



## The Consultations

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During the 2004 reporting period I have embarked on a series of consultations focusing on the ideas and principles that were contained in a Discussion Paper, released by my predecessor as Social Justice Commissioner in June 2004. The Discussion Paper was entitled *Promoting Economic and Social Development through Native Title* (at Annexure 1). This chapter seeks to record and develop the ideas and discussions that were generated in the consultation process.<sup>1</sup>

Before turning to those discussions it is important to note that the consultations were part of a broader process that started with the research and analysis contained in the *Native Title Report 2003*. The ideas emerging from the 2003 Report were condensed into a number of principles on which to base the economic and social development of traditional owner groups through native title agreement making. These principles require native title agreements to:

- Respond to the group's goals for economic and social development,
- Provide for the group's capacity to set, implement and achieve the group's development goals,
- Utilise the existing assets and capacity of the group,
- Build relationships between stakeholders, and
- Integrate the activities of native title institutions to achieve the development goals of the group.

From August to October 2004, my staff met with Native Title Representative Bodies (NTRBs) throughout the country, as well as a limited number of peak bodies, government representatives and academic researchers, to discuss the

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1 Consultations took place on the basis that people could speak openly about what was taking place without risk of being identified. For this reason, comments from particular consultations are referenced without details as to the identity of the person, location or date but rather grouped within the period over which the consultations were conducted. I am grateful to everyone who participated in these consultations, particularly in view of the scarce resources available to representative bodies, in terms of both time and money, and in view of the effort that was taken by many managers to bring their staff together to give HREOC the benefit of a range of views and experiences.



approach taken in the Discussion Paper; that of directing native title to the economic and social development of the traditional owner group. I am aware that the consultations conducted thus far do not by any means represent the entire spectrum of views on this topic, and it is intended that further consultations will take place with other stakeholders in the next reporting period throughout 2005. However, given my limited resources, I considered it necessary, in the first instance, to obtain the responses of those who represent Indigenous interests in the native title process.

Throughout the consultations, NTRBs presented their detailed knowledge of how the native title system operates either to impede or facilitate the economic and social development of traditional owner groups. My staff were able to tap into the depth of experience that has developed within NTRBs among their managers, policy officers, future act officers, lawyers, field staff, Indigenous liaison officers, and community development officers. While not all these positions exist in every organisation, taken as a whole, NTRBs present a vast wealth of specialised and general knowledge that can direct native title policy towards outcomes that benefit Indigenous people. For these reasons, I thought it important that the principles proposed in the Discussion Paper be subjected to the thought and experience that presently exists within these organisations.

As indicated, the consultations focused on the ideas in the Discussion Paper and, in particular, the proposed principles, as a basis for addressing the economic and social development of traditional owner groups. After getting an overview of the significant issues of concern to the particular organisation, my staff directed the participants to the following questions:

- How does the native title system operate to improve or impede the economic and social development of the native title parties?
- Do the principles provide an appropriate or adequate foundation on which to base the group's economic and social development?

Inevitably, the response to these questions differed significantly between organisations, depending on a range of factors. Some of the factors that determined the extent to which the native title system provided a vehicle for economic and social development in a particular area included:

- the cohesion of the relevant traditional owner group and its capacity to negotiate and enter into agreements,
- whether the native title land held resources on which development could be based,
- the level of settlement that had occurred on the land subject to the claim and the extent to which prior or current tenures extinguished native title,
- the attitude of the state government to native title and the way it negotiates native title agreements, and
- the capacity of the NTRB, in resources and experience, to direct native title towards the economic and social development goals of the group.



These and other differences shaped the responses we received to the questions posed. Nevertheless NTRBs repeatedly raised some key issues that must be reappraised in order to direct native title to the economic and social development of the traditional owner groups in their areas. These themes are:

- Identification of the traditional owner group,
- Good governance,
- Capacity development,
- Resources,
- Increasing opportunities for economic and social development through native title,
- Regional issues,
- Legal tests and standards,
- Relationships between stakeholders in the native title system, and
- Levels of engagement between stakeholders in the native title system.

The rest of this chapter is a discussion of these themes as they arose in the consultations. It seeks to capture the issues as they were presented and develop some of the more important issues through additional research and analysis.

Throughout this Report 'traditional owner' is used as a global term referring to native title claimants and/or holders; traditional owners whose rights are extinguished by tenure or who fail to satisfy the connection standards of the *Native Title Act 1993* (Cwlth) (NTA) but who are recognised through the traditional ways of defining who has rights to country, and traditional owners recognised under state, territory and Commonwealth land rights legislation. However, the focus of this model is directed towards the processes that are triggered by or recognised under the NTA.

## 1 Identification of the traditional owner group

Identifying the group that, under traditional law, have responsibilities and entitlements to a particular area of land is very important, not only within the legal framework of the native title system, but also within the framework of Indigenous relationships and values. Traditional ownership is an important basis of authority and respect within Indigenous relationships. It is an important part of the way Aboriginal and Torres Strait Islander people relate to kin and community.

The principles presented in this Report for promoting economic and social development through native title, seek to integrate the structures and values that are important to Indigenous peoples with the processes that will maximise the economic and social development outcomes for traditional owner groups. Indeed it postulates that economic and social development that does not take account of these values and structures will not, in the long term, be sustainable or productive.

The consultations that my staff have conducted so far confirm that identification of the traditional owner group is not only important to Indigenous people it is also important in maximising the opportunities for economic and social



development that can be generated from the native title system. This is because governments and companies seeking to work in partnership with traditional owners need to be confident that they are dealing with 'the right people'.

The consultations confirm that identifying the traditional owner group within a native title system that is directed to their economic and social development must take account of these two factors. First that the process of identifying the group gives confidence to Indigenous people by reflecting the traditional ways of defining who has rights to country, and second, that it gives confidence to those seeking to develop productive partnerships with traditional owners that their dealings and investments will not be undermined in the future by claims from other groups and individuals.

My staff were informed in the consultations that the complexity of identifying the traditional owners of a particular area creates challenges for all stakeholders in the native title process. Traditional owners come under immense pressure to prove themselves within the legal framework and to resolve the membership of their group, as indicated by the Federal Court:

The proper identification of the native title claim group is the central or focal issue of a native title determination application. It is the native title claim group which provides the authorisation under s 251B [requiring the group to authorise those bringing the native title claim], and it is the group on whose behalf the claim is then pursued and, if successful, in whose favour a determination of native title is then made.<sup>2</sup>

Satisfying these demanding legal tests for authorisation and identification is resource intensive. Yet if these tests do not satisfy the requirements of Indigenous people that the process reflects the processes that command respect and authority within their community and the requirements of non-Indigenous people wishing to engage with traditional owner groups then they will not provide a basis for the economic and social development of the traditional owner group. Several respondents in the consultations were critical of the native title system in its early years, saying that the law and the procedures of the National Native Title Tribunal registered many native title claims that did not correspond to traditional boundaries and claimants that did not represent traditional owner groups. In 1998, there was a considerable tightening of the claim process through amendments to the NTA, including what groups had to do to authorise a claim and what the Tribunal required to register a claim. Nevertheless, there are still many applications to the Federal Court made by Indigenous parties unhappy with the composition of various claim groups. The Court has acknowledged the difficulties:

Native title determination applications deal with the concept of customary law and in most cases are made on behalf of a number of people. It is not surprising therefore that they generally involve more than usual practical and legal difficulties including, not uncommonly, disputes between competing claim groups or within the claim group. There can be considerable difficulty in resolving those issues. The difficulties are compounded if there is uncertainty about who is claiming native title in

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2 *Edward Landers v South Australia* [2003] FCA 264 (31 March 2003), per Mansfield J. at [35].



the land that is the subject of the application or if there are multiple claimants asserting essentially identical interests. To some extent, s 61 of the old Act [i.e. before the 1998 amendments] anticipated these problems and attempted to address them by requiring the applicant to describe or otherwise identify the persons with whom he or she claimed to hold native title. It did not, however, resolve the problems.<sup>3</sup>

In seeking to overcome some of these difficulties, as well as avoid enormous expenditure on litigation, governments have developed criteria that will enable them to settle native title claims through negotiation rather than litigation. Connection reports have arisen as a method of facilitating a negotiated outcome to native title proceedings while at the same time satisfying government that they are dealing with the traditional owner group for the area that who would be entitled to rights under the law of native title.

Like the legal tests that they replace, connection reports need to satisfy the two issues raised above if they are to provide a basis for encouraging economic and social development for the traditional owner group.

The role and preparation of connection reports is quite contentious. My staff were informed by NTRBs that connection reports require a substantial investment in terms of human and financial resources. Governments often expect to be provided with these reports before they will embark on similarly time and resource consuming tenure research. The findings of connection reports can then be redundant if tenure research locates a historic and extinguishing tenure.

Some states have not yet developed clear guidelines that enable issues of identification to be quickly and efficiently determined. The lack of clear guidelines in New South Wales for instance has caused difficulties and confusion for traditional owners wishing to access the entitlements that the native title system may make available to them.

In contrast, in South Australia Indigenous people through their NTRB, the Aboriginal Legal Rights Movement, have participated in developing the criteria by which connection is established at the administrative level to enable native title negotiations to commence. The process for developing these criteria and the criteria themselves are set out in the government's publication, *Consent Determinations in SA - A guide to preparing Native Title Reports*.<sup>4</sup> The participation by the NTRB in the formulation of the criteria for identifying the traditional owner group for a particular area, ensures legitimacy of the process within the Indigenous community. It also establishes a good foundation for engagement between the traditional owner group and the government.

I commend the approach adopted by the South Australian Government as an approach consistent with important human rights standards, in particular, that there be effective participation by Indigenous peoples in the development of policies that affect their rights.<sup>5</sup> Moreover it is consistent with General

3 *Bodney v Bropho* [2004] FCAFC 226 (24 August 2004), per Stone J at [47], Spender J. agreeing at [1].

4 Crown Solicitor's Office, Native Title Section, *Consent Determinations in South Australia: A Guide to Preparing Native Title Reports*, Government of South Australia, 2004.

5 International Committee on the Elimination of Racial Discrimination, General Recommendation XXIII – *Indigenous peoples*, 18 August '1997, UN Doc CERD/C/5/51/Misc.13/Rev.4, para 3.



Recommendation VIII of the Committee on the Elimination of Racial Discrimination (the CERD Committee) which states that 'group membership shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned'.<sup>6</sup> Involving Indigenous people in the development of connection criteria ensures that the agreed approach is also one that reflects the standards that Indigenous people would apply to themselves.

The proviso to the principle of self-identification promulgated by the CERD Committee, 'if no justification exists to the contrary', allows the government to engage with the traditional owner group unless there are substantial disputes, overlapping claims or justifiable uncertainty in relation to the identification of the traditional owner group.

Connection report guidelines and negotiation thresholds vary throughout each state and territory in Australia. In some states negotiations can commence while connection is still being established and verified. Another approach is that used by Victoria, where there is a sliding scale of evidence based on the outcomes sought. For example, in relation to a future act where the Victorian Government is a party, the state will require that traditional owners provide basic certainty about the identity of the group; description of claimed rights and interests; traditional basis of connection and some evidence of traditional physical connection to a part of the land under claim.

In Queensland, one NTRB reported that many third party respondents in native title claims want to view connection reports during mediations. Similarly, some third party respondents in South Australia indicated their desire to play a role in the State's assessment of connection material. A Queensland NTRB considered that connection reports should not be provided to respondents, providing an opportunity to contest information in a connection report. I consider the assessment of connection material by third party respondents inappropriate and unnecessary. The government has the responsibility and the necessary anthropological, historical and linguistic expertise to assess material and provide respondents with an overview of this assessment. It is an unnecessary duplication of process and a consequent waste of time and money that respondents conduct assessment as well.

Despite some of the difficulties set out above, connection reports can provide a useful mechanism for identifying the members of a traditional owner group beyond the standards required for registration but without the expense of a litigated native title claim.<sup>7</sup> However, as discussed, preparing connection reports can itself be a lengthy and resource intensive process if it merely requires a replication of the material that would be required in a court proceeding and turns out to be unnecessary after subsequent tenure searches. Delaying negotiations while such a report is prepared will also delay the traditional owner

6 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.

7 However some practitioners have argued that the state government connection reporting standards and assessment are so onerous that recognition pursued through the courts may be more fruitful. R. Blowes, 'Get Determined – the lure of the negotiated outcome', *The Native Title Conference 2004: Building Relationships*, 3-4 June 2004, Adelaide.



group engaging with the processes that can generate economic and social outcomes for their community. Consequently, unless there are substantial claimant disputes, overlapping claims or uncertainty, the first steps set out in the Discussion Paper principles could begin concurrently with the connection report research. That is, research for the membership of the traditional owner group may go hand in hand with assisting traditional owners think about their long term plans and goals. Progressing both connection reports and traditional owner goals for economic and social development simultaneously may bring parties to a negotiated outcome with both the traditional owner group and their goals clearly identified.

## Summary

- The tests for identifying the traditional owner group within a native title system, whether applied administratively by the government or through the court, should reflect the traditional ways of defining who has rights to country, and also, give confidence to third parties that their dealings with the traditional owner group will not be undermined in the future by claims from other groups and individuals.
- Connection reports can provide a useful mechanism to identify the members of the traditional owner group for a particular area. The criteria for establishing negotiation thresholds and the requirements for connection reports should be determined with the effective participation of Indigenous people.
- Governments should commence negotiations with the native title claim group, or those purporting to be it, unless there is a justifiable basis to believe that another group will dispute the identity of this group. A justification not to engage with the native title claim group exists where there are substantial disputes, overlapping claims or justifiable uncertainty in relation to the identification of the traditional owner group. In these cases the government should assist the Indigenous parties resolve the disputes between them.



Good governance within traditional owner groups is necessary to implement the principles set out in the Discussion Paper (at Annexure 1). The importance of governance is highlighted by the second principle which requires that native title negotiations aimed at economic and social development 'provide for the group's capacity to set, implement and achieve their development goals'. This process of goal setting, decision making and management is crucial in achieving the economic and social development goals of traditional owners. During consultations one respondent succinctly commented that 'development and governance are interrelated and integrated'.

The issue of what constitutes good governance was frequently discussed during consultations with many respondents quickly identifying the links, opportunities and limitations for building strong governance processes and structures within the native title system. This section summarises the governance issues raised and also reports on some of the research and analysis that addresses Indigenous governance issues both in Australia and overseas.

In summary, respondents discussed the following issues related to governance:

- the importance of leadership,
- the links between traditional law and governance,
- managing internal relationships and group decision making,
- representation,
- corporate structure and Indigenous governance, and
- Prescribed Bodies Corporate (PBCs).

Governance has become a concept frequently used in the Indigenous policy framework within Australia and can be defined as:

...[the] power, relationships and processes of representation, decision making and accountability. It is about who decides, who has influence, how that influence is recognised and how decision-makers are held accountable.<sup>8</sup>

Governance has also been compared with sport – 'having the ability to organise a fair-minded winning team in any sport is good governance'.<sup>9</sup> Good sport needs clear rules, time frames, umpires, coaches, captains and the skills and tools to play the game well. Similarly, good governance needs:

- clear goals,
- rules that everyone understands,
- values that everyone agrees with,
- clear roles and responsibilities, and
- the skills and abilities to run organisations.

