interim measure in advance of a claim under the Commonwealth

4. The proposed Crocodile Farm was a completely new development approximately 10 km from the existing farm. The proponent and State government often referred to the development as an extension, presumably in an effort to down-play the impact of the new farm in its construction and operation.

Native Title Act. One result has been a blurring of the lines between Aboriginal interests in land – for a range of purposes – and areas which are of heritage value. Each heritage site debate then tends to be seen as a political ‘beachhead’ for all Aboriginal land interests, with a negative spillover to community relations and business confidence.

The document recommends that a Broome Planning Group develop an integrated planning model for Broome accommodating a wide range of interests in land for both Aboriginal and non-Aboriginal cultural, social, environmental and economic purposes. This proposal was not acted upon. Approximately a year later the need for a planning group with Aboriginal representation was again identified by the Minister for Aboriginal Affairs following an objection to the release of a residential subdivision at Cable Beach, Broome, under the WA Land (Titles and Traditional Usage) Act 1993 by the Goolarabooloo Group Inc. The Minister’s department was able to conclude that rights of traditional usage under the Land Act may still exist, although it could not determine the impact of the land subdivision on those rights. The Minister recommended that ‘the future planning requirements of Broome include reference to the requirements of the local Aboriginal community through a Planning Group’⁵ (Western Australian Department of Aboriginal Affairs 1995). This action has now, of course, been invalidated by the High Court’s finding that the Western Australian Land Act was in breach of the Commonwealth’s Racial Discrimination Act 1975.

There are many instances where Aboriginal people and their representative organisations in Broome have asserted and expressed their right to own, manage and relate to their traditional lands, seas and resources on their own terms. Throughout the periods described above, Broome people resisted the degree of control the town administrators desired to impose on their lives. With the development of a more sympathetic national political climate these efforts have been more influential. For example, the establishment of an Aboriginal resource agency, Mamabulanjin, to service the land and infrastructure needs of the residents of the town reserves and those living in the rest of the Shire is an important achievement.

Although there has been little participation in the formal processes designed by governments, Aboriginal people have been active in pursuing

5. This group would consist of representatives of the State Departments of Land Administration and Planning and Urban Development, the Broome Shire, the local Aboriginal community and other relevant agencies involved in the planning process.

an appropriate political framework in which to advance their interests. In 1990 when the communities from Bidyadanga to One Arm Point opposed sand mining along Broome's coast, part of their strategy for protecting their sacred places and coastal resources was to petition the government for a twelve month moratorium on mining in order for a detailed ethnographic study to be carried out and declaration of the area under the Aboriginal Heritage Act (WA) investigated. Importantly, the communities sought funding from the WA government to co-ordinate the survey and research under the auspices of the Kimberley Aboriginal Law and Culture Centre (KALACC). As a letter from the Aboriginal Legal Service (ALS) notes:

Such a document would then be put to government for the purpose of assisting it to develop an **informed long term policy on land usage** in this region taking full and proper account of Traditional and Cultural Aboriginal interests (ALS, 21 March 1990, emphasis added).

It appears that the Legal Service's clients considered that the absence of comprehensive and long-term policies on land use, which truly reflected Aboriginal aspirations for their land and sea, had produced a bad decision - one which would damage their lifestyle and culture. The communities were eventually successful in the Mining Warden's Court, however, the decision to not grant the exploration licences was later overturned by the Minister for Mines who came under heavy pressure from the mining company concerned. The heritage evaluation was eventually undertaken by the Department of Aboriginal Sites, with the request for the research to be controlled by KALACC being refused.

The Premier's reply to the ALS was dismissive of the wishes of Aboriginal people to be directly involved in an imminent land use decision:

The Government has recognised the need for a long-term land use plan for the Kimberley and a major planning study has been carried out by the Department of Planning and Urban Development. The investigation, known as the Kimberley Regional Planning Study, included a comprehensive community consultation process for which Aboriginal involvement was actively sought. The study report is due for release and public comment in the near future. Land use in the area of concern to your clients will be addressed in the report and they will be given the opportunity to comment on the recommendations before they are considered by Government (Correspondence from W/A Premier dated 11 July 1990).

The ALS reply to the Premier informed her that its clients were unaware of the regional study or the 'comprehensive consultation process'. The Kimberley Regional Planning Study makes no specific mention of the

Dampier Peninsula sand mining conflict and the only recommendation under the mining section which could be said to relate to the environmental and heritage issues raised by Aboriginal people in Broome was one which called for environmental impacts to be minimised (Department of Regional Development and the Northwest 1990, 64). A land use policy which reflects Aboriginal people's interests in the Dampier Peninsula's coastal zone has not eventuated.

Contemporary development planning and land use

In 1994 the longest serving Aboriginal councillor with the Shire of Broome, Phillip Matsumoto, described the continuing alienation of Aboriginal people from local decision-making:

I've always seen a big gap between the community development type things to tourist developments. And I've always emphasised to the Shire we should try to draw these two things much closer together rather than have a big gap... I mean the local people have never had any input really, it's just local government and state government planning the future of Broome rather than people, grass roots people. Not just Aboriginal people I mean those people that are living in Broome as a home...what happens in regards to Broome planning or Broome strategy is that local government has got its own thinking and the government has got its own thinking and compile these together and say here's the Broome plan, what do you think of it and then you can start pulling the eyes out of it if you want to, But...I think if you go to any Aboriginal people they say it's not worth talking about Broome planning because we haven't had any input into it or if we did we...we didn't say what we wanted, somebody else has said that for us (Field Work Interview 8 August 1994).

This view was also reflected very recently in research undertaken by the Royal Melbourne Institute of Technology (RMIT) Outreach team:

The focus on tourist resort development, the history of exclusion of Aboriginal people in Broome's planning, development and economic growth have led to feelings of marginalisation and of 'being pushed out' by the local community. One of the main themes to emerge from public meetings was the sense of despair at being locked out of opportunity and participation in the future of Broome. This sense of alienation took a number of forms: a feeling that outsiders are better looked after and more welcome than local Aboriginal people; anger at the lack of consultation and information about local development decisions;

resentment at feeling unwelcome in their own country; and the sense that local resources needed for cultural and daily survival were being taken by others (Royal Melbourne Institute of Technology 1995, 13).

In a locality such as Broome Shire, where a significant proportion of the population has been dispossessed of its land base, development planning and land use decisions have done little to improve their marginalised position. Planners and planning agencies have never advanced the view that the imbalances in power, autonomy and socio-economic status between sectors of the community should be redressed through the planning process. Instead the over-arching objective of all plans, no matter what the scale, has been to provide opportunities for economic growth. It is assumed that the growth generated will translate into higher standards of living across the community. The distribution of wealth created by projects encouraged by land use plans remains unexamined. Given the inequitable distribution of, or access to, the benefits of development it is not surprising that there is little acceptance of development outcomes by the Aboriginal community.

