

**Submission of the Aboriginal and Torres Strait Islander Social Justice
Commissioner to the Inquiry into Indigenous Land Use Agreements by the
Parliamentary Joint Committee on Native Title and the Aboriginal and Torres
Strait Islander Land Fund**

Executive Summary

Native title agreements are emerging as an important tool in defining the rights of native title holders over their land. As Aboriginal and Torres Strait Islander Social Justice Commissioner I welcome negotiation and agreement-making as a way of establishing a stable and enduring basis for a dynamic and long term relationship between Indigenous and non-Indigenous people over land. However I am concerned that throughout this process there are currently no mechanisms to ensure that the human rights of Indigenous people are being respected. Substantive outcomes that are just and equitable are only achieved if there are minimum standards in place that require recognition and protection of these human rights.

An increasing number of native title agreements have been reached across the country, both within and outside the provisions of the *Native Title Act* (NTA). Many agreements reached outside the Act have emerged from negotiations which were initially conducted within the processes of the NTA. Others were negotiated entirely outside the NTA, with the provisions of the NTA acting as a catalyst. In all instances the NTA and the benchmarks contained within it are instrumental to the process by which native title agreements are reached and the rights contained within them. It is therefore essential that these legal benchmarks are consistent with human rights principles of equality and effective participation.

As explained in the *Native Title Reports* 1998, 1999 and 2000 the benchmarks contained in the amended NTA are racially discriminatory in significant ways. In the four sets of provisions which these *Native Title Reports* identify as discriminatory: the validation, confirmation, primary production and right to negotiate provisions, any conflict that arises between native title interests and non-Indigenous interests is resolved by ensuring that non-Indigenous interests always prevail over Indigenous interests.¹ The failure of the NTA to provide to native title-holders the same level of protection of their interests as that provided to non-Indigenous interests is racially discriminatory. Moreover these provisions were adopted in July 1998 without the informed consent of Indigenous people.

In the context of this legislative framework governing native title the human right standard of *equality* is not required to determine the allocation of rights under native title agreements and the standard of *effective participation* is not a necessary component in the agreement-making process.

¹ The Acting Aboriginal and Torres Strait Islander Social Justice Commissioner argued to the Committee on the Elimination of All Forms of Racial Discrimination that the validation, confirmation, primary production upgrade and the amendments to the right to negotiate provisions are discriminatory see: HREOC, CERD submission, paras 43 – 90. www.hreoc.gov.au An analysis of these provisions and their application by State and Territory governments is also contained in the *Native Title Report 1999*, pp49 – 67. The Committee on the Elimination of Racial Discrimination also found these four sets of provisions to be discriminatory in March 1999. Committee on the Elimination of Racial Discrimination, *Decision (2)54 on Australia – Concluding observations/comments*, 18 March 1999. UN Doc CERD/C/54/Misc.40/Rev.2.

The major human rights standards elaborated at international law with regard to Indigenous people are the rights to:

- Non-discrimination on the basis of race as required by article 2, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); article 26 International Convention on Civil and Political Rights (ICCPR)
- Equal protection of property interests before the law as required by article 5, ICERD, and article 17, Universal Declaration of Human Rights (UDHR)
- Protection of the right to maintain and enjoy a distinct culture as required by: article 2, ICERD, and article 27, ICCPR, and
- Right of Indigenous people to effective participation in decisions affecting them, their lands and territories as required by: article 5(c) of ICERD, article 1 of the ICCPR, and article 1 of the International Covenant on Economic Social and Cultural Rights (ICESCR).

The native title agreement-making process should be based on the following principles that have been generated from the above human rights principles:

1. Native title interests are entitled to the same level of protection as non-Indigenous interests
2. Non-extinguishment of native title
Native title-holders should not be required to give up native title in order to access or enjoy benefits that arise from negotiations based on the existence or prior existence of their native title. Negotiations that respect the equality of Indigenous peoples' property rights with other property rights will not seek further extinguishment of native title. Furthermore, where the legal question of prior extinguishment is uncertain, but native title parties maintain a relationship with the land based on traditional law and custom, negotiations should proceed as if native title continues to exist. Even where native title has been extinguished in a part of the claim area, this should not preclude negotiations regarding that land if the interest that extinguished the native title has ceased (and the land has reverted to Crown title) and the native title claimants maintain a connection with that land based on the observance of traditional law and custom.
3. Negotiation of agreements that encourage and allow continued observance of Indigenous laws and customs
International human rights treaties recognise that all peoples have an equal right to practice and enjoy their distinctive culture. Native title negotiations should not require native title parties to breach their laws and customs in order to obtain the benefits of their native title interests.
4. Negotiation of agreements that recognise Indigenous governance within their traditional lands
International human rights principles recognise that Indigenous peoples have a right to effective participation in decisions affecting their traditional lands. In relation to native title negotiations, this right should lead to:
 - Recognition of native title holders as owners or joint-owners and managers of the land;
 - Provision for joint-management arrangements in national parks;
 - The group itself should determine membership of the native title party based on General Recommendation VIII, of ICERD which states that 'group