Good governance within Indigenous groups must include all of these elements. However, it is also important that these elements are determined by traditional

8 M. Dodson, 'Capacity Development for Indigenous Governance and Good Leadership' paper presented at *Northern Territory Indigenous Governance Conference*, Jabiru NT, 4-7 November 2003.

9 N. Sterritt, 'Hands-on Governance, A Canadian Perspective' paper presented at *Northern Territory Indigenous Governance Conference*, Jabiru NT, 4-7 November 2003.





owners<sup>10</sup> in consultation and partnership with NTRBs and governments. This means that the Indigenous groups must decide the rules of the game: how decisions will be made, how disputes will be managed<sup>11</sup> and what the goals are. While NTRBs and government can provide important advice and skills to build governance structures that protect traditional owner rights and interests and promote accountability and transparency. If necessary, NTRBs and government can also provide skills and abilities to support the running of organisations.

## Importance of leadership

During the consultations, leadership within the traditional owner group was said to be critical to the process of developing good governance. One NTRB representative noted that two types of leadership are important within the traditional owner group. First, a leader who can build unity and act as a peacemaker within the group. Second, a leader who can act as a visionary, understand the strength of the negotiating position and encourage traditional owners to explore their goals. These qualities may be found in a team of leaders, rather than one person.

Other respondents stressed the importance of encouraging young people to be involved in leadership, noting that elders are not always effective leaders. Young people may also have more skills and knowledge of non-traditional contexts to contribute to and support the traditional knowledge of elders.

Consistent with the comments from respondents, the Harvard Project for American Indian Economic Development<sup>12</sup> has identified leadership as the first step in building governance within Indigenous groups. The Project found that in nearly every successful community, governance has evolved from one person or a group of people deciding that they will no longer accept the poverty, violence and sickness in their communities and understanding that if the community does not change things, no one else will. These leaders must also be able to create support for their community's transformation among the rest of the community.<sup>13</sup>

In the Australian context it is also important to recognise that in the majority of cases Indigenous groups do not currently have the natural or financial resources to manage their affairs independent of governments. Therefore it is imperative that the leaders and the group are empowered with the skills and opportunity to work in partnership with governments on an equal footing.

10 S. Cornell, 'Starting and Sustaining Strong Indigenous Governance' paper presented at *Northern Territory Indigenous Governance Conference*, Jabiru NT, 4-7 November 2003.

11 Analysis by the AIATSIS Indigenous Facilitation & Mediation Project argues that conflicts may never be resolved and communities should aim to manage conflict so that business still gets done and decisions can still be made. See T. Bauman, *Emerging Issues in research and practice: Imposed Processes and Informed Consent*, Native Title Conference, Adelaide 3-5 June 2004.

12 The Harvard Project aims to understand and foster the conditions under which sustained, self-determined social and economic development is achieved among American Indian nations. Information on the Harvard Project is available at [www.ksg.harvard.edu/hpaied/](http://www.ksg.harvard.edu/hpaied/).

13 *ibid.*



Managing the relationships internal to the traditional owner group is necessary to support good governance and effective decision making. It must be recognised that traditional owners begin native title processes with a shared history and established ways of relating to one another. For some groups, strong relationships form the basis of their interaction and can provide an important foundation for decision making and dispute management. However at times, this shared history may include personal, family or culturally based conflicts which can cause tensions and disrupt decision making. Alternatively, some families or individuals may not be part of this shared history and new relationships and ways of relating need to be established. The complexity of existing or new relationships between traditional owners affects the way the group is able to make decisions. Traditional owners and NTRBs need to recognise these complexities and find ways of managing them.

Many respondents, including government, discussed how this process of managing the relationships which underpin decision making and governance can cause difficulties for traditional owner groups at the outset of the native title process. One respondent noted that 'native title often involves groups coming together for the first time to work together on complex issues'. As a result the 'politics of group cohesion is often a substantial part of the start of the native title process'.

Respondents also noted that in addition to managing the internal relationships of the group, traditional owners are required to reach decisions on complex issues. Rarely will traditional owners have the same view on all issues and building consensus and effective decision making through good governance becomes crucial. One respondent suggested that consensus could be reached when the majority of people agreed, although most of the group needed to be in agreement, and not just a bare majority (51%).

Managing internal relationships and group decision making is so crucial that it was suggested that NTRBs might have to wait, if possible, for a group to develop these skills before the NTRB can engage productively with the group.

A NTRB stated that one group, which holds native title, spent a number of years developing greater knowledge of native title rights and building good decision making processes outside the corporate structure, prior to the establishment of their PBC. As a result, the traditional owners understand the complexities of native title issues and are able to make decisions with little involvement from the NTRB. Also the process of building good decision making ensures that the group has transparent processes and is able to effectively manage internal disputes.

Consistent with views expressed in the consultations, the AIATSIS Indigenous Facilitation and Mediation Project<sup>14</sup> has identified a number of challenges that

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14 This project has established a website with extensive material on dispute resolution and Indigenous decision making with an emphasis on the native title system. The website is at [www.aiatsis.gov.au/rsrch/ntru/ifamp/index.html](http://www.aiatsis.gov.au/rsrch/ntru/ifamp/index.html) and the project also offers training workshops in Indigenous Decision making and Managing Conflict.



traditional owner groups face in managing internal relationships and group decision making. They include:

- the process of identifying the traditional owner or native title group,
- complex legal, commercial and community issues,
- frustration and disappointment at the limited rights available through native title,
- failure to redress historic grievances,
- effects of violence, intergenerational trauma and substance abuse on individuals and communities,
- making collective decisions in a large group, where not every individual is known to every member of the group,
- managing substantial monetary gains, and
- advisers' lack of understanding of the legal and procedural requirements of the NTA.

These problems can develop into serious, possibly violent disputes that can paralyse a group's capacity to make decisions. However, building good decision making and dispute management strategies can assist decision making and may prevent the escalation of serious conflicts.

Options that were suggested in the consultations to minimise the effects of the problems listed above include: clear explanations and educational material so traditional owners can understand the native title process; providing opportunities for traditional owners to get to know one another outside of meetings – this may just include starting a meeting a day later while families arrive and spend time with one another; and developing the skills and knowledge of NTRB staff by supporting staff training and development and promoting staff retention and career development.

In addition, Commonwealth and state governments and NTRBs must recognise that the process of traditional owner decision making is just as important as the native title outcome. At present, this recognition is not supported by the NTRB funding regime or the timeframes for future act negotiations set out in the NTA.

A good process of decision making should empower traditional owners, not confuse or undermine the way decisions are made within the group. Time and attention needs to be given to ensuring traditional owners understand their rights and interests within the native title system, such as procedural rights to comment on or object to future act processes under the future act regime, the right to negotiate in relation to the grant of mining permits, the exercise of native title rights, and the right to protect such rights from breach through common law remedies.

The process of decision making should also ensure that traditional owners are able to make decisions based on free, prior and informed consent. This requires:

- No coercion or manipulation of the traditional owners by external parties, either government or companies has occurred.
- Future act notification must occur with enough time for a group to reach informed consent.



- All members of the group are provided with information setting out the details of the project and the proponent.
- The group must be able to say 'No' to the project.
- All members of the group must be involved in the decision to withhold or provide consent.

Importantly, the process of decision making should also be shaped by the group's needs, rights and 'ways of organising and exercising authority'.<sup>15</sup> This process has been described in the Harvard Project as 'cultural matching'. The AIATSIS project argues that decision making processes must not only respond to culture but also to other issues affecting identity, including class, economic and educational status, gender, and preferred lifestyle and locality.

Time constraints are a significant threat to effective decision making and dispute resolution. The future act timeframes of the native title system create immense pressure for traditional owners and NTRBs to deliver outcomes. These timeframes usually benefit developers wanting quick access to land and waters, and can work against the effective participation of the traditional owners in negotiations, and undermine the cohesion of the traditional owner group as agreements are negotiated and benefits conferred before internal structures for decision making and dispute resolution have been developed.

## Representation

Informal structures of representation are frequently being used by traditional owners and NTRBs. Respondents noted that traditional owner groups are required to make decisions in relation to future acts before the establishment of a corporate structure. To manage this process, many NTRBs and traditional owner groups have established working groups or other representative groups to engage with issues on behalf of the broader traditional owner group before a native title determination is made.

These informal representative structures give traditional owners an opportunity to grapple with often new ways of making decisions such as group representation and transparent decision making. They also provide an opportunity for traditional owners and NTRBs to try different governance structures and processes before they establish formal structures that are more difficult to change.

During the consultations a range of views were expressed that reflect the diverse options and difficulties that might arise in establishing both informal and formal decision making structures and processes. NTRBs noted that working groups or consultation structures can take time to work effectively. In some areas, representational structures do not exist within traditional owner communities, and people need time to adjust to the process and develop the appropriate skills. Another NTRB considered that democratic representation could be problematic because one family might be able to dominate the process and influence outcomes. Alternatively, one respondent suggested that traditional

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15 T. Bauman and R. Williams, *The Business of Process – Research issues in managing Indigenous Decision making and Disputes in Land*, 2004, AIATSIS Research Discussion Paper Number 13, AIATSIS Native Title Research Unit, Canberra.



owners and NTRBs could establish representative structures derived from traditional processes and structures, to provide a governance body based on familiar models.

Respondents also commented on the process of setting up representative groups. NTRBs observed that the initial establishment of representative structures is critical to ensuring a stable decision making group. Large meetings that include as many traditional owners as possible are important to authorise representative groups to negotiate agreements on behalf of traditional owners. This can be costly and difficult to budget if traditional owners are coming from far-flung areas.

NTRBs have an important role in this process and it is essential that they are funded to commit time and resources to ensuring that all families are adequately represented in these informal decision making groups. The South West Aboriginal Land and Sea Council (SWALSC) NTRB in Western Australia undertook this task on a large scale in relation to the single amalgamated native title claim for the region, the Single Noongar Claim. SWALSC assisted traditional owners to establish informal governance structures to manage the claim, by an extensive series of meetings with family groups identified by genealogical research. Each family group was asked to nominate a representative to sit on native title working parties within nine regions, resulting in 500 native title working party members altogether.

AIATSIS Facilitation and Mediation projects have identified appropriate representative structures as important building blocks for good decision making. Representative structures must include all the different families and factions within a group and have authority to make decisions on behalf of the traditional owner group. This was reiterated during the consultations. The responses from NTRBs implied that it was crucial that the representative structure had widespread support, was understood by traditional owners and was considered a legitimate decision making body.

However as noted above, representational structures are not necessarily used in a traditional context and the group may need time to adjust to this type of decision making body. Striking the balance between traditional decision making structures and effective representative structures can be difficult but at the same time, is crucially important. This balance is important because governance structures must be supported by the group and accepted as a legitimate decision making body.

The legitimacy of decision making structures and governance institutions ‘in the eyes of the community’<sup>16</sup> has been identified by the Harvard Project as a foundation of good governance. Without legitimacy, decision making structures and governance institutions will not be able to maintain the support of the community or gain participation in development goals or government policy.

The Harvard Project identifies two important sources of legitimacy that stem from the balance between traditional structures and effective governance. The

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16 S. Cornell, *Accountability, Legitimacy, and the Foundations of Native Self-Governance*, January 1993, Harvard Project on American Indian Economic Development, John F. Kennedy School of Government, Harvard University, p8.



first source of legitimacy is the match between traditional decision making and the representational structure.

Traditional owner groups decide that an organisation or working group is legitimate if its values and way of operating fit with each group's values and 'ideas about how things should be done':<sup>17</sup>

Institutional structures and processes that conform to the community's generally accepted ideas about how persons should interact and relate to each other, about the appropriate exercise of power, about who should be entitled to speak or act for whom, about proper decision making processes, and so forth, are likely to command significantly greater support within the community than those that depart from such standards or ideas, or that challenge them directly.<sup>18</sup>

This process of matching governance structures to traditional decision making is by no means simple or based on two separate disconnected and unchanging domains – traditional and contemporary (or alternatively 'non-Indigenous'). It has been argued that the 'traditional domain' is not an autonomous system, separate from contemporary Australia. Instead, Indigenous Australia is 'a contested, intercultural field of transforming and transformed practices and values'.<sup>19</sup>

As discussed in the Introduction to this Report, the findings of the *Yorta Yorta* decision deny the transformative relationship between Indigenous and non-Indigenous Australia, or at least deny Indigenous people an entitlement to land if this relationship of transformation has been too lengthy. Despite this, the changing and transforming nature of the relationship between Indigenous Australia and the broader Australian context provides greater opportunity for traditional owners to assess, design and modify governing structures to respond to their changing needs and values but most importantly to provide effective governance.

Effective governance is in fact the second element identified by the Harvard Project as essential to successful economic development in Indigenous communities in the United States. If a decision making body fails to make effective decisions and deliver results, it will lose its legitimacy. In the context of native title, this requires that governance structures must be consistent with the values and needs of traditional owners but also include contemporary mechanisms like constitutions, separation of powers and other accountability measures to ensure the organisation is effective. Contemporary mechanisms are particularly important in the native title system where traditional owners are required to make complex and difficult decisions that can also include substantial resource and monetary outcomes.

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17 *op.cit.*, p9.

18 *op.cit.*, p11.

19 D.F. Martin, *Rethinking the design of Indigenous organisations: The need for strategic engagement*, Centre for Aboriginal Economic Policy Research, The Australian National University, No.248/2003, p9.



## Corporate structure and Indigenous governance

During the consultations, many respondents provided a challenging assessment of the relationship between corporate structures and Indigenous governance in the native title system. Many were concerned that managing the corporate structures prescribed under the NTA drew attention and resources away from building strong cohesive governance within the traditional owner group itself. In discussing this issue, respondents compared the NTA model to the Northern Territory *Aboriginal Land Rights Act 1976* (ALRA) Lands Trust model and the experiences of Indigenous people in Canada.

### The PBC model

Concerns were raised during the consultations about the use and relevance of the corporate structures imposed on Indigenous groups by the NTA. The NTA requires native title to be held or managed by a body corporate once a determination of native title is made by the Federal Court. The type and structure of the body corporate is prescribed in Regulations made under the NTA,<sup>20</sup> and is known as a 'prescribed body corporate' (PBC) or 'registered native title body corporate' (RNTBC) once registered on the National Native Title Register (PBC is used throughout in this section to refer to both for shorthand). PBCs have a range of functions and obligations under the NTA, the Regulations, the *Aboriginal Councils and Associations Act 1976* (Cwlth) (ACAA) and the common law. All of the members of a PBC must be native title holders, although not all native title holders in a group must be a member of a PBC – the Regulations envisage that the PBC will be made up of some of the native title holders who will act on behalf of the whole group.