Two recent studies of the Kimberley demographic structure and the role of Aboriginal people in the Kimberley economy present a startling picture of the low socio-economic status of Aboriginal people despite the importance of their contribution to the regional economy (Crough & Christophersen 1993; Kimberley Development Commission 1993). Similarly, assessments of Kimberley-wide regional planning practices, which have a bearing on the Shire of Broome, have been criticised for excluding the interests of the Aboriginal population which comprise approximately half of the Kimberley total (Holmes 1992; Wolfe 1993).

Plans should ideally represent an outline of paths or options for future economic and social development which is shared by as large a proportion of the community as possible. Yet until the latest planning strategy (Broome Planning Taskforce 1993) there was little evidence that the planning process and those who design and implement it were willing to incorporate or change planning practices to reflect the demographic and socio-economic realities of the Broome Shire and the cultural aspirations of a large section of the community. In fact, despite many planning assessments, planners and government departments remain largely ignorant about Aboriginal demography. The recent RMIT report prepared for the Broome Aboriginal community referred to the inadequate attention given to Aboriginal people's socio-economic circumstances in recent planning documents:

The most significant features of these documents (the Broome Planning Strategy 1993 and Draft Town Planning Scheme 4) is that while the Aboriginal community makes up about 40% of the total population of the Shire of Broome, there are almost no demographic or social statistics included about the age, sex, rate of household formation, occupation, income, employment, housing or health of the Aboriginal population. It is difficult to see, then, how these Strategies and Plans could be said to be planning for the whole community of Broome...

Both the Strategy and the draft Scheme have a number of basic inadequacies in relation to their treatment of the Aboriginal community:

- a) There is a lack of basic statistical data on the Aboriginal population on which to form planning policies or regulations;
- b) While information has been sought from Aboriginal groups and bodies, no real consultation has been undertaken;
- c) There is little consideration of the effect of Native Title claims on the whole planning process for the future of Broome;
- d) The draft Scheme proposes a 'Multiple Occupancy Zone' to cover Aboriginal residential reserves and Town Camps, and will require all future development to obtain planning permission relating to siting, layout and access to services. It appears likely that these regulations will produce land use patterns more like conventional subdivisions, which may be inappropriate to Aboriginal lifestyles;
- e) The draft Scheme designates large areas of the Broome Town site as Development Zones, the stated objective of which is to 'provide areas for general urban development in the short to medium term, in accordance with Council's development strategy. Some of these proposed Development Zones cover areas of Vacant Crown Land and Reserves subject to Native Title claims' (Royal Melbourne Institute of Technology 1995, 21).

Native Title in Broome

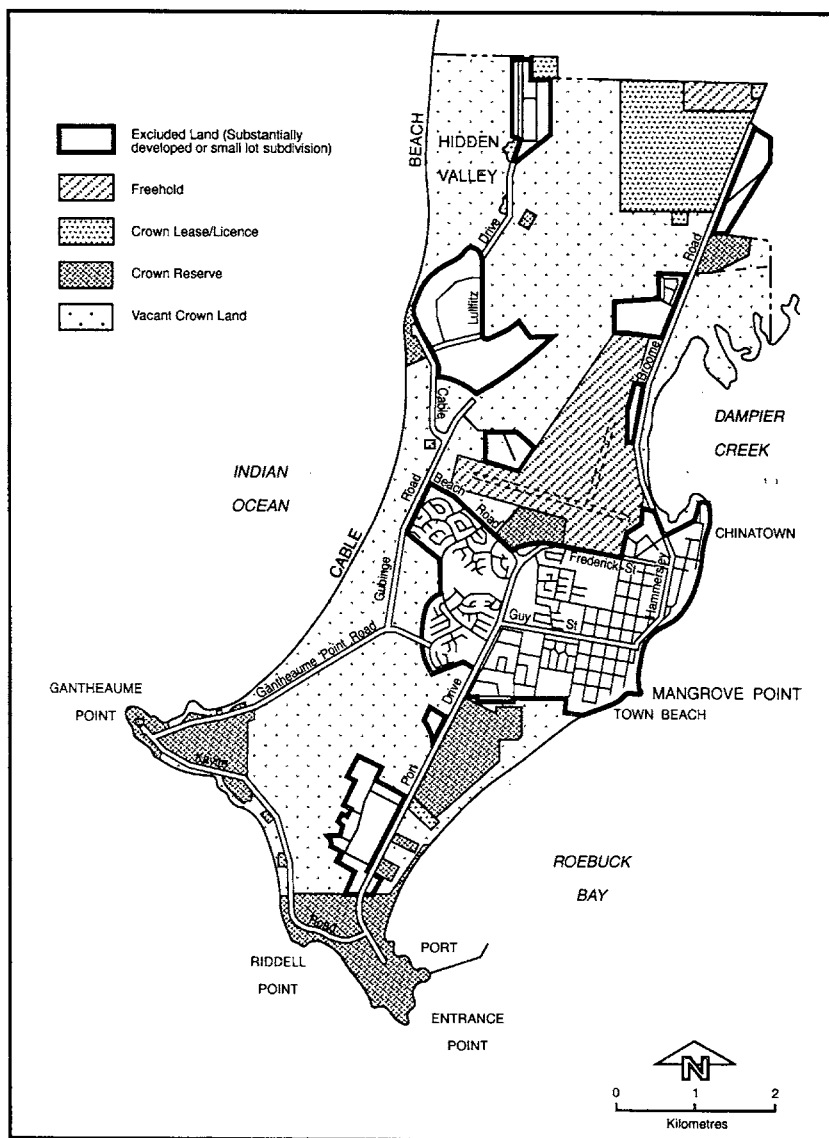
The most significant initiative in recent times in relation to land rights and Aboriginal people's intervention in land use policies in Broome was the establishment of the Rubibi Land, Heritage and Development Working Group set up by the Yawuru, Djungan and Goollarabooloo Aboriginal groups in September of 1994. On behalf of the Native Title holders in Broome this group is lodging Native Title claims and negotiating with interested parties in the National Native Title Tribunal. It was established

as an interim body which was to lay the foundations for the formation of the Rubibi Land, Heritage and Development Council. The tasks of the Rubibi Working Group (RWG) are:

- to monitor all development applications to ensure that Aboriginal interests are protected;
- to set up a planning exercise which will ensure that Native Title and Aboriginal heritage concerns are included in the new Broome Town Planning Scheme;
- to negotiate with the State government as to whether an agreement on Native Title can be reached which would improve the position of Aboriginal people;
- to create an appropriate constitution which will establish the Rubibi Land, Heritage and Development Council as the prescribed body corporate holding Native Title as set out under the Native Title Act;
- to establish and fund an administrative centre and structure;
- to negotiate with every developer who wishes to carry out development activities on land or in the sea covered by the Rubibi Native Title applications (Rubibi Working Group 1995, 2).

To date the Working Group has been so preoccupied with Native Title negotiations that it has been unable to devote sufficient time to formalising a structure and constitution for the future Rubibi Council and prescribed body corporate.