membership shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.²

5. Recognition that native title is a group right and that the inter-generational aspect of the right must be protected
6. Recognition that native title is a unique interest
Native title has cultural, religious and social significance. Furthermore, its economic value to Indigenous people is limited by the fact that it is inalienable. Consequently, purely economic assessments of land value are not appropriate for the calculation of compensation. Negotiated agreements should reflect this.
7. Native title parties' "connection" to land should not be interpreted restrictively.
It must be recognised that, just as non-Indigenous Australian culture has changed since the British acquisition of sovereignty, so have Indigenous cultures. 'Connection' to land may include contemporary cultural beliefs and practices forming a distinct indigenous culture that has developed from an earlier traditional culture as it existed at the time of the acquisition British sovereignty.

I advocate the use of framework agreements to institute these principles into the native title agreement-making process.

Native title agreements are limited by the discriminatory standards contained in the NTA

My concern that native title agreements are not required to meet human rights standards is substantiated by an examination of the legislative context in which agreement-making occurs. In addition to the four sets of provisions which the previous three *Native Title Reports* identify as discriminatory (referred to above), the future act provisions of Division 3 Part 2 of the NTA, as they have recently been interpreted by the Federal Court, also fail to provide to native title holders protection of their interests that is equal to that provided to non-Indigenous interests. These procedural rights are particularly significant in determining whether and at what level Indigenous people are engaged in negotiations concerning state-wide land use policy including water management, infrastructure, national parks, agricultural activities etc. Two cases are of particular significance in this regard.

In the course of a native title determination application before the Federal Court, the Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples sought a declaration that a buoy mooring authority issued by the State to Pasminco Century Mine Limited was invalid.³ The primary basis of the invalidity was asserted to be non-compliance with the procedural requirements of the future act provisions of the NTA.

The Court held that non-compliance with the notification or other procedural requirements of those subdivisions of the NTA does not affect the validity of a future act⁴.

² International Committee on the Elimination of Racial Discrimination, *General Recommendation VIII – Identification with a particular racial or ethnic group (Article 1, paras 1 & 4)*, 24 August 1990, in UN Doc: A/45/18.

Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland [2001] FCA 414, Full Court, 11 April 2001

⁴ Per French J at 26.

The decision raises serious questions about the value of the protections offered by the NTA pending a determination of native title, particularly in relation to non-mining future acts. It appears to render compliance with the procedural requirements of certain provisions of the NTA optional on the part of governments and third parties.

The decision in *Harris v Great Barrier Reef Marine Park Authority*⁵ also highlights the failure of the NTA to provide adequate protection to native title interests. Between November 1998 and February 1999 the applicants received 109 notices for permits, primarily for tourism activities, in the area of sea covered by their native title claim.

The notices did not disclose the identity of the applicant for the permit in each case nor the area or location within the claim area where the proposed act was to occur. The majority of the notices provided little more than a blanket description of the areas.

The Court held that the notices complied with the requirements of section 24HA NTA. Further, the Court held that there was no requirement in subsection 24HA(7) NTA requiring notification to be given to registered native title claimants before an Authority had determined to grant the permit requested.⁶

Here again, the Court's decision raises serious questions about the value and utility of the procedural rights available to native title holders under Subdivision H Division 3 Part 2 NTA.

The majority of Indigenous Land Use Agreements (ILUAs) deal with 'future acts' and their impact on native title rights.⁷ Where the NTA permits the non-Indigenous party to proceed with the proposed act without notifying or consulting Indigenous parties, native title parties have no real bargaining power in the agreement-making process.

In view of this legislative framework and the inequality between Indigenous and non-Indigenous parties devised by the NTA, I am not confident that, in their current form, the ILUA provisions can guarantee outcomes that transform these unequal relationships. I have advocated legislative amendment in my preceding three *Native Title Reports* and before this Committee (23 February 2000) as the most secure method of removing the discriminatory benchmarks in the native title process. In particular I have recommended that the Federal government commence negotiations with Indigenous representatives and native title applicants ensuring that the NTA has the consent of Indigenous people.