Native title holders are able to choose whether their PBC will hold the native title rights on trust; or whether their PBC will manage the native title rights as their agent, acting on instructions from them as principals. In either case, the PBC must consult and get the consent of the native title holders whose rights will be affected when it makes a decision to surrender native title rights or do any other act that would affect the native title rights or interests (this is known as a 'native title decision'). The PBC also has to consult and consider the views of the NTRB for the region when it makes a native title decision.

Paul Memmott and Scott McDougall suggest that PBCs will also need to forge strong institutional links with a variety of external entities such as developers (negotiating land and sea uses), Indigenous service providers (to re-structure service delivery to the native title holders through PBCs where desired), community councils (eg negotiating ILUAs for future acts within council areas) and relevant state and federal government authorities (eg negotiating a joint role in regulating rules governing land or managing national parks).<sup>21</sup>

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20 *Native Title (Prescribed Bodies Corporate) Regulations 1999*.

21 P. Memmott and S. McDougall, *Holding Title and Managing Land in Cape York: Indigenous Land Management and Native Title*, 2003, National Native Title Tribunal, Perth.



## Need for a corporate structure?

In our consultations, some respondents queried the very requirement that native title holders establish a corporate structure. They considered that requiring a corporate structure obscures the fact that Indigenous people are an identifiable community or polity of themselves. This has also been commented on in court cases. The Federal Court noted, in relation to the structure of an unincorporated association constituting a native title claim group, that:

limits or conditions imposed by the rules of the Association to become and remain a member are, in my opinion, alien to the notion of a group with a sole defining characteristic of sharing, having or enjoying native title.<sup>22</sup>

It was pointed out by some respondents that in Canada, traditional owner groups are perceived and engaged with as nations – there is no standard requirement that groups use a corporate structure to order their affairs or to create a point of contact with third parties. The requirement in Australia for corporations to be created to administer government funding for and engage with, traditional owner groups ignores the existing polity or governance of traditional owner groups and may not support ‘a cohesive identity’ for Indigenous peoples.

The NTA does not require a corporate structure be set up by traditional owners before a native title determination is made. Certain types of Indigenous Land Use Agreements (ILUAs) may be negotiated with the native title group or individuals without there being a corporate structure in place. Instead, for these ILUAs, the relevant NTRB must certify that all reasonable efforts have been made to ensure that all individuals who may hold native title in relation to the land or waters in the area of the ILUA have been identified and agree to the ILUA.

However, other respondents felt a corporate structure was a useful decision making structure. Another respondent acknowledged that in one case, the PBC structure had prevented any one family group from taking over the corporation. Other benefits of using a corporate structure are that, in law, the corporation is viewed as a single legal person, separate from its members. A corporation may acquire, hold and dispose of property, including communal property; sue and be sued in its own right; can continue to exist even if its membership changes over time; and may protect its members from personal liability for acts undertaken by the corporation. Other respondents supported the view that corporate structures provide greater protection to the interests of the group, but criticised the current PBC model.

### Difficulties with the PBC model

PBCs were considered by a number of respondents to be difficult and complex structures through which to represent traditional owners. It was noted that to

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<sup>22</sup> *Briggs, on behalf of the Gumbangirri People v Minister for Lands for NSW* [2004] FCA 1056 (18 August 2004), per Moore J. at [29].





run PBCs in compliance with their legislative framework, traditional owners needed the skills of lawyers, accountants, anthropologists and mediators.<sup>23</sup> One respondent had had experience in establishing a large, busy PBC in an urban environment. This respondent noted that developing a PBC structure consistent with traditional laws and customs and the requirements under the NTA and ACAA was like 'fitting into a straightjacket'.

Christos Mantziaris and David Martin outline the difficulties with PBCs as governance structures for native title in their book *Native Title Corporations: a legal and anthropological analysis*.<sup>24</sup> Some of the issues with the existing PBC model identified by the authors are:

- The PBC model subjects traditional owners to a 'bewildering array' of sources of law: traditional law and custom, the NTA and PBC Regulations; the ACAA and ACA Regulations; the common law and equity; and the corporation's Rules of Association. These different sources can set up inconsistent rules.
- Traditional law and custom may lead native title holders to seek to design their PBC so that differentiated native title rights holders, different estates or clan groups, or the traditional authority of elders, are reflected in the PBC structure. However, the ACAA does not allow for the creation of classes of membership which carry different rights to vote or classes which carry different rights to the benefit of the native title.
- The corporate governance structure of the PBC, like other corporations, is based on Western values and practices which may be inconsistent with Indigenous traditional law and custom. For example, the PBC decision making structure allocates much of the decision making power to the Governing Committee. However, authority within Indigenous societies to speak for country is not necessarily able to be delegated. Indigenous rights are typically based more on having particular credentials such as membership of a specific family or descent line, birthplace, seniority, knowledge, or ritual authority, which cannot be delegated. The consultation requirements may not resolve this difficulty, as they only compel the PBC to consult when making a 'native title decision'.

Finally, the rules of the PBC model apply only once there is a native title determination made by the courts. The PBC structure is inappropriate for traditional owner groups who will not get their title recognised under the NTA.

I note that the Office of the Registrar of Aboriginal Corporations (ORAC), which is responsible for administering the ACAA, is currently drafting a Bill to reform

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23 See section 58 *Native Title Act 1993*; the *Native Title (Prescribed Body Corporate) Regulations 1999*; and the *Aboriginal Councils and Associations Act 1976*.

24 C. Mantziaris & D. Martin, *Native Title Corporations: a legal and anthropological analysis*, 2000 The Federation Press, Sydney.



that Act to overcome known legal and technical problems with current legislation, including incompatibilities with the NTA and PBC Regulations.<sup>25</sup>

A key factor in making PBCs work that was frequently identified by respondents is the ability of traditional owners to manage and run their own PBC. One NTRB that has facilitated the establishment of an operational PBC discussed some aspects of this process in detail. It found that capacity building was crucial to the establishment of the PBC, focusing on developing the group's decision making skills and creating a transparent governance process that addressed the needs of traditional people living in an urban environment. This process has taken four years and throughout this period, before the establishment of the PBC, native title holders were under immense pressure to respond to numerous issues arising within the group and from the demands of external bodies. Not all these issues could be addressed and the native title holders have been forced to prioritise the issues with which they could engage.

Another respondent suggested that the role of the ORAC be expanded to provide greater assistance to PBCs. ORAC has recently begun offering 'pre-incorporation information sessions' to groups who want to incorporate under the ACAA to discuss matters such as: why the group wishes to incorporate, what will change post-incorporation, what a corporate constitution and Rules of Association are, what it means to incorporate under the ACAA, what the process is, and likely costs.

Capacity building is discussed further in section 3, *Capacity development* below.

## Other models

The Land Trust model established under the ALRA in the Northern Territory was proposed by some respondents as a better model of Indigenous governance. The Land Trust model relies on the resources of the large centralised land councils to manage land granted to the traditional owners under the ALRA on trust, enabling traditional owners to focus on using their land for 'traditional' purposes as well as developing their capacity for social and economic development.

Memmott and McDougall offer suggestions for 'passive' or 'active' PBC designs within the existing PBC model in the publication *Holding Title and Managing Land in Cape York*.<sup>26</sup> The 'passive' PBC structure is designed to be a minimalist structure with little administrative demands, and suits the agency PBC type which manages but does not hold native title rights and interests. The passive PBC defers decision making to the native title holders, who continue to hold their own native title rights and interests. The PBC would have a limited role in decision making, instead focusing on communicating between the native title group and third parties. Therefore it could have a small membership and not be resource-intensive to run. However, it would probably be heavily reliant on the NTRB. This is similar to the land trust model established under the ALRA.

25 See the discussion paper Reform of the Aboriginal Councils and Associations Act 1976 (ACA Act) – Proposed new Corporations (Aboriginal and Torres Strait Islander) Act, Registrar of Aboriginal Corporations, Department of Immigration and Multicultural and Indigenous Affairs, 2004. Available online at [www.orac.gov.au/about\\_orac/legislation/reform\\_act.aspx](http://www.orac.gov.au/about_orac/legislation/reform_act.aspx).

26 *op.cit.*



The 'active' PBC model would have a greater role in decision making and suits the trustee PBC type which holds the native title rights and interests on trust for the native title holders, having discretion to deal with the rights and interests as it chooses as long as its decisions are in the best interests of the native title holders and it consults in relation to 'native title decisions'.

Other respondents suggested that NTRBs should be resourced to allow greater involvement in the establishment and ongoing administration of PBCs. This could create a hybrid approach, bringing together features of the ALRA model and the PBC model.

Respondents considered that, ultimately, traditional owners should decide which governance structure to adopt in light of their particular circumstances and goals. Different traditional owner groups in different contexts will require specific governance structures that fit their needs. Respondents suggested that rather than a one-size-fits-all view, traditional owners, in partnership with the relevant NTRB, should be able to choose what form of governance structure they consider suits their circumstances, needs and goals for their native title rights and interests, and social and economic development.

In addition to the alternatives to the PBC model suggested by respondents above, other options for Indigenous governance structures include:

- **Incorporating 'native title working groups' established to manage a native title claim**

It may assist traditional owner groups to develop familiarity with the operation of a corporate structure to incorporate before their native title determination is made.

Informal structures of representation set up by the traditional owner group to make decisions in relation to future acts and other matters before a native title determination was discussed above. If the traditional owner group is happy with their informal representative structure, this structure could be incorporated. This would enable the traditional owners to experience, assess and refine the structure of the corporate entity they use to manage native title, which may ultimately become the PBC determined if native title is recognised.

- **Centralise administration functions in a service provider**

Memmott and McDougall recommend that NTRBs form or support a central service provider in regions determined by NTRB planning, to provide administrative services to PBCs and other Indigenous land-holding entities in the region. This would enable traditional owners to focus on strategic planning and the outcomes they want to achieve from their native title rights, as well as developing their own management and governance capacity, while the administrative obligations of their corporate structure are met by a central service provider.



- **Coordinate the operations of PBCs and land trusts established under State, Territory or Commonwealth land rights legislation**

Memmot and McDougall call for PBCs and land trusts established under state land rights legislation to be integrated into single corporate entities to reduce confusion and overlap in functions. They suggest this may be done either by allowing land trusts to be PBCs, appointing PBCs as grantees or trustees of land trusts, or coordinating the activities of PBCs and land trusts by agreement.

- **Develop regional-based PBCs that manage native title for multiple native title groups**

Mantziaris and Martin suggest that regional-based PBCs could be developed that represent multiple native title groups in an area rather than establishing one PBC per native title determination area or group. Regional PBCs would offer advantages over a multiplicity of small PBCs through economies of scale and organisational capacity and efficiency, the strategic and coordinated management of native title across a region and stronger links to other Indigenous organisations.

- **Widen the class of corporate entities eligible for nomination as a governance structure by traditional owners**

Examples include corporate entities under corporations law, state land rights statutes, community councils and NTRBs. This would allow traditional owners to build upon existing governance structures in the traditional owner group, establish links with non-traditional owner members of the community and capitalise on the skills base of people already experienced in management and governance.

- **Develop broad membership corporations**

Native title groups may wish to include other traditional owners, non-traditional owner Indigenous people or non-Indigenous people in their corporate structure to make it representative of the broader community in which they live, or to increase the corporation's pool of skills. As suggested by respondents above, they may wish to forge partnerships with the local NTRB or even include the NTRB as a member of the corporation's management.

- **No corporation**

Despite the advantages of the corporate structure some traditional owner groups may not wish to incorporate, but prefer to use informal or traditional decision making structures. Local Indigenous organisations such as community councils or NTRBs could be used by the traditional owners and third parties as a representative of the traditional owner community. This would be similar to the approach used for some ILUAs discussed above.



Further options are discussed in the Australian Research Council's Collaborative Research Project *Governance structures for Indigenous Australians on and off native title lands*, which seeks to develop recommendations for a more adequate fit between traditional forms of land ownership and control under traditional laws, and non-Indigenous forms of law and government.<sup>27</sup>

## Corporate structures for economic development

One respondent cautioned against using the corporate structure of a PBC for anything other than holding native title, such as commercial enterprise, because although the NTA protects native title rights and interests held by the PBC from liability incurred by the body corporate, the non-native title assets of the PBC, of individual members and of the broader native title group could be at risk if the PBC was wound up for any reason. It was suggested that if traditional owners are interested in pursuing other goals, like economic and social development, a separate but related entity should be established. This view was shared by other NTRBs that considered other structures could be set up to address land and sea management and economic and social development. However, it was thought that traditional decision-makers who control the PBC should also make the decisions in relation to subsidiary organisations, but not be responsible for implementation. Additionally, some respondents anticipated that PBCs may also take on greater responsibility in cultural heritage issues and also require the capacity to manage this process.

Mantziaris and Martin also recommend against using the PBC corporate structure for purposes other than managing native title rights because of the complex nature of the legislated relationship between the PBC and the native title group, and the lack of suitability of the ACAA corporations as a vehicle for commercial ventures. They suggest a number of ways in which a separate structure for economic development may be established but still linked to the PBC so that the traditional owners retain control of subsidiary entities. These include setting up separate but formally linked organisations, such as making the PBC a shareholder in a separate corporation set up under the Corporations Law; establishing appropriately differentiated management structures within the one organisation; or establishing separate trusts (one for native title trust property, the other for non-native title property) administered by the PBC.

## Summary

Respondents raised many interesting and challenging issues, drawn from their experiences working with traditional owners to establish good governance structures and processes. Key issues raised during consultations addressed:

- The importance of leadership in prompting a traditional owner group to achieve social and economic development goals, and the role of different types of leaders from visionaries to peacemakers.

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27 See in particular the options canvassed in the discussion paper available online at [www.austlii.edu.au/au/special/rsjproject/rsjlibrary/arccrp/dp4.html](http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/arccrp/dp4.html).



- The need to understand and manage new and old relationships between traditional owners.
- The importance of developing good decision making processes.
- The role of representative structures in the decision making process and as a mechanism to help traditional owners establish more formal governance structures.
- The need for alternatives to the existing PBC model and for traditional owners to be able to choose which governance structure to adopt in light of their particular circumstances and goals.
- The need for a separate structure from that used to manage native title to be used by traditional owners to carry out commercial activities.



### 3 Capacity development

While governance provides a framework for group cohesion and decision making, capacity development provides a process and guidelines for achieving sustainable social and economic development goals.

The UN defines capacity development in the following way:

Capacity refers to the ability of individuals, communities, institutions, organisations, social and political systems to use the natural, financial, political, social and human resources that are available to them for the definition and pursuit of sustainable development goals.

Capacity building or capacity development is the process by which individuals, institutions and countries strengthen these abilities.<sup>28</sup>

Consistent with the principles of the Harvard Project, capacity development stresses the empowerment of the group to achieve sustainable development. Capacity development, as a process by which sustainable development might be achieved, has two important features. First, capacity development puts those who seek to achieve development goals at the centre of the process. In native title negotiations, this means traditional owners. Second, the pace and agenda of capacity development is determined by the ability of the group to engage with the process and achieve goals. Capacity development requires not that sustainable development be 'delivered', but that those who seek to achieve development goals within their communities are actively involved in setting the agenda and determining the outcomes.