The eight Native Title applications lodged to date claim Native Title rights in the land and sea from Willie Creek, 38 kms north of Broome, to Yardoogarra, approximately 120 kms to the south, and over land in the central Broome area. Rubibi's claims cover vacant crown land and reserve land, with one claim over parts of a pastoral lease to the north of Broome. The claims include vacant crown land north of the Broome airport (formerly a special lease for a dairy), vacant crown land in a new subdivision near the industrial area, a 3 km strip of sea abutting parts of the Broome coast, vacant crown land and reserves in an area south and west of Broome airport and the southern Broome residential area (see Map 2). The native title applicants are claiming the right to 'go onto country, and to hunt, fish, take bush tucker, and perform ceremony as well as the right to look after country, use the resources of the country for economic benefit and live on the country' (Rubibi Working Group 1995, 1).



Map 2 Land tenure of Broome showing extent of Vacant Crown Land and Crown Reserves, most of which have been claimed by Rubibi under the Native Title Act. Source: Figure 6, Broome Planning Strategy, 1993.

Broome provides an example of the enormous range of interests and existing rights which need to be considered, mediated and reconciled by the Native Title holders and those declaring an interest in the outcomes of any determination, if litigation in the Federal Court is to be avoided. For instance in the first claim lodged in Broome covering land and water to the south of Broome and parts of outskirts of the town, thirteen parties registered their interests which ranged from sports fishers, pearling companies, all three levels of government, an Aboriginal group and a crocodile farmer.

The intensity of development activity in the Broome area has placed enormous pressure on the Aboriginal community pursuing the protection of its Native Title Rights. As the first edition of a community newsletter, Rubibi News, states:

It was decided at the first meeting to form a working group made up of four members from each of the three groups... Since that first meeting the Working Group has worked very hard dealing with all of the issues that keep coming up because of development proposals in Broome. Today there are more than sixty different projects which have to be constantly monitored and considered by the Working Group. These projects came about because of the way that the Native Title Act is set up. It requires mediation between the Working Group and those others who say they have a legal or legitimate interest in the land or sea that is being claimed (Rubibi Working Group 1995, 2).

For the purposes of this report the negotiations between the Broome Shire Council and the Rubibi Working Group will be the focus for analysis, rather than negotiations with commercial developers or the State government. This is for two reasons: apart from the commercially sensitive nature of any agreements or discussions between private developers and the Working Group, it is the Shire which drives the land use planning and decision-making processes which affect Broome's development. Land use in the administrative centre of the Shire is directed and controlled by the Broome Shire Council. However, WA State government departments have played a prominent role in the design and formulation of strategic land use, development and environmental management plans, producing a range of land use and environmental management plans since the late 1980s.

Although the role of the State government could indeed be very influential in these matters, consideration of its position is beyond the scope of this report, suffice to say that the WA government has again indicated a willingness to support land use planning exercises which recognise the needs of the Aboriginal community, however, significantly, ones which are

not predicated on the existence of Native Title. Prior to the High Court's finding against the WA Land Act the State was even less inclined to enter into dialogue with the Broome Native Title applicants. The State government's position remains extremely hostile to the notion of Native Title and the workings of the Native Title Act, preferring to protect other property rights and interests over Native Title. For example the path the State government will take in attempting to 'balance' interests in the Native Title era is clear from a speech the Mines Minister made to the mining industry:

It is expected that there will be other 'special cases' where on the balance of judgement no Native Title interest exists and where it will be judged to be in the public interest to grant titles without referring the matter to the Native Title Tribunal. In such cases the government will apply strict qualifying criteria and conditions (Cash 1995, 5).

It appears that the WA government will, in some cases, take it upon itself to determine if Native Title exists rather than following the procedures of the Native Title Act which provides Native Title holders with rights in relation to determining what land use proposals can or cannot proceed over their traditional land. Indeed it appears that the WA government's intention is to challenge every Native Title claim in the courts, as the following comment from a recent WA government 'Progress Report on Native Title' indicates:

There is still no understanding as to what native title is or where it may exist. However, it is presumed, judging from the actions of the National Native Title Tribunal (NNTT), to include occupation and possession of large tracts of land in this State. These ambit claims, and the manner in which they are being progressed by the Tribunal, will only lead to court action so that existing interests can be protected... Since 1 January 1994, apart from the cost, the major impacts have been delays caused to resource and tourism developments particularly in regard to land subject to ambit native title claims in the Kununurra, Broome, and West Pilbara region. Individuals seeking an interest in land are being put off. Developers are being faced with demands for money or a share of their projects to commence their development (Western Australian Government 1995, 2).

The Broome Shire began meeting formally with the Rubibi Working Group in February 1995 within the mediation framework developed by the National Native Title Tribunal. At the meetings held by the Tribunal, discussion centred on how in the short term, the two organisations could work together to develop a Heads of Agreement which would, in time,

reconcile Aboriginal rights to land and sea with non-Aboriginal interests in Broome's development. The Heads of Agreement would focus on planning, heritage and development issues in and surrounding the Broome township in so far as the Shire's influence extends.

It was proposed that the Council would involve the RWG in future Council decision-making by seeking input on any agenda items for all regular Council meetings (four sub-committees and one full Council meeting per month) and that Rubibi would prepare a submission to the review of the Town Planning Scheme. It is clear from this initiative that the Shire recognised the need for greater Aboriginal input into decision-making, however, the way in which that input has been received and acted upon points to the fact that the Shire has yet to fully comprehend and appropriately respond to the new situation where a formerly powerless section of the population may soon own large tracts of land under Australian law, and will have ancillary rights to participate in land use and resource management decisions. The Shire continues to participate in the mediation process, albeit reluctantly, apparently out of a desire to avoid court action, and no doubt, following advice that the Native Title applicants' case is strong. Thus there appears to be a recognition that the issues surrounding planning, development and heritage protection will eventually have to be addressed and that the Tribunal offers a forum for structuring the resolution of these issues, perhaps even a speedier means of removing the element of 'uncertainty' which the Shire is currently so concerned with.

The workload facing the RWG is intense. During the 212 working days since January 1995, the Rubibi Working Group had recorded 198 meetings (a number of impromptu meetings were not recorded in the diary kept by the RWG). From this staggering figure one can appreciate the pressure being placed on the Aboriginal negotiators, who for the first ten months of 1995 had only 14 work days free of meetings in which to pursue their own economic, social and cultural affairs. No Aboriginal representative is paid a wage or attendance fee to participate in meetings and transport is a constant impediment to full Working Group member participation. Meetings are held during work hours thereby precluding 'employed' Aboriginal people from frequent and consistent attendance which is desirable for good decision-making. The assumption that there is a pool of unemployed Aboriginal people who are able to attend daily meetings places enormous stress on the community, distracts people from other 'business' and skews the representative capacity of the local organisation. It is not unreasonable

to expect that under these conditions, any underlying conflicts between or within groups may be inflamed, or new tensions generated, by the stressful workload facing negotiators.⁶