I advocate this approach not so as to finally determine the rights of the Indigenous and non-Indigenous parties over native title. The NTA should be amended so that the agreements that will inevitably continue to be reached between Indigenous and non-Indigenous people over native title can form the basis of an enduring and stable relationship between them. Where racial discrimination remains intrinsic to the agreement-making process, the relationship between Indigenous and non-Indigenous people will always be contingent upon its eradication.

⁵ (Unreported)[2000] FCA 603 (11 May 2000) per Heerey, Drummond and Emmett JJ.

⁶ Per Heerey, Drummond and Emmett JJ at 15.

⁷ See *National Native Title Tribunal*, Submission to this Inquiry, 30 November 2000, p4

In this submission I focus upon the agreement-making process as an alternative course available to Federal, State and Territory governments, and peak bodies that have the political will to deal with native title rights on the basis of equality. A clear illustration of how agreements can mitigate the discrimination contained within the NTA is their capacity (under sections 24BB and 24CB) to change the extinguishing effects of the validation of intermediate period acts. Unfortunately, to date, no ILUA has been used for this purpose.

Native title is the recognition of the laws and customs that make Indigenous people distinct. Native title agreements provide an opportunity to governments and other parties to deal with Indigenous people on the basis of the recognition of this unique identity. What I advocate is the use of framework agreements to institute non-discriminatory standards in the native title process. These standards then provide a benchmark against which site-specific and project-specific agreements can be negotiated.

The utilisation of framework agreements to ensure the adoption of minimum standards by negotiating parties

Settling co-existence by agreement cannot be bypassed. Legislation does not and cannot dictate the way in which people sharing land will live together. A court does not and cannot direct the parties to a dispute on how they should interact. Only the parties to the relationship can do this.

As I have indicated framework agreements provide an opportunity to both Indigenous and non-Indigenous parties to settle upon a set of standards for the co-existence of their interests in land. The human rights principles outlined above provide the basis for a co-existence that is productive, stable and enduring.

There are many examples of States and peak bodies entering framework agreements with Indigenous representatives in order to set standards and templates for subsequent site-specific or project-specific agreements. The South Australian Government, Farmers Federation and Chamber of Commerce are working with native title groups and the representative body, Aboriginal Legal Rights Movement, to establish a state-wide framework agreement in which an enormous range of issues, including, native title determinations, access agreements, service provision, public health, heritage protection, intellectual property rights, water management, environmental management infrastructure, heritage clearance and notification procedures are on the table. In Victoria the State government, ATSIC and the Mirimbiak Nations Aboriginal Corporation have agreed to a *Protocol for the Negotiation of a Native Title Framework Agreement for Victoria* in order to resolve native title applications as well as a broad range of issues outside of native title. In New South Wales, the NSW Aboriginal Land Council and NSW Minerals Council have signed a *Protocol for the Negotiation of Agreements for Exploration and Mining for NSW*. In Queensland the State government and Indigenous representatives are negotiating an ILUA for determining the process for issuing of notifications under s29 of the NTA. Western Australia is currently reviewing its guidelines in relation to native title and in relation to s29 notifications. Clearly there is a willingness by governing and representative bodies to establish a framework for the co-existence of Indigenous and non-Indigenous interests in land.

The process by which this framework is being established is as important as the standards that it sets. Indigenous people must be invited to participate in the process through negotiation, not consultation. Issues that integrally affect Indigenous people should only be decided upon with their informed consent.

The following is a discussion of just some of the issues that have arisen in the formulation of framework agreements.

1. The settlement of native title applications by agreement.

The membership of the native title group, its traditional lands, and its relationship to this land can be agreed upon through regional or state-wide agreements aimed at facilitating productive future negotiations between Indigenous and non-Indigenous people. The South Australian state-wide agreement process demonstrates the potential of agreement-making to determine native title applications where native title groups across the State are involved in the process.

Blanket opposition and conditional opposition to settling native title determinations through agreement have been raised at the government level.

- **Blanket Opposition**

The Federal Attorney-General has criticised the use of the agreement process for the purpose of settling native title claims.

ILUAs and determination are both important but very different tools – they have different objectives and serve different purposes. One is not capable of replacing the other. ILUAs were never intended to be an alternative to a native title determination.

A determination of native title – whether by consent or at the end of a hearing before a court – establishes the area over which native title exists, its nature, content, and extent, and the identity of the native title holders. Determinations guarantee important procedural benefits for native title holders under the Act.⁸

In my view this approach gives too much credit to the capacity of courts and the legal system to determine native title claims in a just and equitable manner. The court process, from application through to a hearing followed by a determination, has not proven to be a fruitful process for Indigenous people claiming native title.