Broadly, capacity development has five main principles. The process must:

- be based on a locally driven agenda,
- build local capacity,
- involve ongoing learning and, where appropriate, adapt goals and agendas to fit community achievements,
- be a long-term investment,
- integrate activities, through the creation of partnerships at various levels, to address complex problems.

The last of these principles highlights the importance of cross-sector cooperation in capacity development. Without support at various levels within a system, capacity development strategies can fail. Within the native title context, this requires support for capacity development among traditional owners from NTRBs, governments, companies and institutions such as the NNTT and Federal Court.

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28 United Nations, *Report of the UN Inter-Agency Workshop on Capacity Development*, Geneva, 20-22 November 2002, p4.



In Australia, capacity building<sup>29</sup> is being addressed and promoted within the native title system through the ATSIC/ATSIS (now Office of Indigenous Policy Coordination) NTRB Capacity Building program. The 2001-2002 Federal Budget provided \$11.4 million for capacity building projects for NTRBs. The program targets corporate and cultural governance, management and staff development, native title technical training, collaborative relationships, research and applied capacity building. In the *Native Title Report 2003* it was noted that:

While capacity building directed to organisations such as NTRBs is an important element of achieving sustainable development, it must be consistent with and enhance the development objectives of traditional owner groups by providing opportunities, skills and resources necessary to facilitate and promote their empowerment.<sup>30</sup>

The NTRB Capacity Building Program will end in the financial year 2004-05.<sup>31</sup>

The Federal Government is also considering capacity building for Indigenous communities through its service delivery programs. In June 2004, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs released the report of its inquiry into capacity building and service delivery in Indigenous communities. The report, entitled *Many Ways Forward*, recognised that capacity building 'is a process, not a final outcome and, as such, is about developing sustainable skills and abilities'.<sup>32</sup> The Committee went further and sought to identify what the outcome of the capacity building process might be. The Committee quoted from the Northern Land Council's submission, which stated:

The goal of capacity development is not simply to encourage "well managed communities" and "better service delivery", but to enhance Aboriginal people's capacity for self determination and sustainable development.<sup>33</sup>

Quoting from the submission of the previous Aboriginal and Torres Strait Islander Social Justice Commissioner, with which I agree, the Committee concluded that capacity building could be:

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29 Capacity building and capacity development are often attributed with different meanings in international development theory. Capacity building focuses on improving organisational structures and building on staff skills to improve productivity, for example the NTRB Capacity Building Program. On the other hand capacity development refers to improving skills and knowledge across different levels in a system to achieve sustainable development goals. The model for economic and social development set out in this report is consistent with a capacity development approach. However, in Indigenous policy the terms are used interchangeably. For example the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs report into capacity building, uses the term capacity building to describe what is essentially a capacity development approach.

30 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, 2004 Human Rights and Equal Opportunity Commissioner, Sydney, p36.

31 Senate Estimates Committee QoN 241, 31 May 2002.

32 The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Many Ways Forward – Report of the inquiry into capacity building and service delivery in Indigenous communities*, June 2004, The Parliament of the Commonwealth of Australia, Canberra, p15.

33 *ibid.*, p15.





...[A] potential vehicle for the renewal of societal structures and the political recognition and representation of Indigenous peoples' status.<sup>34</sup>

The Committee's views are consistent with the strategy set out in this Report, which recognises the important role of capacity development in promoting traditional owners' social and economic development.

The bulk of the Committee's report is focused on the role of government agencies, Indigenous organisations, and individuals, families and communities in supporting capacity development. The report recognises that without capacity building for these service delivery stakeholders, sustainable outcomes are unlikely. Government agencies need to be coordinated, cooperative and better integrated. Funding arrangements must be improved and partnerships between government and Indigenous communities need to be established. The report also identifies the capacity building needs of Indigenous organisations. These organisations require improved governance structures, greater internal and external accountability, strong leadership and corporate and Indigenous partnerships. At the grassroots level, the Committee's report acknowledges the need to build the capacity of individuals, families and Indigenous communities. The report identified key areas for capacity development, including primary healthcare and early intervention, numeracy and literacy, crime, safety and justice, family violence, housing, and employment and training.

Capacity building at all three levels is based on the understanding that change needs to occur in a systemic way. This systemic approach is reflected in the principles in the Discussion Paper (at Annexure 1), which require that agreements build relationships between key stakeholders and integrate activities at various levels to achieve the development goals of traditional owners. This means that state and Commonwealth governments, industry, and traditional owners must share the goal of sustainable development. Sustainable development aims to realise the objectives of all stakeholders, including the traditional owners' goals for social and economic development, without neglecting environmental, economic and social outcomes. It is also important that native title administrative agencies such as the NNTT and Federal Court, support this goal in the conduct of their functions.

During the consultations, capacity development was frequently discussed. Issues ranged from the importance of capacity development for traditional owners, to the role of NTRBs in this process and barriers to developing the traditional owners' capacity in a native title context.

NTRBs and others noted that the native title process should be an opportunity for traditional owners to develop their capacity and skills, individually and as part of a group. Group skills may include improved goal setting and leadership; governance and decision making. Some respondents referred to this process as 'nation building'. While the skills of individuals, may include job specific training that may be included in the terms of an agreement. Capacity development for individuals through education and training is discussed further below.

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34 *ibid.*, p16.



## NTRB role in capacity development

There is growing recognition amongst NTRBs that traditional owners need to develop their capacity so they can understand and manage their native title rights and also to achieve their economic and social goals. One respondent, who has been involved in providing workshops to NTRBs under the Capacity Building Program, said the overwhelming feedback from NTRBs was: 'we're all right, but what about capacity building for traditional owners?'

This respondent pointed out that traditional owners had responsibilities as applicants in native title proceedings and as representatives of traditional owners and the whole community. To properly carry out these roles and responsibilities, traditional owners needed to develop their capacity to understand the native title system; understand their roles as family representatives and; have the skills, knowledge and confidence to represent their families in dealing with the NTRB, government and industry. In short, traditional owners need capacity building.

A number of NTRBs identified the role they could play in assisting traditional owner groups develop their capacity to build and achieve their goals for social and economic development. However NTRBs also acknowledged that staff employed to carry out legal processes under the NTA may not be the right staff to assist traditional owners develop their capacity and stressed the importance of appropriately trained staff to undertake this process. Consequently, NTRBs need capacity building, and staff with the right skills and time and resources to assist traditional owners develop their own capacity.

Similarly, respondents argued that there is a great deal of inconsistency between NTRBs, in terms of what they can do and offer. They suggested that smaller NTRBs must be provided with the support they need to improve their service delivery, making it consistent with the service of some of the larger land councils. Greater support for smaller NTRBs could be provided through the NTRB Capacity Building Program discussed above.

NTRBs discussed how specific areas of their work could be used to support traditional owners' capacity development and goal setting. NTRBs can use legal, anthropological and environmental reports to advise traditional owners of their opportunities. They commented that aspects of the native title process – meetings and taking instructions, contributing to connection reports, determining strategies for the finalisation of a claim, establishing a PBC and so on – should aim to develop the group's capacity and assist the group build goals for future economic and social development.

During the consultations, a number of NTRBs discussed their own strategies to help traditional owners develop their capacity for economic and social development.

One NTRB stated that first and foremost, the process of capacity development should aim to empower the traditional owner group. Other NTRBs have been aiming to develop traditional owner capacity through the establishment of stable decision making processes and structures; and extensive consultation processes to improve traditional owners understanding of their rights and interests. They considered these processes particularly important in building the foundation for identifying the social and economic goals of the group. They



also identified a number of ways to help traditional owners build their capacity. These include:

- creating an environment where people are comfortable to meet and talk
- building good relationships between staff and traditional owners by retaining ongoing, long-term staff
- delivering regular outcomes and information to traditional owners
- responding to where the group is at and the issues that are occurring in families
- using good communication skills, and
- tapping into the capacity of the group and maintaining their interest in the process.

The Northern Land Council's (NLC) Caring for Country Strategy for land and sea management reflects the principles of capacity development set out above. The Strategy includes five guiding principles:<sup>35</sup>

1. Be proactive and responsive to the expressed land and sea management needs and aspirations of Aboriginal people as required by the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Native Title Act 1993*;
2. The land needs its people. Pursue the philosophy of extending Aboriginal people's capacity to look after their land and sea country (which is empowering) versus the philosophy of setting up an agency to look after the land and sea on behalf of the people (which is disempowering);
3. Respect and apply both traditional Aboriginal knowledge and contemporary science-based knowledge to promote and ensure best practice land and sea management;
4. Promote the intrinsic and economic value of ecologically and culturally intact landscapes for Aboriginal people's customary and commercial uses of their country; and
5. Promote and facilitate partnerships and collaborations to achieve positive land and sea management outcomes.

Comments from NTRBs demonstrate that many of these organisations are considering ways of helping traditional owners develop their capacity to direct their own economic and social development. NTRBs have already begun applying strategies to build traditional owner capacity by helping traditional owners understand and manage their rights and interests. As discussed, the NLC has developed a comprehensive and sophisticated strategy applied to land and sea management. Such a comprehensive approach could also be undertaken within the native title system by examining the processes of the native title system and identifying opportunities to assist traditional owners develop their capacity. The principles and discussion contained in the Discussion

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35 Northern Land Council, Caring for Country Unit, *Caring for Country Strategy, Northern Land Council Region 2003 -2006*, Northern Land Council, Darwin, p4.



Paper and this Report begin a process that is aimed at developing an approach to native title that develops the capacity of traditional owners to achieve their economic and social development goals.

## Existing group capacity

Respondents also elaborated on the skills and knowledge of traditional owners, discussing both existing capacities and also areas for ongoing capacity development – commenting that there is substantial but varied capacity within traditional owner groups. Some groups have highly influential and articulate leaders, experienced in the political context. Other groups have strong traditional leaders whose third or fourth language is English. Traditional owner groups and NTRBs must consider how the different capacities and skills of traditional owners can be best used and developed.

One NTRB noted that many of the traditional owners with the skills to deal with complex legal, financial or corporate issues work full-time and find it difficult to participate regularly in frequent native title meetings, especially if they have to travel long distances to get to them.

Using the existing capacity of a group is an important feature of capacity development. It requires that existing capacity within the group is recognised and valued by traditional owners, NTRBs, government and industry. Capacity may exist in a range of forms, from highly articulate and experienced individuals to more collective capacity belonging to the group. Group capacity may include an organisation's committed membership, a community's traditional decision making structure, or its ability to use and manage the natural environment in a sustainable way. This internal or endogenous capacity provides the foundation for capacity development, and can then be further developed, organised and used by the group to identify and achieve its goals.

## Developing 'non-traditional' skills and knowledge

Respondents considered that capacity development needed to focus on building 'non-traditional' skills and knowledge to ensure that traditional owners can engage with complex and difficult native title and governance issues.

The NLC's Caring for Country Unit builds on the existing skills of traditional owners and supports the development of 'non-traditional' skills and knowledge. Underlying this is an acknowledgement that both traditional and Western science-based knowledge systems are important for land management. For example, traditional practices have important fire management techniques that can be supported by satellite fire mapping, while science-based knowledge systems may deal better with invasive weeds and feral animals.<sup>36</sup>

A similar approach can be applied in governance and economic development for traditional owners. Traditional governance structures may provide an important foundation for decision making but this may need to be supported

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36 M. Storrs, P. Cooke and P. Josif, 'Caring for Country: The rapidly developing formalised structure for Aboriginal natural resource management in the Northern Land Council region of the Northern Territory' paper presented at *National Landcare Conference 2003*, Darwin NT, 28 April–1 May 2003.



by non-Indigenous ideas, such as separation between decision making and administrative processes and transparent and accountable processes. Similarly, economic development goals might be determined by traditional decision making structures, supported by economic knowledge and advice.

The importance of traditional owner capacity cannot be overemphasised and is included in the principles in the Discussion Paper which require that agreements should 'utilise to the fullest extent possible the existing assets and capacities of the group'. Linked to this, is the need to assist traditional owners develop new skills. Their own new and existing skills strengthen traditional owners' opportunity to achieve their economic and social development goals.

## **Barriers to capacity development**

During the consultations, NTRBs noted that capacity development is an important part of the process of native title but identified substantial barriers to this process.

Lack of time within the native title process to both satisfy the NTA and help traditional owners develop capacity was identified as a fundamental obstacle. Linked to this is the pressure applied by a high number of external demands made upon the traditional owner group. For example, traditional owners must respond to third party issues such as site clearances or agreeing to a particular future act which often draws attention away from developing the capacity of the group.

As an alternative to focusing only on third party interests, capacity development aims to identify the objectives that traditional owners want addressed through negotiations. This is a proactive approach to negotiations, setting out traditional owners' goals for agreement making as well. However capacity development and identifying social and economic development goals is likely to extend timeframes beyond the future act timeframes of the NTA. This could be managed if third parties engage with NTRBs as early as possible and before the NTA process begins (triggered by notification of the act).

The UN Development Programme, Management Development and Governance Division states that allowing sufficient time for capacity to develop is critical.<sup>37</sup> However capacity may not increase just because a group has a lot of time to build it. Capacity is built through active engagement with issues, goals and success or failure – both are learning opportunities. As a group builds its skills and knowledge by engaging with issues, its capacity is developed. Therefore the amount of time a group needs to build capacity is linked to its ongoing achievements and the group's own willingness and confidence to engage.

One respondent noted that in a large-scale native title agreement, a group might not be ready to negotiate terms and reach final agreement quickly. Instead, time should be factored in for the group to gradually build up its decision making skills and identify its goals. This gradual process could be facilitated by an incremental approach to agreement making.

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37 UN Development Programme, *Capacity Assessment and Development – In a Systems and Strategic Management Context*, January 1998. Technical Advisory Paper No.3, Management, Development and Governance Division Bureau for Development Policy.



Such an approach has been proposed by the British Columbia Treaty Commission in Canada, after the Commission conducted research into the success of the treaty-making process. The Commission found that the process was expensive, time-consuming and delivered few results, particularly to Indigenous communities. A central recommendation was that incremental agreement making be adopted. This requires building treaties over time so that relationships could develop, skills could be developed on both sides of the negotiation and outcomes could be achieved with greater regularity.<sup>38</sup> These outcomes should not only meet the objectives of proponents and government but provide meaningful outcomes for traditional owners.

Respondents also noted that current funding for NTRBs does not adequately support NTRB functions under the NTA, let alone providing assistance for traditional owners to develop their capacity. One respondent noted that government capacity building programs are focused on NTRB service delivery and are not considered by government to be a major part of the native title process. As a result, NTRB funding is not available to assist traditional owner groups build their capacity. Also, funding restrictions mean that NTRBs have to justify all their spending in terms of measurable outcomes. While NTRBs have to be accountable for their funding, the process of capacity development is not easily measured. Nor is it an outcome but rather, a process. One NTRB is considering establishing a separate community development unit with separate funding, to progress the social and economic development phase of the agreement making process.