Of those 198 meetings, 22 were with the National Native Title Tribunal, 45 with the Shire, and 25 with the Rubibi membership or the Working Group alone. The remaining meetings were held with land developers, industry groups or government departments. Leaving aside the need to address the internal maintenance of the group and any proposals from private developers, it is clear from this tally of meetings that there is a great deal of 'Shire business' which requires close scrutiny if the rights and interests of the Native Title applicants are to be protected under this interim arrangement. As an example, at an Ordinary Meeting of the Shire Council in June, the RWG raised the following issues. These agenda items are taken from the minutes of the meeting which I took and as such they reflect the Shire's response as well as the position put by the RWG and the detail of the issues under consideration:

- Proposal to prepare planning studies: The Shire proposed to select a consultant to prepare four studies (a Housing Strategy, Cable Beach Tourism Node Structure Plan, a Local Commercial Strategy and a Land Availability Assessment). The RWG raised the need to ensure that these planning studies did not proceed independently of the planning project that Rubibi was to undertake in July (see page 44). The Shire President said that Rubibi would have the opportunity to comment, however, Rubibi's lawyer, George Irving of the KLC, made it clear that there needs to be more integration and not consultation after a draft report has been produced. It was agreed that Rubibi should meet the Shire's consultant.
- Relocation of Shire Depot: The Shire wants to move its Depot to the Transport reserve on the Highway north of One Mile. George Irving raised the progress of the reserves assessment and the fact that the Shire had not got back to Rubibi with the final list for discussion. Rubibi did not wish to continue to discuss the reserves one by one until the list had been looked at comprehensively. The Shire President said that a

6. Discussions at the ALATSIS Workshop on Anthropology in the Native Title Era touched on the types of conflicts which anthropologists are likely to encounter whilst working on Native Title claims and the potential for these to be exacerbated by the Native Title process itself. See for example Deborah Bird Rose's 1995 paper 'Anthropological ethics for the native title era'.

meeting would occur very soon to consider the reserves vested in the Shire.

- **Short Street extension:** George Irving said that Rubibi wanted to be sure that the extension was in accordance with the agreement reached with Pearls Pty Ltd (new shopping centre developers). The Shire Clerk offered to provide Rubibi with a copy of the plans for the road extension so that they could check it for themselves.
- **Department of Land Administration (DOLA), Lot 5B:** The Shire agreed to proceed with plans for lay-out, drainage and cycle ways for the residential sub-division despite Rubibi's request to not proceed any further with the development process until Native Title issues had been resolved with DOLA. The Shire President claimed that they were under an obligation to respond to DOLA's request for approval.
- **Meatworks redevelopment:** The Shire agreed to allow for the leased area to be incorporated into the re-development rather than reverting to its former use as a Recreation Reserve. Comments were made by Shire Councillors about Rubibi's right to speak on this issue when it wasn't a Native Title issue. George Irving reminded them that Rubibi had made a submission as an organisation representing the Aboriginal public. He referred to the importance of maintaining good access to the coast because of the area's value as a fishing and camping place, as well as the heritage values.

The Shire President mentioned a former Shire proposal to rehabilitate and declare a recreation reserve over the 8 ha. foreshore area which was allegedly stopped by Aboriginal claims. There was some debate about the high economic value of the site because of its elevation and views over Roebuck Bay. Councillor Male said that if the area was to revert to a recreation reserve it may endanger its future use for tourism/residential development because it may then be subject to a Native Title claim. He said that there were no sites in town overlooking the sea where a hotel could be built, and Native Title was greatly restricting the development of major tourist facilities.

- **Chinatown Strategy:** RWG reiterated its concern that it was about to embark on a comprehensive planning study and that it did not want to see the scope of that project restricted by the Shire's adoption of other plans. The Shire President agreed to defer consideration of the matter for 30 days until Rubibi's planning process was complete.

- Structure Plan for the Airport: RWG requested a copy of the plan and an opportunity to meet with the consultant to integrate the two planning processes – the Shire's and Rubibi's.
- Amendment to the Town Plan for construction of Diocesan staff facilities: RWG requested that a Work Program Clearance be conducted to ensure the protection of Aboriginal heritage. The Shire Clerk undertook to write to the Bishop informing him of the need to liaise with the Working Group.

From this range of agenda items and the nature of debate there are three observations worthy of emphasis apart from the obvious degree of resistance to Rubibi's contributions and recommendations. Firstly, the RWG is attempting to respond to the issues under consideration in a strategic way which ensures that decisions made today do not erode Native Title rights which still require determination. For instance, rather than commenting on land use proposals for every recreation or drainage reserve vested in the Shire one by one, the RWG requested an opportunity to comprehensively assess the reserve system in Broome and to provide advice on what management action could be undertaken by the Shire. Rubibi's land use planning initiative, which will be discussed in some detail in the following section, developed out of this strategic approach to reconciling differing and often competing land use interests.

Secondly, the RWG is attempting to provide comment and make input into decisions where Native Title rights may be indirectly affected by a Shire decision. For example the development of the old meatworks site on the coast will bring hundreds of newcomers to this vacant site which is of considerable importance as an isolated and quiet place to fish. Although Native Title would most likely have been extinguished by the grant of the freehold and leasehold title covering the site, Native Title is being asserted over the neighbouring coastal reserve.

Lastly, it can be seen from the level of detail required that the Rubibi Working Group believes that close scrutiny of Shire activities is necessary. This lack of trust permeates the interactions between the Shire and the Aboriginal community – a situation which has been harmed by very recent Shire action such as the sealing of a track over the Cable Beach dunes in an area under claim and known for its sensitivity on Aboriginal heritage and environmental grounds.

The current arrangements for involving Aboriginal people in local government decisions pertaining to land use and development, while

mediating the claims of the Shire and Rubibi, are problematic. At best they create an avenue for the Shire to hear Rubibi's views on the Shire's agenda and way of governing, however, there has been little opportunity for Rubibi to initiate actions. These arrangements are certainly far from sufficient in meeting the objective of effectively involving Aboriginal people in the land use decision-making process and reconciling Aboriginal and non-Aboriginal rights and interests.

Prior to July 1995 there had been only one instance where the Shire was prepared to delay a decision or to significantly alter a proposed course of action. Such is the volume of work required in evaluating and responding to the Shire's business that the Rubibi Working Group has insufficient time to consult with all Broome's Native Title holders. Decisions often need to be made within twenty-four hours. Compounding this problem is the lack of resources, for example, the majority of Working Group members do not own a vehicle which limits their capacity to consult with the Aboriginal community. The composition and tone of Shire meetings are often very intimidating and occasionally hostile. For example at one meeting where the Rubibi Working Group made known its opposition to a development proposal on the coastal dunes, there was a concerted effort by Shire Councillors to seek an immediate answer which would meet their objectives of getting approval for the development. The question 'What's the compromise then?' was asked on a number of occasions when the Aboriginal representatives were not in a position to bargain with the Shire Councillors. The Aboriginal representatives are often reminded of the Shire's view of the 'unreasonable' nature of Native Title rights, for example, the following question was aggressively put to the Working Group by the Shire President: 'where do we go on this when your people have claimed all the reserves in town'. Similarly the legitimacy of the need for 'economic progress' and the perceived impediment posed by Native Title was reinforced by a number of Councillors at many of the meetings I attended.