The *Yorta Yorta* case⁹ stands as a poignant reminder of the injustice contained within the common law's recognition of native title. That is, where the dispossession of Indigenous people through colonialism has been most brutal and systematic, the less likely that the traditions and customs practiced today by the descendants of these Indigenous people will be recognised and protected by the law as native title rights.

Even though Justice Olney made it quite clear in the *Yorta Yorta* decision that he was not concerned with addressing this fundamental injustice within the common law, his

⁸ The Hon Daryl Williams, Opening Address, Native Title Forum 2001, Negotiating Country, *Beyond Mabo: The Practical realities of negotiating native title*, Customs House, Brisbane, 2 August 2001

⁹ The members of the *Yorta Yorta* Aboriginal Community v The State of Victoria and Others (unreported, Federal Court of Australia) [1998] FCA 1606, 18 December 1998 Olney J ('Yorta Yorta').

treatment of the evidence before him and his limited construction of native title as a bundle of rights compounded this injustice.

The case demonstrates the limitation of the legal concept of native title and its failure to protect contemporary Indigenous culture when constructed as a bundle of frozen rights recognising only traditional practices as they occurred prior to sovereignty.

In contrast to determining native title through the legal system, the agreement process is premised on the understanding that the parties to the agreement have an equal right to be at the negotiating table. Of course issues might arise between the Indigenous parties as to who constitutes the native title party. Non-Indigenous parties also need to be assured that they are dealing with the right parties. These issues are discussed below. The central issue in the agreement making process however is how the rights of the parties affect each other. It may be of no consequence to a farmer that native title is either a bundle of rights or a right to land, or that it is either extinguished or suspended by inconsistent acts, so long as he is able to continue unimpeded in his enterprise. A framework agreement based on human rights principles, involving all those affected throughout the state or in a particular region can bypass the injustice inherent in the legal system where there is no practical reason to rely upon it.

- **Conditional Opposition**

A developing practice by state governments is to require a connection report from independent experts about the merits of the native title claim prior to entering into negotiations with the claimant group. Connection Reports are a pivotal part of native title policy in Queensland and are a significant part of the Western Australian draft guidelines currently under review.¹⁰¹¹

The primary purpose of the connection report appears to be to satisfy the government as to the *legitimacy* of the native title claim in order to protect the non-native title parties rather than assisting in the process of building a long lasting, stable and equitable set of relationships between all stakeholders.

Connection reports are reports written about Indigenous people, culture and land by non-Indigenous people. They contribute very little to intra-Indigenous agreement regarding who speaks for what country or about the basis of the native title claimed. In fact, the production of genealogies using prescriptive and culturally inappropriate criteria for establishing membership of the group through biological descent has in some communities greatly increased division regarding how to pursue native title interests.

The Kimberley Land Council has explained its concern at a restrictive test, based on genealogies, for inclusion in the claim group in relation to the registration test as follows:

¹⁰ Wand Review of Western Australian ‘General Guidelines – Native Title Determinations and Agreements’

The conditions and implementation of this aspect of the registration test marginalise the customary law and cultural practices of Aboriginal people in the Kimberley, where traditional connections to country remain strong. In order to comply with the registration test, native title claimants are forced to find ways of expressing extended kin relationships that do not correlate with the traditional Western definitions based on marriage and blood ties. The requirement for those in the claimant group to express the relationships which connect them in terms of biological descent is at odds with traditional ways of defining who has rights to country...

Aboriginal ways of defining their relationships within a claimant group are belittled when they must do so according to Euro-centric notions of a biological descent group. This feature of the registration test and its administration is creating an artificially narrow definition of the claimant group... The laws and customs which underpin native title rights should be accorded legitimacy in the process of registering native title claims.¹²

The assumption that native title parties' claims must be 'legitimised' through the production of 'connection reports' takes away native title parties capacity to speak for themselves. I argue below that an important part of building enduring relationships between all stakeholders is empowering Indigenous people to speak for and represent their own interests.

- **Building relationships between all stakeholders**

Building relationships between all stakeholders through native title agreements will require that some basic issues about the nature of native title and the native title group be established early in the negotiation process. These issues include;

- ensuring that negotiations are conducted with native title parties who, in accordance with their tradition, can speak for country. There is mutual benefit to parties to a native title agreement including in the agreement some level of definition to the membership of the native title group. For Aboriginal people it ensures adherence to the principle that no-one can speak for another person's country. For non-Indigenous parties it ensures that negotiations are being held with those people who have the authority to provide binding promises in relationship to the land in question.
- establishing what country native title parties can speak for, and
- establishing basic information about their relationship with the land.