A number of NTRBs noted that their organisation does not have the staff, skills and resources to assist with capacity development and governance. One NTRB has established a community development unit but this was possible due to funding from other sources, not native title funding. Other NTRBs employ land management officers who use participatory planning to develop land management projects and commercial enterprises promising environmentally sustainable development, but they also operate outside the native title process, relying on funding partnerships with external organisations.

The UN Development Programme, Management Development and Governance Division recommends that individuals facilitating capacity development:

must be competent and experienced managers, with sufficient qualifications and/or skills in project and programme management, strategic and change management, and capacity initiatives.<sup>39</sup>

However, the skills and knowledge necessary for capacity development do not have to be drawn only from NTRB staff. Partnerships with government, industry or academia can supplement the knowledge and skills of NTRBs. Respondents discussed, in various ways, the importance of building relationships between Indigenous groups, NTRBs and others who may be able to assist in capacity development. The Registrar of Aboriginal Corporations has hosted a similar process that brought together practitioners and traditional owners to discuss

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38 British Columbia Treaty Commission, *Looking Forward – Looking Back*, BC Treaty Commission, Vancouver, British Columbia, 2001.

39 *op.cit.*



issues of Indigenous corporation membership and finance.<sup>40</sup> These discussions could also be broadened to address other governance issues including separation of administrative and decision making roles, and transparent decision making.

Similarly, the NLC's Caring for Country Unit has an extensive and diverse partnership network that supports capacity development for Indigenous communities. Partners include the Indigenous Land Corporation, the Commonwealth Department of Employment and Workplace Relations, the Batchelor Institute of Indigenous Tertiary Education, Greening Australia, the Australian Quarantine and Inspection Service, and the Northern Territory Department of Infrastructure, Planning and Environment.<sup>41</sup>

Finally, some NTRBs identified governance issues within their own organisations as obstacles to capacity development for traditional owners, stating that without high level internal support, NTRBs would only be able to provide limited assistance to traditional owners as they develop their capacity.

Comments made during the consultations highlighted substantial barriers to capacity development within the native title process. However some of these barriers can be overcome if other participants in the native title process commit to agreement making that aims to empower traditional owners and address some of their social and economic goals. Governments and third parties can provide important assistance, as discussed in the next section.

## Capacity development and non-Indigenous parties

During the consultations, respondents noted that government departments and companies also need capacity building in a number of key areas, first to understand their role in the process and second, to be able to assist traditional owners develop their capacity. For governments this may mean the skills and ability to negotiate wide ranging agreements and a more integrated 'whole of government' approach to native title and other land related issues. For companies this may require a commitment to negotiate on broader issues and the skills and knowledge to address social and economic issues, within their area of operations.

All parties including traditional owners also need cross-cultural training. During consultations the Aboriginal Legal Rights Movement (ALRM) has noted the benefits of cross-cultural training for all native title parties. They noted that industry groups have gained a greater understanding of the process of traditional owner decision making and traditional owners have had the opportunity to learn about the issues affecting government decisions.

Respondents noted that achieving economic and social development through native title requires the support of third parties and governments. In fact one respondent considered the role of government crucial in order to manage aspects of the native title system that undermine a strategy for economic and

40 The Office of the Registrar of Aboriginal Corporations provides a three-day Bridging Workshops in Governance and a Certificate IV in Business (Governance). The training aims to improve the skills of Indigenous directors and improve Indigenous governance and management. Information available at [www.orac.gov.au/training\\_information\\_sessions/default.aspx](http://www.orac.gov.au/training_information_sessions/default.aspx).

41 M. Storrs, *op.cit.*, p3.



social development for traditional owners. These aspects include the time frames of the future act process, pressure from the Federal Court to progress cases, the narrow legal construction of rights and the native title funding regime. Without the assistance of companies and government departments willing to extend timeframes established under the NTA by negotiating before a future act is notified, provide financial assistance to NTRBs and adopt a broader definition of rights and interests by agreement, economic development for traditional owners is very difficult.

Working in partnership with NTRBs and traditional owners, government departments and third parties can help traditional owners build their decision making structures and the skills and knowledge needed to negotiate agreements and achieve their goals. For example some corporations also provide training and employment for traditional owners that build the capacity of individuals to take advantage of job opportunities offered under native title agreements.

Industry respondents acknowledged their role in helping traditional owners develop their capacity but were concerned that the extent and area of their involvement and responsibilities were not clear from the principles. This issue is discussed in detail in section 5, *Maximising opportunities for economic development* below. It was also noted that not all industry stakeholders were large multinational corporations who could afford to support training and employment programs. It appeared that particularly where corporations are paying a substantial amount to the government in mining royalties, it is likely that they will be unwilling to assist. In these situations, corporations may suggest that traditional owners approach government for economic and social development opportunities.

The feedback from consultations also indicated that industry stakeholders are likely to provide training and employment to traditional owners only in areas where they have development interests. Traditional owners in non-resource-rich areas will have to attract assistance from elsewhere.

## **Determining group goals**

### **Identifying goals**

Identifying and responding to the goals of traditional owners in native title negotiations is the first principle set out in the Discussion Paper. However, few respondents commented on this issue during the consultations. The respondents who did discuss the issue focused on the difficulties of identifying goals within the limited timeframes of the future act process and without traditional owners having established a strong and stable decision making structure. Even when decision making structures are established, the focus of the NTRB is usually, of necessity, on negotiating agreements and responding to the goals and timeframes of third parties.

Consultations did not reveal many examples of traditional owner groups being able to engage in negotiations with clearly agreed and articulated goals for their own economic and social development.

However some agreements have been negotiated with a clear process to identify traditional owner goals. These include large-scale mining agreements, described





as 'comprehensive agreements' that focus on 'long term objectives and benefits to all parties'.<sup>42</sup> Two of these agreements, the *Gulf Communities Agreement*<sup>43</sup> and the *Western Cape Communities Co-existence Agreement*,<sup>44</sup> have been negotiated in north Queensland. The Gulf Communities Agreement provides for social impact assessments, health facilities, compensation, funding based on strategic plans and detailed commitments to employment and training. The Western Cape agreement links regional development, employment opportunities and training, community assistance and financial advice with the development of the mine.<sup>45</sup> Rio Tinto, a signatory to both of these agreements, also applies a 'comprehensive agreement' approach to small-scale activities, including exploration and land access. The application of a 'comprehensive' approach to small-scale agreements provides an opportunity to address broader issues affecting traditional owner groups whose country is not the site of a major mine where these types of agreements are most commonly negotiated.

The Western Cape Communities Co-existence Agreement provides an example of how traditional owner goals can be identified and include in the negotiation of a comprehensive agreements. The process for negotiating the Western Cape Agreement was broken up into seven stages:

- initiation of process,
- creation of the framework for negotiations,
- information gathering and community consultation,
- establishment of a negotiating position,
- conduct of negotiations,
- endorsement and signing of final agreement, and
- implementation.<sup>46</sup>

The information gathering and community consultation stage of these negotiations shows how the communities from Western Cape York identified their goals and objectives for negotiations. Two major information-gathering projects were undertaken – anthropological research and an Economic and Social Impact Assessment. The latter was designed to identify the impact of the proposed mining project on local Indigenous communities and to express the aspirations and concerns of traditional owners. The Impact Assessment project was managed by a traditional-owner-controlled Steering Committee, and desk-based research and consultation with traditional owner groups formed

42 S. Bradfield, 'Agreeing to Terms: What is a 'Comprehensive' Agreement?' *Land, Rights, Laws: Issues of Native Title*, Vol 2, Issues Paper No.26, March 2004, p9.

43 This agreement is currently under review. The agreement was negotiated between Pasminco Century Mine Limited, the Queensland Government and three native title groups – the Waanyi, Mingginda, and Gkuthaarn and Kikatj – under the right to negotiate provisions of the *Native Title Act 1993*. See the Agreements, Treaties and Negotiated Settlements Project website for more information: [www.atns.net.au/biogs/A000081b.html](http://www.atns.net.au/biogs/A000081b.html).

44 The agreement covers areas of land in and around Weipa on Cape York Peninsula and is registered as an ILUA under the NTA. The parties to the agreement are Comalco, the Queensland Government, the Cape York Land Council, traditional landowners and community representatives.

45 Bradfield 2004, *op.cit.*, p10.

46 C. O'Faircheallaigh, 'Negotiating Major Project Agreements: The 'Cape York Model'', *AIATSIS Research Discussion Paper* No.11, 1999 Australian Institute for Aboriginal and Torres Strait Islander Studies.



the basis for the assessment. Traditional owners are then able to determine their negotiating position based on the results of the Impact Assessment.

Another strategy for assisting traditional owners identify their goals that is often used by Indigenous organisations, particularly in land management projects, is participatory planning. Participatory planning requires that traditional owners determine the goals for social and economic development, rather than assisting in the development of objectives set outside the community.<sup>47</sup> Participatory planning:

...starts with self-identification of the need for capacity, self-setting of objectives and priorities, self-assessment of capacity and self-management of the development process itself, as well as self-monitoring and evaluation of the results of the process. This means that other partners participate in a process owned and driven by the individual/organisation/institution who is the subject of the capacity development.<sup>48</sup>

Above all, participatory planning is people-centred and seeks to promote development based on the active participation of individuals within their communities, local organisations, regional or national governments. The model includes methods to facilitate group analysis, learning, consensus-based decision making, planning processes, special studies, workshops, consensus-building and conflict resolution.

Information gathering, traditional owner goal identification and participatory planning need not take substantial amounts of time. Social scientists working in the overseas aid development sector have designed methodologies that allow them to identify development needs, goals and impacts with the participation of the community, relatively quickly. In particular, the 'rapid appraisals' technique involves short periods of fieldwork (usually less than one month) and uses a shortened formal survey process combined with key informant interviewing. The fieldwork component is often carried out by a team comprising researchers from different disciplines (such as an agro-economist, anthropologist, health professional) who each gather information within his/her area of specialisation. Informal, open-ended surveys with members of the community, individually or in groups, are also held. In the course of the interviews, culturally meaningful and important categories are meant to emerge so that an appropriate idiom or dialogue is developed.<sup>49</sup> This approach generally requires a social scientist on the team who has a first hand understanding of the qualitative research methodology involved, as well as staff with a first hand understanding of the communities to understand the group's recent history and cultural context, and be able to correctly evaluate what norms and values underlie a particular person's expressed opinion or action.<sup>50</sup>

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47 *ibid.*

48 *ibid.*, p44.

49 T.L. Finan and J. van Willigen, *Soundings: Rapid and Reliable Research Methods for Practising Anthropologists* vol 10, 1991, American Anthropological Association, Washington DC.

50 A. Molnar, 'Rapid Rural Appraisal methodology applied to project planning and implementation in natural resource management' in J.V. Willigen and T.L. Finan *Soundings: Rapid and Reliable Research Methods for Practising Anthropologists* vol 10, 1991, American Anthropological Association, Washington DC.



The participation of the traditional owner community in identifying their needs and goals for development is crucial.

Community participation can describe local developmental problems and can reflect on the identification of risks, resources and opportunities for local development. The community can work towards making [development] programmes sustainable and environmentally compatible...The greater the divergence between the community's perceptions of wellbeing and that of outside agencies the less relevant becomes the efforts of the latter.<sup>51</sup>

A variety of participatory social research tools may be used in rapid appraisals to engage the community in the information gathering and development planning, including visual methods like diagramming and interviews in smaller groups in culturally appropriate spaces, to ensure that all members of the community feel able to participate.<sup>52</sup>

These options for identifying the traditional owners' goals for economic and social development reflect the first principle set out in the Discussion Paper. This principle requires that negotiations 'respond to the group's goals for economic and social development'. Participatory planning and rapid appraisals or other methods of social and economic impact assessments discussed above provide mechanisms to help groups identify their goals.

## When to set goals

An important question that emerged from the consultations was the point at which traditional owner groups should aim to identify their social and economic goals. One respondent stated that groups needed to develop strategies and plans prior to the determination of a native title claim or the negotiation of an agreement. Other respondents supported this approach, commenting that capacity development should assist groups to develop their social and economic development goals. These goals should then be part of the negotiation process.

However, other respondents raised concerns that traditional owners have no time to develop social and economic goals before or during the negotiation process. For many groups, capacity development is first needed to build governance and decision making processes so that groups are able to respond effectively to native title decisions. An effective governance structure is also necessary to identify social and economic goals. However, these processes can take a substantial amount of time.

Added to this, respondents observed that third parties prefer that negotiations are resolved quickly. One NTRB noted that they can often get better results for traditional owners if they act quickly – leaving little time for groups to identify their goals.

51 N. Mukherjee, 'Policy measures, limitations and opportunities of PRA' in *Participatory Rural Appraisal: Methodology and Applications*, 1993, Concept, New Delhi pp134-151.

52 See for example Mukherjee (*ibid.*); and D.A. Davis Case, and T. Grove, 1990. 'The community's toolbox: the idea, methods and tools for participatory assessment, monitoring and evaluation in community forestry.' *Community Forestry Field Manual No.2*, 1990, United Nations Food and Agriculture Organisation, Rome.



A number of respondents suggested that traditional owners could decide to delay the distribution of economic benefits received through native title agreements, using fixed term investments or some other mechanism preventing access for a number of years. During this time, traditional owners could develop good governance and identify the social and economic development goals that their investments might be used to achieve.

## Summary

Respondents recognised the importance of traditional owner capacity development not only in the context of economic and social development, but also as part of traditional owners' general engagement with the native title system. Key issues discussed included:

- The need for traditional owners to develop capacity to engage with native title system and achieve their economic and social development goals.
- The role of NTRBs in facilitating traditional owner capacity development.
- The existing capacities of traditional owners to engage and achieve their economic and social development goals.
- Barriers to capacity development within the native title system – lack of time; emphasis on responding to third party interests through the future act process; limited funding to NTRBs; and lack of appropriate NTRB staff to assist traditional owners develop their capacity.
- The importance of capacity building for non-Indigenous participants in the native title process, including governments, companies and NTRB staff.
- When and how traditional owners' goals for economic and social development can or should be identified.



Redirecting the native title system to the economic and social development of traditional owner groups in the way suggested above requires considerable resources. This issue arose in nearly all the consultations, with most parties saying it was impossible to achieve outcomes consistent with traditional owner economic development within the current resourcing arrangements. The consultation discussions concerning resourcing, and its relevance for economic development, centred on four main issues:

- Native Title Representative Body (NTRBs) funding,
- State government assistance,
- Commonwealth government funding for non-Indigenous parties, and
- Funding to Prescribed Bodies Corporate (PBCs).

### Native Title Representative Bodies

Native Title Representative Bodies (NTRBs) are discussed in some detail above (section 3, *Capacity development*). This discussion explains the capacities NTRBs need to help traditional owners further their economic development goals.