Mediating and reconciling conflicting 'land claims' in Broome

Prior to the commencement of mediation in Broome the Kimberley Land Council (KLC) briefed Aboriginal negotiators on the workings of the Tribunal and the intentions of the Native Title Act. The following excerpt from a briefing paper by George Irving described the limitations of the

Tribunal's approach and foreshadowed the likelihood of encountering many imbalances in the cross-cultural mediation context:

the question remains, whether the Tribunal's approach to its task, focussed as it is on the reconciliation of narrow, material and utilitarian interests in the claimed land and waters, is the best approach for Aboriginal people and whether it will adequately meet their future aspirations. In this regard it is worth bearing in mind that the approach adopted by the Tribunal fails to take into account the social circumstances and cultural difficulties of Aboriginal people, their non-literate culture and their history of brutal subjugation... The problem is too deep seated, and complex in our view, to be addressed simply by the Tribunal's 'policing' of the procedures. It requires a process that involves the direct participation of the Aboriginal people themselves.

It would be inappropriate for a process of mediation to commence, in which demands are made on Aboriginal interests, before Aboriginal people have been given an opportunity to come to terms with the consequences of their history, to fully explore the parameters of their interests and discover how other non-Aboriginal interests might be accommodated in a way that will not further undermine their culture (Irving 1994, 4).

These concerns were voiced as a result of comments by the President of the Tribunal, Justice French, made in relation to the promise of mediation and the foundations of the Tribunal's approaches to it. According to French:

The mediation process... will apply the approach known as 'principled negotiation' ... subject to modification according to the circumstances of the particular case. It requires that the parties should identify their own and others real interests and objectives, consider a variety of options to accommodate those interests, develop criteria of legitimacy to test the fairness of agreements which might emerge from the process and consider what are the likely best alternatives to a negotiated outcome (French 1994, 84).

From the Tribunal's Draft Mediation Strategy there is no evidence of any consideration of how culturally appropriate the Harvard Law School method of mediation and negotiation is. This issue was raised at the recent Ecopolitics Conference in Darwin (September 1995), where Aboriginal delegates called for mediation methods which are derived from Aboriginal people's dispute resolution techniques. Patrick Sullivan, who has observed the workings of the Tribunal in Broome, is highly critical of the mediation process describing it as:

a process which is highly culturally intimidating, where there is considerable duress to participate, in which the parties meet unequally, and in which those inequities can be institutionalised by the process... The structured mediation that we are now going through with the National Native Title Tribunal has the potential for enforcing the acceptance of lesser rights and benefits than the Aboriginal parties are due (Sullivan 1995b, 97).

The Tribunal's Draft Mediation Strategy acknowledges the power imbalances which can prejudice the Aboriginal negotiating position, however, it naively assumes that the Tribunal can divorce itself from the history of power relations which continue to influence the contemporary political environment in which it operates:

From the perspective of some, if not most, Aboriginal applicants, there is a history of significant power imbalance in their dealings with governments, local authorities, pastoralists, miners and other elements of the communities in which they live. These power imbalances can inhibit the ability of applicants to fully and freely express themselves to, or in the presence of, those with whom they have had such relationships in the past. They may also lead to inappropriate and unfair agreements being concluded. The Tribunal in this context can be seen as a body divorced from that history (albeit carrying some of the baggage of non-aboriginal power structures) (National Native Title Tribunal 1995, 2).

The baggage referred to is already evident in the mediation process. For example, Tribunal members travelling to a bush-based mediation conference between pastoralists and a group of Kimberley Native Title applicants arrived with the pastoralist, thereby upsetting the Aboriginal community who expected to see the Tribunal demonstrate the complete independence it claims it can. Another example was observed at an important introductory session in Broome, where scant attention was paid to the views of the Aboriginal women by a male Tribunal member. The Tribunal is deluding itself if it believes it can remove itself from history and society so easily and painlessly. The impacts of dispossession and colonisation are far more deeply felt and less easily solved than assumed by the Tribunal's mediation strategy which offers as its solution to the on-going power imbalance 'a kind of "shuttle diplomacy" to lay the groundwork for direct communications between applicants and others as the mediation progresses' (National Native Title Tribunal 1995, 2).

In a mediation conference with a set of interested parties in Broome, the President of the Tribunal referred to the joint creative process of tossing

around ideas and seeing proposals emerge. When discussing what the Native Title rights might look like in relation to the rights or interests of the parties the Judge sought to explore what traditional rights and interests could be enjoyed by the applicants and accommodated or 'lived with' by the other interested parties. As it is intended that during mediation the parties will come to define the substance of Native Title, much is at stake during this process.⁷ As a Tribunal case manager explains:

So it's what the parties themselves can work out which becomes the substance of native title; mediation is therefore more likely to produce a flexible outcome than a determination by the Federal Court (Nish 1995, 95).

This flexibility may immediately appeal to governments and interests which aim to 'process' Native Title and to accommodate it within the current system of land law and land management arrangements, or as Sullivan (1995) argues, to contain the 'Aboriginal problem'. However, for indigenous people the contingencies and fluidity of the process may result in extremely sub-optimal outcomes. Within this flexible framework there is a need to stretch the options and to be innovative and creative about opportunities and possibilities. Such consideration of course takes time and resources, and without necessary support the situation Sullivan describes in Broome may characterise many mediated agreements across the country:

I am not concerned here with whether they are better than they could have been without the NTA (Native Title Act) and the Tribunal, or as a result of court action. I am concerned only with whether they meet the rights of and future needs that Aboriginal people feel they have. My opinion is that they are nothing more than a compromise in the face of continuing powerlessness. Whether they are good agreements or not is perhaps not the most important point. The point is also that there is no possibility of assessing this. Now I may be wrong, this may be the best that's possible, they may be just and fine agreements under the circumstances, but the resources are simply not there to assess them. There is no means of assessing the fine detail of proposed developments, there are no precedents, and there is no time to look for solutions that would produce the same results for the developer but may not require relinquishing as much on the part of the Aboriginal people involved (Sullivan 1995b, 102, emphasis added).

7. Michael Maurice warns of the risks of compromising Native Title rights during mediation in the fourth Issues Paper prepared by the Australian Institute of Aboriginal and Torres Strait Islander Studies (1994).

It is in this area of resourcing mediation where Aboriginal people can be significantly disadvantaged. In the case of Broome the financial resources made available by ATSIC for Native Title applications are inadequate, and as a result insufficient effort is being devoted to developing alternatives to the current land use decision-making arrangements. Again the Tribunal appears to underestimate what is required in resourcing this important aspect of negotiation, as can be seen in its Draft Mediation Strategy. The Tribunal will commit itself merely to providing 'reliable drafting and printing equipment so that hard copy can be given to parties for consideration on the spot, and amendments can be made progressively'! (National Native Title Tribunal 1995, 6). The trivialisation of this need is extremely insensitive when you consider the resources required by the Rubibi Working Group, for example, in trying to design what is effectively an alternative system of local government which would accommodate Aboriginal people's land, social and economic needs.