The process of building a stable set of relationships between all stakeholders *relies upon the existence of stable agreement between and within Indigenous communities* about these issues. Where these are unclear it is essential that Indigenous communities themselves are involved in sorting out the issues. Building this agreement requires

¹² Kimberley Land Council, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund – Section 206d inquiry into the operation of the Native Title Act 1993*, 8 March 1999, (Herein Kimberley Land Council Submission to section 206d inquiry) pp 5-6.

that, as a first and fundamental step to all negotiation processes, Government must engage directly with Indigenous communities and resource Indigenous people to work out amongst themselves how they wish to pursue their native title rights. This may involve:

- empowering Indigenous people to resolve disputes over native title issues, and to this end:
- allocating resources (time, money and personnel) for Indigenous institution building,
- allocating resources (time, money and personnel) for capacity-building in Indigenous communities, and
- resourcing Indigenous people to effectively participate in negotiation processes within their own communities and with other stakeholders in land.

As a result of these processes, native title parties themselves could produce a report (a negotiation report) such as that suggested by the Western Australian Aboriginal Native Title Working Group (WAANTWG) “Submission to the Review of the State Government’s General Guidelines” of 16th May 2001.¹³ In this way, it may be possible to clarify issues that are central to all native title negotiations and are fundamental to establishing stable, equitable relationships between all parties, while ensuring that the processes according to which the negotiations are conducted respect the fundamental human rights of all parties.

Agreements offer an opportunity to return decision-making power over group membership to Indigenous people. Such an approach has the support of the CERD Committee through General Recommendation VIII, which states that ‘group membership shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.’¹⁴ A benefit for all stakeholders in adopting this approach is that it ensures that each individual member act with the authority of the claimant group.

2. Future Act Agreements

As indicated the majority of native title agreements, both under the ILUA regime or outside the NTA, deal with ‘future acts’ and their impact on native title rights.¹⁵ These agreements decide the terms by which Indigenous people and non-Indigenous people co-exist on native title land. While these agreements deal with a vast range of issues, from mining projects to the installation of moorings, it is important that they are all guided by a set of minimum standards consistent with human rights principles set out in the executive summary above. Framework agreements, on either a state or regional level, can ensure that co-existence agreements are premised on an understanding of native title that:

- applies the non-extinguishment principle (see definition at s238 NTA)
- entitles it to the same level of protection as non-Indigenous interests

¹³ page 7

¹⁴ International Committee on the Elimination of Racial Discrimination, *General Recommendation VIII – Identification with a particular racial or ethnic group (Article 1, paras 1 & 4)*, 24 August 1990, in UN Doc: A/45/18.

¹⁵ Op cit, Submission to this Inquiry of the National Native Title Tribunal, p4

- encourages and allows continued observance of Indigenous laws and customs
- recognises Indigenous governance within their traditional lands including recognition of native title holders as owners or joint-owners and managers of the land

Framework agreements can also establish protocols for resolving disputes between the parties in the negotiation of or for the duration of a particular project. These may include referral to the National Native Title Tribunal (NNTT) or some other mediation service culturally sensitive to the issues. The use of compulsory acquisition to resolve disputes between Indigenous and non-Indigenous parties is an unacceptable dispute resolution strategy.¹⁶ It is not conducive to stable and long term relationships between Indigenous and non-Indigenous people in the area. Nor is it consistent with the human rights principles of equality and effective participation.

3. Enduring Relationships

A benefit of framing native title agreements in human rights principles is that it enhances the durability of the relationship created through the agreement. Two aspects of the current agreement process detracts from this goal:

- Transferees of the non-Indigenous interest are not bound by the native title agreement whereas successive generations of native title holders are bound by the agreement. The National Native Title Tribunal have made a number of suggestions to overcome this inequality at page 4 of its submission to this inquiry. I endorse these suggestions. I also recommend amendment of the NTA to rectify this imbalance.
- The recent withdrawal of the NSW government from a framework agreement that it signed with the NSW Aboriginal Land Council in March 1999 in relation to the management of national parks raises the issue of whether such agreements are binding on governments who are signatories to them or their successors. If, as it appears, governments are able to renege on these important agreements without liability then Indigenous parties need to seek further protection of their rights outside of the agreement. While registration of such agreements under the ILUA as ‘alternative procedure agreements’ may provide some security, further security would be gained by entrenching the rights agreed to through regulation or legislation.

¹⁶ At the National Native Title Tribunal Agreements Conference in Brisbane held on 1 – 3 August 2001, Senator Jeannie Ferris, Chairperson of this Committee, informed the conference that compulsory acquisition had been used by a State government to break a deadlock in negotiations between local Aboriginal parties and the local council over a community riverbank project.