The preamble to the NTA states: 'It is important that appropriate bodies be recognised and funded to represent Aboriginal peoples and Torres Strait Islanders and to assist them to pursue their claims to native title or compensation'. NTRBs are funded by the Commonwealth in the following way: base funding for each NTRB;<sup>53</sup> additional funding and assistance provided to some NTRBs through a reserve fund; a strategic priority claims resolution program; and a capacity building program.<sup>54</sup> The Commonwealth Parliamentary Joint Statutory Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund is currently conducting an inquiry into NTRB capacity, with particular reference to NTRB funding.<sup>55</sup> I provided a written submission to the committee and made a number of recommendations including:<sup>56</sup>

- that the Commonwealth Government increase its funding of NTRBs so they have the capacity to conduct their functions addressing the recognition and protection of native title, the effective participation of traditional owners in decisions affecting them, and the efficient and effective operation of the native title system.

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53 For the most recent tabulation of NTRB funding, see Aboriginal and Torres Strait Islander Services, *Background Paper: Inquiry into the capacity of Native Title Representative Bodies to discharge their duties under the Native Title Act 1993*, May 2004, submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, point 7.

54 Evidence of B. Stacey to the Joint Statutory Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Proof Committee Hansard*, 12 May 2004, pNT8-NT10.

55 For full terms of reference, see [www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/tor.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/tor.htm).

56 The submission is available at [www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/submissions/sub15.pdf](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sub15.pdf).



- that the NTRB funding should:
  - respond to the long term strategic plans of NTRBs and claimant groups;
  - not be limited to native title outcomes, but instead provide the opportunity for NTRBs to assist in addressing social and economic development of traditional owner groups;
  - not be subject to the unfettered discretion of the funding authority.

The amount of assistance that NTRBs can give traditional owners is dependent on NTRB funding. As explained earlier, achieving economic development for traditional owner groups often requires a multi-disciplinary approach. Staff in some NTRBs include economists, geologists, environmental scientists, mining experts and others, in addition to field officers, anthropologists and lawyers. While not all NTRBs need to have this range of experience among their permanent staff, they need resources to be able to contract or employ additional specialists where relevant.

During the consultations, a variety of respondents, both Indigenous and non-Indigenous, raised concerns about the priorities of NTRB funding. A state government official explained the ramifications of NTRB funding being tied to an adversarial system. Various respondents in NTRBs report having insufficient funds to conduct both litigation and agreement making, requiring NTRBs must choose between these processes.<sup>57</sup> As the NTA requires NTRBs to prioritise protection of native title interests above other work,<sup>58</sup> NTRBs are statutorily bound to attend to litigation first. The ability of NTRBs to address agreement making and economic development within the Commonwealth's resourcing arrangements is very limited.

These views are supported by the experiences of local government. NTRB resources are so tied up in litigation and related matters, that NTRBs cannot negotiate agreements, thus impeding local and regional development.<sup>59</sup>

Many of the more successful examples of native title working for the benefit of Indigenous people – Burrup,<sup>60</sup> Yandicoogina,<sup>61</sup> heritage arrangements in

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57 The Kimberley Land Council, due to limited funding, was forced to use its limited resources to pursue claims instead of the negotiation of agreements: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001, 2002* Human Rights and Equal Opportunity Commission, Sydney, pp78-79.

This aspect of the interrelationship of different aspects of this system has been explained to the Joint Committee by the Queensland Government during the NNTT inquiry. See evidence of J. McNamara (Queensland Department of Natural Resources and Mines) to the Joint Statutory Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Official Committee Hansard*, 15 April 2003, p203. The Queensland Government supports increased funding to NTRBs and is providing financial assistance itself, acknowledging NTRBs have inadequate funding to perform their duties: pp200, 202.

58 NTA, s203B(4).

59 Evidence of E. Wensing to the Joint Statutory Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Official Committee Hansard*, 9 November 2000, p26.

60 See *Native Title Report 2003*, pp84-87, and [www.atns.net.au/biogs/A001468b.htm](http://www.atns.net.au/biogs/A001468b.htm).

61 See [www.atns.net.au/biogs/A000875b.htm](http://www.atns.net.au/biogs/A000875b.htm).



Queensland<sup>62</sup> and Western Australia,<sup>63</sup> the South Australian statewide negotiations<sup>64</sup> – were not achieved through the Commonwealth’s regular funding of NTRBs. These outcomes were all extensively assisted, and in some cases entirely funded, by the relevant companies and state governments. It shows that, in some critical aspects, the Commonwealth’s system of funding is unable to assist Indigenous interests to the extent necessary to achieve agreements. Claimant groups who do not have an opportunity to engage with companies are particularly affected. The situation also presents conflict of interest issues, giving those seeking to develop Indigenous land an actual or potential advantage in negotiations. As the Kimberley Land Council has previously explained to the Commonwealth Parliament: ‘We are left in the position of having to ask those resource companies to provide the funds in order for us to fulfil our statutory obligations’.<sup>65</sup>

Several NTRBs reported that, due to funding shortages, their ‘engagement’ with native title claimant groups is limited to advising and taking instructions from the claim’s applicants listed on the Federal Court’s records (and this is sometimes only five people on behalf of a group of 100 or more). This process relies on those few applicants ensuring that information is passed out and back between the whole group and the NTRB. This is an onerous task, which often does not properly involve the larger group in decision making on matters affecting it. Where funding allows (often with use of targeted additional funding) these same NTRBs adopt a far more comprehensive and inclusive process for the negotiation of larger agreements, indicating that they are aware of the shortcomings of the more limited engagement.

Another observation on NTRB funding came from the perspective of companies and other non-government parties. These parties prefer to deal with NTRBs and traditional owner groups who are funded in a way that enables them to engage appropriately in the process. Rio Tinto advised the Parliamentary Joint Committee on Native Title last year that because of the insufficiencies of the

62 The Queensland Government has provided funding for NTRBs to employ additional staff to deal with future act matters and become involved in capacity building, assisting the native title group to set up their own process for response, such as the issuing of notices and holding of meetings. Assistance from the Queensland Government has also been received for authorisation meetings, and for the meetings necessary to negotiate ILUAs and other agreements. These have included aspects of the pilot South-West Petroleum Project and the Regional Forestry Agreement.

63 The Western Australian government has recently made funding available to NTRBs for extra Future Act officers in each NTRB region. This initiative was one of the recommendations made by the WA Technical Taskforce on Mineral Tenements and Land Title Applications to expedite the processing of the backlog of mineral tenements applications on land under native title claim: *Technical Taskforce on Mineral Tenements and Land Title Applications*, 2001, Final Report, Government of Western Australia, p19.

64 The South Australian Government considers that the SA NTRB, the Aboriginal Legal Rights Movement (ALRM), has received insufficient funding from the Commonwealth to enable them to negotiate. As a result, the South Australian government has provided funds totalling \$5.4 million to 30 June 2003, plus an additional \$1.5 million for the current financial year. The South Australian government has also provided funding to ensure that the statewide ILUA process can be sustained; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, 2004, Human Rights and Equal Opportunity Commission, Sydney, p161.

65 Evidence of W. Bergmann to the Joint Statutory Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Official Committee Hansard*, 2 July 2001, p391-392.



Commonwealth's funding of NTRBs, the progress of many negotiations relied on company funding:

[B]ecause of the funding situation and our need to establish equity in any negotiation in order for it to be credible and stand up down the track, we will often provide resources to rep bodies.<sup>66</sup>

Where a company (or state government) is able and chooses to provide funding to NTRBs, beneficial engagement can occur. But this leaves a very inequitable system. In Queensland, respondents lamented the lack of consistency in the resourcing of NTRBs. It has also been observed that there are no criteria guiding the application of the Commonwealth's strategic claims and capacity building funds for NTRBs, resulting in concerns about lack of transparency in decision making about use of the funds.<sup>67</sup> It should be noted, however, that not all company financial assistance is earmarked for particular negotiations of direct benefit to the company. Rio Tinto has provided two scholarships for candidates to undertake postgraduate study in mining law and policy on the condition that the recipients commit to working within the NTRB system for at least two years after the study.<sup>68</sup> This program, which is an initiative flowing from the NTRB lawyer professional development project currently being undertaken under the auspices of the Castan Centre for Human Rights Law at Monash University, is an invaluable way of increasing the experience and capacity available to traditional owner groups through NTRBs.

Insufficient NTRB funding not only limits the resources and skills NTRBs can bring to a particular issue, it also curtails the broader role of the NTRB in assisting traditional owner groups resolve governance and development issues. During the consultations, some respondents discussed the wider community role that some NTRBs used to provide, but explained that this has been curtailed by restrictions in conditions and funding.

The NTA gives some indications that an NTRB should fulfil a community role. For example, under the Act an NTRB must:

- perform its functions in a manner that promotes 'the satisfactory representation by the body of ... persons who may hold native title in' its region, and promote 'effective consultation with Aboriginal peoples and Torres Strait Islanders living in' its region.<sup>69</sup>
- pass on notices given to it, to 'any person who the representative body is aware ... may hold native title' in its region.<sup>70</sup> The NTA also requires the NTRB to 'advise [those] persons ... of relevant time limits under this Act or another law of the Commonwealth or a law of a State or a Territory, if the person would not otherwise

66 Evidence of B. Harvey to the Joint Statutory Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Official Committee Hansard*, 28 March 2003, p61.

67 Gurang Land Council, *2003-2004 Annual Report*, 2004, p3.

68 E-mail by R. Potok, *Rio Tinto NTRB Scholarships*, to Yahoo 'native\_title' discussion group, posted 25 October 2004.

69 NTA, s203BA.

70 NTA, s203BG.





be notified of those time limits'. Through the notification process, traditional owners are made aware of and can begin to participate in decisions that affect their country.

- inform all persons it knows who may hold native title in its region 'of any matter that the representative body considers may relate to, or may have an impact upon, native title' in that region.<sup>71</sup>

These statutory provisions suggest that these bodies are more than simply service providers. But, as raised repeatedly during the consultations, the funding limitations of the NTRB system are obstacles to increasing the role of NTRBs.

The Commonwealth Government and Parliament have been consistently alerted to the lack of NTRB resources and there have been repeated calls for more funding. Increased NTRB funding has been recommended in the reports and reviews of Commonwealth agencies,<sup>72</sup> Commonwealth Parliamentary committees,<sup>73</sup> state governments<sup>74</sup> and industry.<sup>75</sup> The issue is of concern even outside traditional native title/Indigenous areas: a Commonwealth Parliamentary inquiry into mineral exploration received many Government and company submissions recommending increases in NTRB funding.<sup>76</sup>

Various NTRBs expressed frustration at their funding being tied to 'native title outcomes', particularly where, because of the 1998 NTA amendments and subsequent High Court decisions, the range and availability of native title outcomes is decreasing. This encourages NTRBs to diversify their funding and find opportunities for assisting traditional owners' economic development outside of native title funding. Some NTRBs have staff and projects funded from sources other than the Commonwealth's NTRB funding. For instance, state governments fund staff in NTRBs in Queensland and Western Australia to work on mining-native title matters.

71 NTA, s203BJ.

72 G. Parker and others, *Review of Native Title Representative Bodies*, 1995, ATSIC, Canberra,; Senatore Brennan Rashid and Corrs Chambers Westgarth, *Review of Native Title Representative Bodies*, March 1999, ATSIC.

A report by Anthropos Consulting Services also informed the government that NTRBs were under-resourced to carry out their functions: *Research Project into the issue of Funding of Registered Native Title Bodies Corporate*, October 2002, ATSIC, p3.

73 House of Representatives Standing Committee on Industry and Resources report, *Exploring: Australia's Future* August 2003, paras 7.42–7.51 and recommendation 19; and Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Report on Indigenous Land Use Agreements*, September 2001, para 6.83 and recommendation 4.

74 For example, *Ministerial Inquiry into Greenfields Exploration in Western Australia*, Western Australian Government report November 2002, recommendations 8-12; and *Technical Taskforce on Mineral Tenements and Land Title Applications*, November 2001, Government of Western Australia, pp103-106.

75 ABARE report commissioned by the WA Chamber of Minerals and Energy, the Minerals Council of Australia, and the WA Government, *Mineral Exploration in Australia: Trends, economic impacts & policy issues*, 2002 p76; Strategic Leaders Group, *Mineral Exploration in Australia: Recommendations for the Mineral Exploration Action Agenda*, July 2003, Commonwealth of Australia, p12.

76 See submissions from Queensland Government, AIMM, Newmont, SA Government, WA Government, and Minerals Council of Australia, to the House of Representatives Standing Committee on Industry and Resources, *Inquiry into resources exploration impediments*.



Most of the financial assistance to parties engaging in the native title system comes from the Commonwealth Government. However, as explained above, that funding is often insufficient and various state governments also provide financial assistance to NTRBs and Indigenous groups.

Usually, state government funding is targeted at enabling or finalising specific negotiations, and properly informing and advising relevant Indigenous groups. Well-known examples of this include the South Australian statewide negotiations,<sup>77</sup> Burrup negotiations,<sup>78</sup> and the Queensland Government's assistance for authorisation meetings to finalise Indigenous Land Use Agreements (ILUAs).<sup>79</sup> In other instances, however, state governments have provided funding not just for specific negotiations, but for an ongoing process. For instance, both the Queensland and Western Australian Governments provide funding to NTRBs to be used in processing exploration/heritage matters. In Queensland, some of this funding is being used to produce long-term outcomes, with one NTRB hiring an officer to develop template material to help groups deal with exploration, tenure and associated heritage issues themselves.

State governments must be commended for funding negotiations and other initiatives that increase the potential for beneficial economic and social development outcomes for traditional owner groups. One difficulty with this funding, however, is that even where funding is provided for an ongoing process rather than a specific negotiation, it is almost always provided where the state government wants a particular outcome (such as to increase the processing of exploration tenure, facilitate a particular industrial development, or expand residential areas). This means the potential for assistance is entirely dependent on the state government's priorities and interests. Commonwealth parliamentarians have previously commented on the danger that progress will occur only in those areas with resources of interest to government and industry.<sup>80</sup> Native title might then become a system to assist the state governments with land management, rather than to recognise and protect Indigenous connection to land. Native title must be able to provide a nationwide system, not a system where some traditional owners can receive assistance if they live in particular area or want to negotiate a particular development.

One respondent, during the consultations, urged that government funding be channelled, as much as possible, directly to the community. I consider that funding allocated to assist Indigenous people in communities should be monitored to ensure the proposed benefits are reaching the intended

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77 See *Native Title Report 2003*, pp64-68.

78 See *Native Title Report 2003*, pp84-87.

79 See *Native Title Report 2003*, pp160-161.

80 See comments by Sen J McLucas, Joint Statutory Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Official Committee Hansard*, 11 June 2003, p297.

See also evidence by barrister Angus Frith, explaining that government use of the expedited procedure is driven from a development perspective, not from the point of view of traditional connection with land: evidence of Angus Frith to Joint Statutory Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Official Committee Hansard*, 11 June 2003, p286.



beneficiaries. However, in light of some of the issues discussed above in section 2, *Governance* and section 3, *Capacity development*, it may be that supplying funding directly to communities is not the best approach for long-term development where governance structures and community capacity in the traditional owners group are not yet developed.