As well as financial assistance there is a clear need for sufficient time. This need is acknowledged in a paper on mediation by a Tribunal Case Manager:

There are many groups, particularly claimants, saying to us very clearly, 'Don't push us, we need time to think'. The Tribunal is very conscious of ensuring that there is sufficient time for parties to consider options, consider their position and engage in internal consultative processes (Nish 1995, 95).

The observation that it is often claimants who are seeking time is a critical one. It is the claimants who, in many cases, will have to develop internal structures for decision-making and representation if they are not in existence, nominate representatives to negotiate, and then formulate negotiating positions which obviously requires a thorough understanding of options. For many, if not all the interested parties, there are existing structures and strategies upon which to rely. For instance a pastoralist or fisher will know the regulatory framework under which they operate and will know to whom they are accountable and what conditions they require for their business to operate, although of course they will need to become familiar with the principles of the Native Title Act and the mediation process and may desire legal assistance. For the Native Title applicants much more is required to bring them to the table with as many resources and in as equal a position as the pastoralist or fisher. And in a situation such as Broome or Kununurra, where there are so many competing claims (not in the strict sense of Native Title claimants) to land and resources, the situation and its complexity is magnified, thus escalating the demands placed on the applicants.

This disadvantage facing claimants is acknowledged by Benn in a paper on the rights of claimants delivered to a 1994 Native Title Conference:

Dealing with a number of separate land use application at the same time becomes extremely onerous in terms of a group's time and resources. Dealing with separate land use applications on an individual case by case basis also fails to address the combined, overall impact of the applications on a group's native title rights and interests. Such an impact could, however, be effectively addressed by agreements between the native title holders and the government on a regional or local basis as provided for by Section 21 of the Act (Benn 1994, 107).

The RWG's response at the first meeting with the Tribunal was to call for an inquiry under S.137 of the Native Title Act. It was felt that a Special Inquiry would ensure examination of the complexities of tenure and land uses and the historical disadvantage of Broome Aboriginal people in a forum which would be adequately resourced and properly structured. Ultimately the purpose of the Inquiry would be to pursue the possibility of a comprehensive agreement or settlement over land title matters on a regional or sub-regional basis. Such a settlement might take a number of years to conclude, however, the Rubibi Working Group was willing to explore interim arrangements which would provide interested parties with sufficient certainty while not eroding Native Title rights yet to be determined. Extracts from the Rubibi Working Group's statement to the Tribunal President, Justice French, at that meeting over a year ago demonstrate a determination to prepare themselves to negotiate as equals and not to allow the Tribunal to determine the process of responding to the newly recognised Native Title rights held by Aboriginal people in Broome. It is worth quoting at length:

The Aboriginal people of the Broome region have been asked to lay our interests in land before you so that you can mediate between our interests and non-Aboriginal interests. We will in due course make known our interests, but we prefer at the outset not to talk to you of interests but of rights.

Our interests arise from our rights. We have ancestral rights to this land that are now, after many years of neglect, recognised in white Australian law as Native Title rights. Our interests flow from this. They are not a narrow list of wants. Our interests are as deep and complex as our culture, our history and our Law.

We are very concerned about how these deep, complex, and far-reaching interests can be presented within the confines of the Tribunal. It must be recognised from the start that there are strong impediments

in the very process and structure of the Tribunal's compulsory mediation conference that restrict us in presenting the totality of our interests and in establishing the rights on which they are based.

In the first place, it should be plain that we do not meet here as equals with those who seek to match their interests against our own... We have suffered, and we continue to suffer, not just in a general way as a result of the impact of accident or impersonal forces, but at the hands of the non-Aboriginal interests you now seek to mediate on the basis of equal rights... We address you today on the land of an independent Aboriginal organisation, but this land was not long ago the ration camp of these same people before you who were forbidden to leave its confines and walk freely in the streets of Broome after six o'clock at night.

In another sense we are not, in fact, equal. Our rights are prior, more fundamental, and bound up with our spirit. It is a matter of continuing hurt that we should be asked here to lay our rights down side by side with the so-called rights of those who have dispossessed and denied us. We meet here not as the recognised prior owners willing to concede rights to others in a spirit of co-operation and conciliation. We meet as supplicants pleading for our interests in the face of those who have in the past, and who continue to, deny the existence of our rights... How can our deep complex and multi-faceted native title rights be reduced to a list of interests to be traded with others without making a mockery of our culture and our obligations both to our ancestors and to our descendants? (Pat Dodson, Introductory speech to His Honour Mr Justice French at the first compulsory conference of the National Native Title Tribunal in Broome, 19 September 1994).

The request for a Special Inquiry under the Native Title Act which might have developed into the basis of a negotiated settlement, or sub-regional agreement, was not taken up by the Tribunal, nor have requests to the Commonwealth for funds to develop such a strategy been forthcoming.

There is another matter pertaining to the mediation process which is relevant to the success of reconciling differing and sometimes competing rights and interests in the land, sea and natural resource base in Broome. It was envisaged by the Federal government in drafting the Native Title Act that the mediation process would have the positive effect of stimulating and encouraging reconciliation between the Aboriginal and non-Aboriginal communities of Australia. The laudable aim of reconciliation will not however simply nor easily occur without substantial efforts to overcome existing prejudices and ignorance.

The Tribunal appears to understand the role of community politics in mediation, stating that 'there has to be broad community support for whatever kind of options or potential agreements parties are looking at in order for an agreement to be sustainable. That broad community support and positive dealing with community politics is necessary for durable agreements' (Nish 1995, 95). There is a clear role for the Tribunal in this regard, one that appears to be acknowledged in the Tribunal's Draft Community Liaison Strategy, however, one that is not being lived up to in Broome. The Tribunal has not developed nor actively pursued a community education strategy in Broome, offering instead minimal support in preparing media releases and one to one conferences with applicants and interested parties. It has done little to educate the Broome public or engage them in constructive discussions and debate about Native Title. Rather the Tribunal is relying on a series of newspaper articles and a one-off information stand at a local festival to engender the broad community support it acknowledges is essential to successful mediation. Parochial and extreme reactions are commonplace in the Kimberley media illustrating that there is much work to be done in this area – for instance consider the following headline and article in the *Kimberley Echo*:

Broome Under Land Claim Siege – The Goolarabooloo people of Broome have lodged a Native Title claim over a pastoral lease, reserve and vacant crown land around Broome and north to Beagle Bay. The claim, lodged with the Federal Native Title Tribunal last week, leaves Broome surrounded by Native Title claims, with the Yawuru claim to the south and east. All of Broome's coastline, from Cape Villaret in the south to Beagle Bay in the north, is under claim (Ryan 1994, 1).

Fear and ignorance in the Broome community have generated adverse reactions to the acknowledgment of the rights of the Aboriginal community. Such reactions are felt directly by the Aboriginal negotiators, yet it has been left to their representative organisations to attempt to challenge their basis. The Acting Director of the Kimberley Land Council referred to this pressure in an ABC Radio interview on the eve of a Tribunal meeting:

Well I think there has been a lot of comments in relation to the Rubibi Native Title claim in and around Broome, that it will, or might, stop development. I think that in the last couple of weeks the Rubibi Working Group has been involved in negotiating with two developers in the area, and I think that sort of reflects the basic understanding of the Rubibi claim, that they are willing to, you know, become involved in negotiations with developers in the area, and not sort of impede

future developments (Mark McKenzie, ABC Broome Regional Radio, Morning Program, Sept 1994).

Rubibi's land use planning project

Early in the negotiations Broome's Shire President suggested that the Rubibi Working Group prepare a submission to the review of the Town Planning Scheme as a means of seeking Aboriginal people's views on Broome's development. The Rubibi Working Group felt that the preparation of a submission to the Town Planning Scheme would be of value, however in itself insufficient as a solution to the stark lack of Aboriginal participation in land use decisions. What was required was consideration of ways of ensuring that Aboriginal people would be involved in all current and future decision-making processes affecting their Native Title rights.

An optimal negotiating position depends on knowing and advancing the Native Title holders' vision of how the town is to develop in the future, at the very least over the period of the new Town Planning Scheme. In order to develop such, the negotiators must consider a huge array of decision-making structures and processes with their attendant policies, legislation, jurisdictions and opportunities to participate and influence. Issues such as the State government's policies on the vesting and management of reserves for recreation and drainage, the Shire's re-zoning processes, the environmental assessment process for developments – in short, the Working Group was faced with grappling with the prospect of a new governing structure, or an Aboriginal government for the area over which Native Title is asserted.

One aspect of governance which required urgent attention because of interactions with the Shire during the preparation of the Town Planning Scheme, was land use control and environmental management. In early 1995 the RWG contracted the Royal Melbourne Institute of Technology's Department of Planning, Policy and Landscape to assist it by preparing a report on how to reform land use planning in Broome.

Rubibi's objectives for the land use planning project were articulated in the terms of reference provided to the RMIT Outreach team:

1. Assess the needs, aspirations and requirements of the Aboriginal people of Broome in relation to town planning and development;

2. Assist the Rubibi Working Group in the formulation of a policy document reflecting the land, culture and heritage interests of the Broome Aboriginal community in relation to town planning and development;
3. Advise the Rubibi Working Group on appropriate town planning policies and procedures for inclusion of Aboriginal viewpoints in all planning strategies, schemes and processes for Broome;
4. Prepare a report/newsletter for the RWG and other Aboriginal people in Broome which sets out the work of the Consultancy Team and which highlights relevant town planning and development issues along with the advice of the Consultancy Team in relation to those issues.
5. Prepare a report for the KLC which details:
 - the expertise of the Consultancy Team;
 - the research undertaken by the Consultancy with the Broome Shire Council, the Rubibi Working Group and other Aboriginal people and organisations in Broome; and
 - the findings of the Consultancy Team based on such expertise and research, with particular reference to issues relevant to both the Town Planning Scheme and the Shire's *modus operandi*, which offers a critique of current consultative mechanisms along with recommendation for the development of appropriate structures and processes to ensure that the rights and interests of the Aboriginal people of Broome are included in any planning decisions of the Shire that might impact upon such rights and interests (KLC 1995).

The desire to move beyond a land-parcel by land-parcel site-specific approach to land use proposals or decisions and their impact on native title to a comprehensive and strategic approach was explained by the KLC's lawyer representing the RWG, in a recent ABC radio interview:

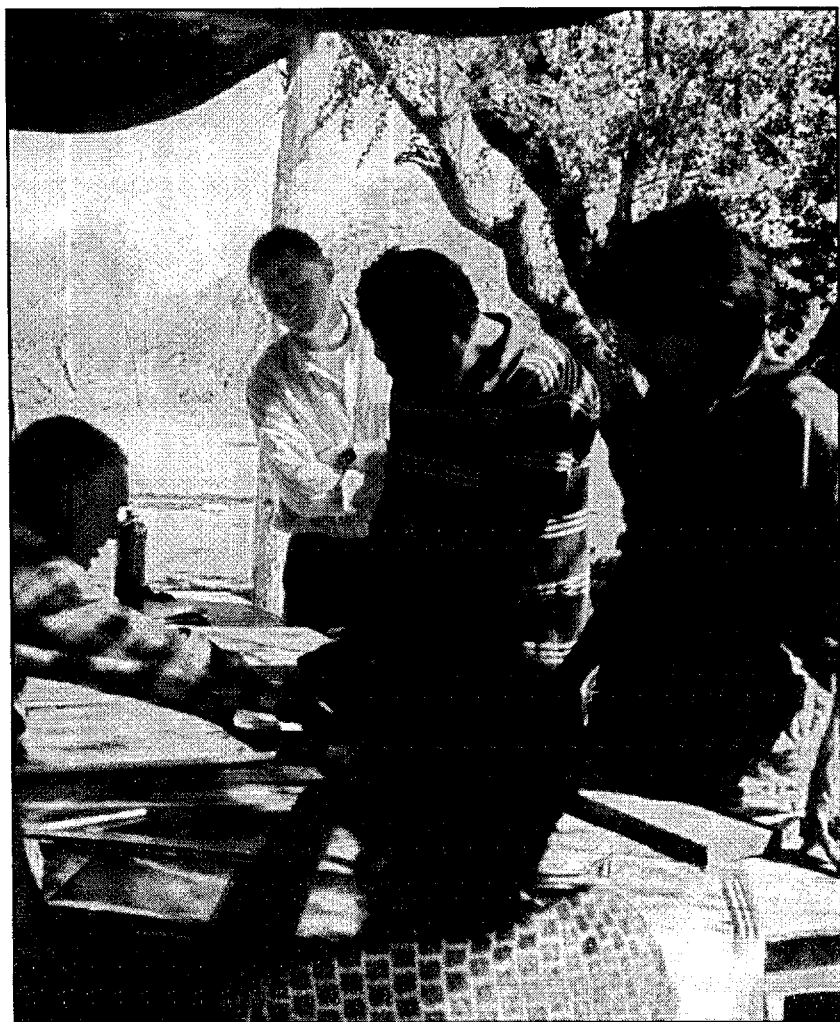
As a result of the claims going into the Tribunal, negotiations started with the Shire and it became apparent fairly early on in the piece that some sort of process would need to be set up to include Aboriginal people in the decision-making processes that the Shire has in relation to land use and development in Broome. Some arrangements have been put in place on that but there's a really great need to form a back drop, or create a back drop of information looking at Aboriginal interests or aspirations in terms of planning and development in Broome and this exercise is designed to do just that. ...And the idea of those (public meetings) is really to collect information about what people think is important in Broome. Places that people go fishing if they want to

make sure that its protected, people have voiced concerns about pollution in Dampier Creek and the effect that has on their ability to collect cockles that are edible. And there are other places of significance around that people are wanting to make sure are protected and to ensure that development doesn't go ahead there. Given that development is proceeding in Broome, one of the things that we're trying to look at is places where Aboriginal people would feel it was appropriate to develop and then perhaps have other areas where there can't be development because it needs to be protected (George Irving on ABC Broome Regional Radio on 6 July 1995).