## Government funding for non-Indigenous parties

The Commonwealth Government provides financial assistance for non-Indigenous parties to engage in the native title process through the Attorney-General's Department. Most commonly, this assistance is provided through a legal aid scheme where respondent parties to native title claims receive reimbursement for the legal fees they incur in native title proceedings.

Previous Native Title Reports have commented on the Commonwealth's respondent funding scheme,<sup>81</sup> noting its effect in hardening the positions of those who already have their interests protected in any event,<sup>82</sup> and its seeming encouragement of litigation over negotiation.<sup>83</sup> During the consultations, an NTRB in Queensland expressed frustration at the inequality created when mining and other companies are financed directly by the Attorney-General's Department, putting NTRBs (and therefore the traditional owners they represent), with limited funding as described above, at a disadvantage when appearing in arbitration hearings about the doing of future acts.

Various parties raised concerns during the consultations about the prioritisation of funding litigation. The effect of this is that initiatives seeking a broad negotiated outcome (e.g., the state-wide negotiation process in South Australia) are not funded, because they do not relate to a specific native title proceeding. The former Commissioner has reported on how funding is being withdrawn from some of the more progressive negotiation-assisting measures.<sup>84</sup> In effect, respondent funding is more litigation-focused, and even where it can be applied to negotiations, these are negotiations of a particular case rather than a regional or wider process.

Respondents explained that unequal distribution of funding is further exacerbated by current legal understandings of native title. Given that respondents' interests are largely protected (i.e., non-Indigenous rights are deemed to 'override' any inconsistent native title right), the threat of litigation and a court ruling is of little consequence to respondents because their costs are met through the Attorney-General's funding. These parties explained that, on the Indigenous side, the threat of litigation is very real, as adverse findings may impact severely on traditional owners' use of land.

81 *Native Title Report 2003*, pp156-158.

82 *Native Title Report 2003*, p157.

83 *Native Title Report 2003*, pp157-158.

84 As a result of these changes a number of group recipients were advised that pursuant to s.183 NTA their funding will be terminated unless they are directly involved as a party or future party in proceedings relating to particular native title applications. This resulted in some peak bodies being deprived of funding for information, training and general advice on agreements and agreement making for their members: *Native Title Report 2003*, p96.



The role and structure of PBCs were discussed above in section 2, *Governance*, where it was suggested that there is a need for alternatives to the existing PBC model and for traditional owners to be able to choose which governance structure to adopt in light of their particular circumstances and goals. At this stage, the NTA requires traditional owners to establish a PBC when a positive determination of native title is made. Despite PBCs being mandated by legislation, there is currently no government funding provided for them.

The issue of PBC funding has been a contentious one for some years. The Commonwealth does not provide funding for PBCs and has suggested that this could be done by other parties.<sup>85</sup> While this situation continues, native title holders are unable to exercise or protect their native title rights. The WA Pastoralists and Graziers' Association told the Commonwealth Parliament that, while the Nharluwangga Wajarri and Ngarla determination in WA enables traditional owners' access to country, these rights cannot be enjoyed because of a lack of implementation funding.<sup>86</sup>

During the consultations we were told that some PBCs have been able to obtain funding assistance from non-government sources, but just as with other areas of native title, this happens mostly where mining companies are interested in the native title land. When the PBC is operating in an environment where there are few opportunities for economic return for companies, such as in national parks, the funding possibilities are either inadequate or non-existent.

The issue of PBC resourcing is receiving considerable attention. ATSIC (at that time the main source of NTRB funding) commissioned a report into PBC funding.<sup>87</sup> The report notes that PBCs are not able to satisfy their obligations under the NTA and PBC regulations. And nor are they able to satisfy their compliance obligations under the incorporation legislation *Aboriginal Councils and Associations Act 1976* (Cwlth). The report also notes that while NTRBs have statutory functions to assist, their funding levels and guidelines prevent ongoing assistance. The report concludes that as a result of the lack of funding for PBCs, these organisations are 'essentially dysfunctional [and] are accordingly vulnerable to failure and being wound up. This would put at risk both the protection and management of native title, and the certainty required by land and resource management stakeholders'.<sup>88</sup>

85 The Attorney-General, the Hon P Ruddock, made a speech to a conference in Adelaide: *The Government's Approach To Native Title*, Adelaide, South Australia, 4 June 2004. In the speech, he spoke about prescribed bodies corporate and stated 'It is the States and Territories that have primary responsibility for the day-to-day management of land. And along with proponents of future Acts, such as mining and industry groups, they benefit from land development. With that in mind, the Australian Government believes it is appropriate that the States and Territories, and others should contribute to the costs of that development'.

86 Evidence of J. Clapin to the Joint Statutory Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Official Committee Hansard*, 12 June 2003, p350.

87 Anthropos Consulting Services, Senatore Brennan and Rashid, *ATSIC Research Project into the Issue of Funding for Registered Native Title Bodies Corporate*, October 2002, for ATSIC Native Title and Land Rights Centre, Canberra.

88 *ibid.*, p4.



These issues have even concerned the Federal Court. In late 2004, the Court had before it a consent determination proposed for a native title claim in north-western Australia.<sup>89</sup> The Judge noted his concern that, given the legislative functions imposed on PBCs by the NTA, the proposed PBC may not have the capacity to perform these functions, and requested submissions from the parties on this issue. The native title claimants outlined the PBC's lack of resources and resulting inability to undertake the functions expected of it. The Judge observed:

Some have pointed to policy objections to the whole concept of PBCs. They have argued that it would be more appropriate to utilise the existing representative bodies [namely, NTRBs] for the purpose of administering land which is the subject of native title determinations. Whatever merit there is in that view is not reflected in the present statutory arrangement.

There is a good argument that the inability of a PBC to fulfil its statutory functions is a relevant factor in the Court's consideration of whether an agreement providing for such a PBC is appropriate for the purposes of s 87. In the end, I accept the respondents' arguments that, in this case, that consideration is not determinative because no party wishes the Court to refuse to make the orders on that ground.<sup>90</sup>

The Judge expressed his hope that funding would be provided for the PBC's operation, and observed: 'It would be an absurd outcome if, after the expenditure of such large sums to reach a determination of native title, the proper utilisation of the land was hampered because of lack of a relatively small expenditure for the administration of the PBC'.<sup>91</sup>

Some state governments are providing limited assistance to help PBCs. For example, the Western Australian Government agreed to assist a PBC in a central Western Australian determination establish an office in the community.<sup>92</sup>

## Summary

Resourcing is a critical issue that determines whether the essential requirements and processes for Indigenous economic development can be provided including: capacity building, governance, implementing and monitoring agreements, negotiation protocols and so on. It is clear from the consultations and also from a range of inquiries and reviews conducted over the last few years, that most parties consider current resource levels for NTRBs and PBCs inadequate to enable Indigenous people to properly engage in the native title system. This necessarily means that Indigenous people are not able to access the full range of economic development opportunities that should be available through native title. It is possible, from the consultations, to identify some key areas that need attention:

- Sufficient resources are needed to enable capacity building both within the traditional owner groups and also in those parts of the native title system on which these groups depend.

89 *Nangkiriny v Western Australia* [2004] FCA 1156 (8 September 2004).

90 *Nangkiriny v Western Australia*, per North J at [10] & [11].

91 *Nangkiriny v Western Australia*, per North J at [11].

92 Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, *Annual Report 2003*, p40.



- Particular attention needs to be given to traditional owner groups in areas where there are few natural resources of interest to industry. Company and government development priorities often leave these groups out of the process.
- The basis on which the Commonwealth provides financial assistance to respondent parties needs to be reassessed so that broader economic and social development initiatives can be supported.
- PBC funding must be urgently provided.



The tangible and intangible assets of native title, including the acknowledgement of Indigenous Australians' traditional ownership of land and inherent rights, legally recognised rights and interests in land, the opportunity to negotiate agreements and the national NTRB structure, provide a foundation on which economic and social development for traditional owners can be built.

During the consultations, a number of issues were highlighted, including the opportunities and costs for economic development from resource-rich land. There was also substantial discussion of the types of economic development that could be negotiated through agreements, including employment, training, enterprise development and community development.

Some respondents were concerned that the native title system may not be an appropriate structure through which to promote economic and social development for traditional owners. Issues raised included the inequities that may develop in Indigenous communities if traditional owners had development opportunities and other people did not. Concerns were also raised that native title negotiations should not result in traditional owners' rights and interests being exchanged for the delivery of services in health, education and housing, which are fundamental citizenship rights. Other respondents were also sceptical about state and Commonwealth governments' willingness to support economic and social development for traditional owners in the native title context.

### Native title rights and interests as assets

A number of respondents discussed the idea of legal rights as assets for economic and social development, highlighting the need for a contemporary view of Indigenous rights. Other respondents talked about the need for greater discussion of the meaning of assets in the Discussion Paper (at Annexure 1) and the ideas of the fungibility<sup>93</sup> of assets discussed by Noel Pearson and others.<sup>94</sup> Linked to this, alternative financing strategies that might be available to traditional owners were also raised. Respondents noted that loans do not have to be linked to land but can also be linked to services or production. For example, loans for pastoral properties are linked to stock and equipment, not to land title.

One respondent noted that it is important to recognise the dilemmas that Indigenous people face in a modern economy. Country has to sustain Indigenous people in the framework of a modern economy, which is far from the subsistence style of living of the past. The rights of traditional owners should reflect the fact that, like other Australian citizens, they are members of a modern state involved in a global economy. Their property rights to country should provide opportunities

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93 The term 'fungibility' refers to the representations that physical assets can be given, in order to suit a particular commercial transaction, so as to enable capital formation – such as a certificate of title for freehold land which may be sold or used as collateral for a loan through mortgaging.

94 F. Deemal, 'Direct negotiations with numerous native title holders and project proponents' paper presented at 'Negotiating Country' Native Title Forum, National Native Title Tribunal, Brisbane, 1-3 August 2001.



to participate in that economy. This respondent noted that a consulting role for traditional owners on government authorities and boards is not enough to ensure a sustainable economic livelihood. Traditional owners need to have a greater degree of control over decisions affecting their land. This would provide more opportunities for traditional owners to generate an income or livelihood from resources on their land including flora, fauna and such things as water or sand from riverbeds.

Native title, although often conceptualised as an 'Indigenous right', is also a property right with parallels to many other property rights. In fact, in many ways, native title is no different to already recognised, and uncontroversial, property rights such as easements. Its communal nature is also analogous to other property holdings such as property held by corporations. The co-existence of the interests is like many competing interests over a piece of property: mortgagors/mortgagees, landlords/tenants.<sup>95</sup>

The property rights of traditional owners, as for other Australian citizens, should assist their economic development where this is desired. The respondent group that made these comments concluded that the overall problem is that economic and social development goals are dealt with merely at the level of micro-economic management, group by group or enterprise by enterprise. They considered that a broader focus would be more effective in generating social and economic development for Indigenous peoples. It was argued that international human rights standards should be respected, including the right of peoples to sovereignty over natural resources.<sup>96</sup> They stated 'sovereignty is the only adequate response required, at a macro level, to solve problems in the long term and is the only viable and sustainable solution'.

As still the most socio-economically disadvantaged group in our society, Indigenous people's participation in the mainstream economy should not be conditioned upon an ability to buy into it. Traditional owners should not be forced to purchase licenses to exercise their native title rights commercially. Another approach is required, such as directing a proportion of catch profits or mining royalties to traditional owners as 'resource rental' (in recognition of their traditional property right to the resources being exploited); subsidising the purchase of, or granting without fee, commercial licences; providing an equity stake for traditional owners in development on Indigenous land; granting seed funding for Indigenous enterprises; offering contracting concessions to Indigenous businesses in development projects; and other means of facilitating the exercise of commercial rights that flow from native title rights and interests. In a number of speeches and papers, Noel Pearson has argued that the lands, housing, infrastructure and enterprises of Indigenous communities, collectively owned and inalienable, have no capital value. Instead this property becomes

95 L. Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future*, 2003, The Federation Press, Sydney.

96 This concept has been well-developed by the United Nations Special Rapporteur on Indigenous Peoples' Permanent Sovereignty over Natural Resources, Professor Erica-Irene A. Daes, See for example, E.A. Daes 'Indigenous peoples' permanent sovereignty over natural resources' paper presented at the *Native Title Conference 2004: Building Relationships*, 3-5 June 2004, Adelaide.





dead capital because, unlike the property of non-Indigenous people, it is not available to be used to create more capital. In addition, legislation controlling the recognition of Indigenous rights in land, including state land rights legislation, native title legislation and the Indigenous Land Corporation:

... create[s] inefficient and complex structures without any thought to how workable ownership structures and decision making and land use procedures might be used for the purposes of economic development.<sup>97</sup>

As a result Indigenous assets are unable to be represented in a fungible form. That is, Indigenous ownership of land, houses and infrastructure is not represented by legal titles, deeds and statutes of incorporation that are alienable and able to be used to create capital. However Pearson and others argue that the features of ILUAs – time efficiency and legal certainty – could, with a creative legal and entrepreneurial approach, be used as fungible assets in commercial negotiations. Marcia Langton has also considered the transformation of other Indigenous assets into fungible form for the creation of capital.<sup>98</sup>

The alienation of traditional lands is a feature of the Nisga'a Nation Treaty in British Columbia, Canada. The treaty is a comprehensive document covering all aspects of the life of the Nisga'a nation. The Nisga'a Treaty allows for the alienation of traditional land held in fee simple. However, the alienation must be in accordance with the documents and laws that form the foundation to the Nisga'a nation: the treaty, the Nisga'a Constitution and Nisga'a law. Alienation of land must be done in accordance with Nisga'a law, tradition and customs. Where the land is of particular cultural significance, Nisga'a law prevents it from being alienated.<sup>99</sup>

Strategies for economic and social development must be built in the context of Indigenous communities. Transforming some Indigenous assets into more fungible forms may be an effective strategy for economic and social development in one context but ineffective in another. Simply creating capital may not address underlying social and economic development issues, particularly in remote areas. These communities require support and assistance to build and develop their capacity to sustain development in the long term. The right to development is aimed at the realisation of economic, cultural and social rights as well as civil and political rights, and is not achieved, although it may be assisted, by the generation of capital.

UN principles on sustainable development state that 'human beings are at the centre of concerns for sustainable development'<sup>100</sup> and it is clear that sustainable development can only be achieved if social and economic development and

97 N. Pearson, 'Review of Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*' in *JAS Review of Books*, Issue 1, September 2001, Australian Studies Centre at Curtin University of Technology, available at [www.api-network.com/cgi-bin/reviews/jrbview.cgi?n=0465016146&issue=1](http://www.api-network.com/cgi-bin/reviews/jrbview.cgi?n=0465016146&issue=1).

98 M. Langton, *A New Deal? Indigenous development and the politics of recovery*, Dr Charles Perkins AO Memorial Oration, The University of Sydney, 4 October 2002.