The land use planning project's objectives also reflect an awareness that the numerous planning studies and reports prepared for Broome by government agencies or Shire consultants have ignored or undervalued Aboriginal people's contributions and involvement – and indeed, on occasion, have misrepresented Aboriginal people's concerns (see for example, O'Connor 1992). A member of the RWG, Frank Sebastian, explained the need for an Aboriginal controlled planning exercise in Rubibi's community newsletter:

The Working Group, we are there, speaking up for our rights and we want to be recognised by everybody for what we're there for. We're helping to look after the land, to make sure that what we're doing is right for our people and for our future generation. To make sure that they won't be going through all the rubbish that we went through and our fathers and their fathers before that – so we can all enjoy this land and live happy. With the town planning I reckon its important that we all know what's going in and we would like everybody to be involved, everyone that lives here (Rubibi Working Group 1995, 8).

From the terms of reference the enormity of the project's scope can be appreciated. Unfortunately it was severely restricted in time and resources. The RMIT team who volunteered their time, acknowledged the constraints on the project's achievements in their draft report, attributing the lack of time to 'the pressure of development and planning issues in the Shire of Broome' (Royal Melbourne Institute of Technology 1995, 6). At the time of writing (December 1995) the project team's recommendations are still under consideration by the Rubibi Working Group and so will not be discussed in this report. There is, however, a clear intention to finalise recommendations promptly in order to advance the determination and protection of Native Title rights in further negotiations with the Shire in the Native Title Tribunal.



Community discussions over land use options. From left: Franz Hoogland (Goollarabooloo), Patrick Sullivan (KLC consultant), Joe Roe (Rubibi Working Group), Jeanné Browne and Lachlan Walker (RMIT). Photo taken by Prof Jim Sinatra of RMIT, June 1995.

Conclusions

Relations between local government authorities and the Aboriginal community in Broome have historically been poor. During the era of strict control and regulation of Aboriginal people's lives, the experience of town camps in Broome provides an insight into State and local government policies and actions of harassment, discrimination, and marginalisation. The historical background provided here is central to understanding the contemporary degree of disaffection of the Aboriginal community and, above all, important because it is the experience of past events and the grievances suffered which people bring to the negotiating table when pursuing Native Title claims.

An evaluation of the experience of the broader community's ability to accept and protect Native Title should be of value to the National Native Title Tribunal, Aboriginal negotiators and others participating in Native Title negotiations in Broome and elsewhere. It is for this reason that considerable attention has been given to the contemporary and historical positions of Aboriginal people in relation to the agents and agencies who have, to date, made decisions about their country. The collective memory and more recent experiences of Aboriginal people are a vital part of their current social identity and political strategies.

Furthermore, the experience of Broome should have a wider relevance for those interested, or directly involved, in the struggle against domineering racist interests in many Australian towns. Broome's development history, which is touched on in this report, is one which is shared by towns such as Katherine in the Northern Territory, Armidale in NSW, and towns in the Gascoyne-Murchison region of Western Australia.

In recent times Broome Aboriginal people have demanded rights and recognition from the Broome Shire and other levels of government over their living conditions, ownership of traditional lands/seas and resources, and protection of places of cultural importance. Yet powerful forces within the township have remained reluctant to fully embrace land rights and their ancillary resource management rights, nor to genuinely accept a positive role for Aboriginal culture in Broome's make-up and identity.

The RMIT project conducted in 1995 was required to legitimise obvious conclusions about the level of discontent, the exclusion of Aboriginal people from planning processes and the failings of past approaches. The Broome Shire and State government have observed and contributed to these circumstances yet have not been able or willing to devote serious

effort to their just resolution. Indeed from observations of the conduct of the new arrangements under the auspices of the National Native Title Tribunal's mediation process, the grievances held by Aboriginal people in relation to Broome's development are not adequately understood by the non-Aboriginal participants: there are few demonstrations of empathy, respect and goodwill - responses which are essential to the mediation process adopted by the Tribunal and underpinning the national goal of reconciliation. It is the Aboriginal community which is expected to appreciate the demands on the Shire to serve the 'public interest' in progressing Broome's development. There is little reciprocity in appreciating the overwhelming demands placed on the Aboriginal negotiators as they seek to represent their communities and act in their long-term interests with a pitiful resource base and unequal political strength. Contrast the resources of a Shire Council with over twenty staff, consultants at their disposal, a budget of millions and a group of elected representatives working within a legislative framework, to that of a newly established group of people who are still developing a representative structure which as yet has no constitution, no formal mechanisms for consulting, and an extremely limited budget for expert advice, transport, and wages.

This paper has argued there are inherent problems for Aboriginal people engaging in the processes established by the Native Title Act. The historical experiences of the Aboriginal negotiators, and the communities they represent, should be seen as a continuum, and not as features of a discrete era bearing no relevance on the positions Aboriginal people take today. For the community in Broome, engaging in mediation to reconcile differing rights and interests in land and sea ownership, use and management, the past experiences are extremely relevant to current processes. The exclusion of Aboriginal people from very recent land use planning exercises or strategies, and the dismissal of Aboriginal people's aspirations from more general development planning, is inexcusable yet it has continued until it can no longer be avoided. There is no doubt that the assertion of Native Title rights will force change on the decision-making structures and processes affecting the land and sea traditionally held by the Broome Native Title holders, however, for all the reasons discussed above, it is doubtful at present whether the Aboriginal community is in a position to negotiate optimal and lasting outcomes.

There is sufficient evidence from the last fifteen months of negotiations within the Native Title Tribunal in Broome to demonstrate that serious

attention must be given to reform of the mediation process. There can be little hope for equitable outcomes until the structural problems and resource inadequacies are redressed. Native Title processes should protect Aboriginal and Islander people's custodial relationships to the land, sea and natural resources; the substance of that title should not be reduced to mere transactions in interests in land and land-based commodities. Nor should the mediation process entrench the current land use development paradigm and thereby foreclose alternative community development paths. If recognition of Native Title is to be acted on more attention will have to be focused on the needs of the Aboriginal community in maintaining and re-asserting cultural strength and challenging contemporary power relations than on the needs of others' predominantly economic interests, claiming rights in land and demanding certainty in land use decisions.

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or Rubibi Dreamings**

Designed by:

Patricia Mamajun Torres

Language group: Yawuru

Skin group: Banaga

Aboriginal name: Mamajun, after a
red berry that grows along sand-
dunes north of Broome, WA.

STORY OF DESIGN

The cover design depicts three important Dreaming histories of Broome, WA. The snake represents Bulany, the water-snake, 'bringer of rain'; the three-toed footprints of Marala, the Emu-man, a creator of laws for this area; the footprints of Yila Rayi, the Dog Spirits that protect Minyirr area. All are Yawuru histories from Broome, WA.

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