99 Nisga'a Nation, *Nisga'a Final Agreement*, 1998, Canada, British Columbia, Chap 3.

100 *Rio Declaration on Environment and Development*, Principle 1, UN document A/CONF.151/26, 12 August 1992, endorsed by UN General Assembly on 22 December 1992, UN document A/RES/47/190.



environmental protection are addressed. A sustainable development approach within Indigenous communities requires that economic development is consistent with and cognisant of the social, cultural, political and spiritual context of the group aiming to achieve economic and social development.

The recognition of Indigenous rights and interests in land is also intended to protect Indigenous people's cultural, spiritual and social relationship with land. The Preamble to the NTA demonstrates a willingness to protect Indigenous rights in land, in part because of the special relationship between Indigenous people and the land. It states that the people of Australia intend:

...to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests and their rich and diverse culture, fully entitle them to aspire.

Similarly, Article 27 of the ICCPR requires that rights of minority groups including Indigenous peoples are protected to ensure their enjoyment of their culture, religion and language. Article 27 states:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion or, to use their own language.

Transforming Indigenous rights and interests into alienable interests in land may ignore the cultural importance of traditional lands by reducing the relationship Indigenous people have with their land to a purely economic value. Further, it is unlikely that the creation of capital alone will contribute to the economic and social development of Indigenous communities. A comprehensive approach is needed that includes the development of Indigenous capacity to achieve economic and social goals in a sustainable and culturally appropriate way.

Indigenous rights and interests in land could be transformed into a stronger economic base by the acceptance of commercial rights that flow from Indigenous ownership of land and resources. To date, the NTA has failed to recognise and support traditional owners' commercial interests in land and resources. Legislative or administrative changes may be required to give such recognition effect. Any legislative or administrative changes to Indigenous people's assets and rights and interests in land should only be made with their prior informed consent.

## **Economic development in Indigenous communities**

A number of respondents highlighted the issue of economic development for traditional owners who may live in communities with Indigenous people who are not traditional owners for the area. Respondents noted that the emphasis on traditional owners in the NTA ignores the reality of many Indigenous communities. In these communities, traditional owners, 'historic' and 'residential' Indigenous Australians live together, with traditional owners often married to 'historic' or 'residential' community members.



Respondents commented that the distinction between traditional owners and other community members may lead to inequities within Indigenous communities. Economic development exclusively through native title, only for traditional owners, is unlikely to be sustainable within diverse Indigenous communities. It was suggested that a more inclusive model, that brings benefits to everyone in the community, is needed.

Linked to the issue of a broader more inclusive model, one respondent queried whether NTRBs were set up to deal with this approach. Instead, they suggested that the appropriate body to promote economic development should reflect the contemporary realities of physical communities, rather than being based on the recognition of traditional ownership. This issue is discussed in chapter 2, *Governance*.

### **Opportunities and costs for resource-rich land**

Comments from respondents highlighted a number of important issues that affect the opportunities or costs of agreement making. First, government and third parties are more willing to negotiate fair terms when they are eager to get on to the land. A drawback of this is that negotiations often have to occur within short timeframes. One NTRB noted that it has found the quicker it can respond and deliver agreement to a development proposal, the more likely it is that good terms will be reached through negotiations. However, rapid agreement making barely provides enough time to establish decision making structures, let alone allow a group to decide on its goals.

Opportunities may also be lost if the terms of the agreement do not fit with the social and cultural context of the traditional owners or if traditional owners do not have the capacity to take advantage of the opportunities presented by an agreement. This has been demonstrated by the limited take up of employment opportunities offered under native title agreements by traditional owners.

A number of respondents have commented on the employment outcomes for traditional owners through agreement making. One respondent noted that a large-scale agreement with generous employment provisions for Indigenous people was reviewed in 2002. One of the issues emerging from this review was the lack of employment and business development for traditional owners under the agreement, despite a large number of Indigenous people working for the company. In short, the traditional owners were not able to take advantage of the employment terms of their agreement because they did not have the skills and knowledge to take on the jobs available to them. Also, most jobs are created at the construction stage and are not ongoing. As a result, people gain training and employment but when construction is completed, the jobs finish and workers have to move elsewhere to stay employed. This may require people to leave their communities and traditional country to keep their jobs.

Respondents also noted that while large-scale development projects bring employment opportunities, this creates new challenges for communities. The construction of large projects brings an influx of new people into a community, which can create instability and exacerbate inequalities in employment and income between Indigenous and non-Indigenous people.



Respondents observed that traditional owners with no developer or third party interest in their land may struggle to attract the resources needed to work towards economic and social development. Also, without the opportunities and pressure of the future act process, NTRBs may find it difficult to help traditional owners develop goals for economic and social development because the litigation or negotiation of other claims and future act processes absorb their limited human and financial resources.

A number of respondents stated that resource development was not the only way traditional owners could work towards social and economic goals. Instead, traditional owners and NTRBs must be able to 'think outside the box'. Small scale enterprises may offer alternatives to income and employment from large agreements and development projects. Eco-tourism, cultural tourism, training, airstrips and environment and wildlife management are examples of enterprises that could help to build sustainable economic and social development that are not dependent on resource development. Cultural tourism may be combined with eco-tourism where traditional owners have rights to the land, and allows some control over how they will 'host' tourism.<sup>101</sup>

This approach is being used by the Northern Land Council to help communities build land and sea management programs and commercial customary harvesting of wildlife. However these projects can at times be undermined by the failure to allow traditional owner commercial rights and interests in land in the government allocation of commercial licences. Indigenous communities are often prevented from using resources on their traditional lands for commercial purposes while others who hold licences are permitted to commercially exploit resources on Indigenous land.<sup>102</sup>

Jon Altman argues that there are great benefits that accrue to both remote regions and the nation as a whole from Indigenous customary economic activity (such as hunting and gathering) and associated landscape management:

For example, much of the output of the Indigenous arts industry, a market activity that generates much tourist interest, is produced on country and uses sustainably harvested natural resource inputs; wildlife habitats on Aboriginal lands (which are the breeding grounds for many migratory species) are maintained; and customary fire regimes assist biodiversity maintenance and can abate atmospheric carbon and smoke. In short, supporting Indigenous futures on country has the potential to generate economic benefits – not just for Aboriginal people, but also for the nation – in meeting international biodiversity conservation obligations and potentially in meeting carbon abatement goals.<sup>103</sup>

101 T Rowse, *Indigenous Futures: Choice and development for Aboriginal and Islander Australia* UNSW Press, Sydney 2002

102 P. Whitehead, 'Indigenous products from Indigenous people: linking enterprise, wildlife use and conservation', paper presented at *Seizing our Economic Future Forum*, Alice Springs, NT, 6-7 March 2003.

103 J. Altman, 'People on country, healthy landscapes and sustainable Indigenous economic futures: The Arnhem Land case' *The Drawing Board: An Australian Review of Public Affairs* Volume 4, Number 2, November 2003, p75.



He points out that Indigenous use of land and resources is actually already matching 'triple bottom line' public and corporate policy rhetoric, and should be encouraged to support ecologically and socially sustainable economic growth for regional Australia. He envisages new industries which might develop:

...industries based on greenhouse gas reduction through reduced fire-related emissions and associated carbon trading; enhanced pest eradication services, including provision of disease monitoring and bio-security; and enhanced provision of invasive weeds control services. An enhanced engagement with the market could occur through growth in the production of goods exports (of arts and harvested wildlife), services exports (such as recreational fisheries and eco- and cultural tourism) and import substitutes (such as selling fish and wild harvested game locally, if restrictive regulations could be modified and property rights in commercial species vested with Aboriginal people). And finally, an enhanced and more active engagement with the state could occur, through the provision of publicly funded contracts for the provision of both natural resource management services that aim to conserve biodiversity and some of the ecosystem services identified above.<sup>104</sup>

The Centre for Aboriginal Economic Policy Research at the Australian National University has examined the issues of Indigenous land ownership and its relationship to economic development since its establishment in 1990. It has explored many options for the design and implementation of innovative ideas for traditional owner social and economic development, including the legal recognition of Indigenous property rights in species, enabling the value of such rights to be realised either by sale to a commercial harvester or through joint ventures between Indigenous and non-Indigenous parties.

This approach is exemplified in an enterprise concept for traditional owner economic development conceived by the Northern Queensland Land Council (NQLC). NQLC suggests that the grant of a licence to export native flora and fauna collected through the exercise of native title rights could help stop illegal trade in native flora and fauna and create employment opportunities for traditional owners.<sup>105</sup>

It was also recognised by respondents that lack of external development on traditional lands provides an opportunity for traditional owners to begin planning their social and economic goals without the pressure of a development proposal and looming negotiations.

## Responding to the group's goals and capacities

The opportunities and costs for traditional owners on resource rich land and also on land without resource appeal highlights the role of the principles in the Discussion Paper which state that native title negotiations should:

- Respond to the group's goals for economic and social development; and
- Provide for the development of the group's capacity to set, implement and achieve their development goals.

<sup>104</sup> *ibid.*

<sup>105</sup> See ABC News Online: 'Aborigines seek licence to export native animals' 10 January 2005.



These principles require first, that the outcomes for traditional owners from agreement making are based on their own goals. Second, that traditional owners, companies, governments and NTRBs have established a strategy to achieve these goals. This strategy should include an understanding of the skills and skill shortages of traditional owner groups. Third, agreements should include provisions to develop existing and new skills, through suitable employment and training to ensure traditional owners can achieve their goals.

If the goal of traditional owners is employment on a mine site, there must be a strategy to achieve this goal and an opportunity for education, employment and training for traditional owners so that they can benefit from their agreement. If a group's goal is for a better community store – what can the resource developer do to help? How can traditional owners and other people in the community be trained to run their store? And importantly what is the role of government?

Native title agreements provide an opportunity for traditional owners to say what it is their community needs. But is not an opportunity for governments to shift their responsibilities to companies or for traditional owners to trade off their native title rights for basic infrastructure and government service delivery. Instead it is an opportunity for government and companies to respond to the goals expressed by traditional owners for themselves and for their communities.

## **Structuring benefits**

During consultations, respondents frequently raised questions about the type of agreements that could be negotiated by the principles proposed in the Discussion Paper (at Annexure 1). Could these agreements include benefits and outcomes for individuals rather than the whole group? Is this model for economic development suited to the diversity of traditional owner groups? And what is the role of government and industry in supporting the economic and social development of traditional owners? The next three sections summarise these discussions.

### **Group or individual goals and benefits**

Respondents raised a number of issues relating to the types of economic development that could be achieved through the Discussion Paper principles. An important issue was whether goals for economic development had to be directed towards the group or whether benefits could be enjoyed by individuals. Regional development opportunities were also identified as an issue that may need to be addressed within the principles. One respondent questioned the feasibility of an economic development strategy for a small traditional owner group that owns large areas of land.

Respondents suggested that agreements could have a broad range of benefits to address individual and group aspirations. This might include cadetships, business enterprises, contractors with preferred Indigenous employment and community development. This is consistent with an approach to economic development that promotes economic diversity and reflects the goals of the traditional owner group.



## Consistency with traditional owners' culture and values

During the consultations, concerns were expressed that economic development should be consistent with traditional culture and values. It was noted by one respondent that, in remote communities, an unconventional approach to economic development was needed. This approach should build on the rights, interests and culture of traditional owners.

Structuring agreements for group and/or individual outcomes and matching these outcomes to traditional owners' cultures and values highlight the need for economic and social development models to be responsive to the social, cultural and economic context of the group and to be based on the group's goals for economic and social development. This is supported by the Discussion Paper principles, which state that agreements 'should respond to the group's goals for economic and social development'.

Importantly, economic and social development should not be seen in a prescriptive or formulaic way, but rather as an opportunity for a traditional owner group to build an economic and social development model that fits with the group's tradition, cultural, social and economic context and goals. As discussed above, there is a growing array of sustainable economic development strategies that can be used as models for economic and social development. What is required is that traditional owners are able to determine what models or opportunities they wish to use, in partnership with NTRBs, governments and industry where applicable.

Economic diversity suggests that local circumstances require local solutions, solutions that will not be driven from outside and that need to mesh with Indigenous aspirations...<sup>106</sup>

## Role of non-Indigenous stakeholders

The role of non-Indigenous stakeholders, including government and industry, in social and economic development for traditional owners was discussed frequently during the consultations. Respondents were particularly concerned that the ongoing service delivery responsibilities of government be maintained if traditional owners were seeking economic and social development through agreement making.

One respondent noted that government is still the largest financial contributor to Indigenous communities through service delivery arrangements. Governments' approaches to service delivery need to change. At the moment, governments bring in non-Indigenous teachers, health workers and land management people. Instead, local people should be employed in these positions. The same respondent noted that the pastoral industry has been 'let off the hook' of taking a role in Indigenous economic development.

A complex issue raised by respondents was the extent to which governments and companies are expected to assist or satisfy traditional owners' economic

106 J. Altman, *Economic Development and Participation for Remote Indigenous Communities: Best Practice, Evident Barriers, and Innovative Solutions in the Hybrid Economy*, presentation to the Ministerial Council for Aboriginal and Torres Strait Islander Affairs (MCATSIA) Sydney 28 November 2003, p5.



and social goals. Respondents noted that governments already have ongoing relationships with communities in areas such as health, housing and education. One respondent expressed concern that traditional owners not be forced to use their native title rights to gain access to these government services, like health and education, that are provided as of right to the rest of the community.

Jon Altman notes that a crucial issue that has arisen in the past in Indigenous agreement making is that governments have tended to substitute agreement moneys for government expenditure rather than using them to supplement such expenditure.<sup>107</sup> This emerged as a key explanation of the lack of economic benefit flowing to the Kakadu region from the Ranger Agreement signed in 1978: a significant proportion of mining payments was used to provide services (like housing, infrastructure and outstation support) that were the legitimate responsibility of government.

During the consultations, my staff met with the Larrakia people in Darwin. The Larrakia have established two corporations, the Larrakia Nation Aboriginal Corporation (LNAC) and the Larrakia Development Corporation (LDC). The LDC focuses on economic development opportunities while the LNAC is involved in a range of activities, including Community Development Employment Projects (CDEP) programs, aged care services, training and employment and arts and cultural programs. These programs are supported through CDEP, Commonwealth funding and education facilities in Darwin.<sup>108</sup> The work of the Larrakia demonstrates that traditional owner organisations may also be able to use programs offered by State and Commonwealth departments. The Larrakia have not had to and should not be expected to exchange their rights in land for access to government services.

Industry respondents also acknowledged their role in assisting in the economic and social development goals of traditional owners but were concerned that the extent of their involvement and responsibilities was not clear from the Discussion Paper principles.

Guidelines for company involvement in development outcomes and responsibilities for human rights are currently being developed at the international level. The United Nations *Global Compact* and the *Draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* (Draft Norms) provide guidance on the extent to which industry and government should be responsible for the respect, promotion and protection of human rights standards. The approach contained in these documents is a useful starting point to discuss company and government responsibilities in implementing the principles set out in the Discussion Paper.

Principle 1 of the *Global Compact* asks that companies:

... embrace, support and enact, **within their sphere of influence**, [bold added] a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption.<sup>109</sup>

107 J. Altman, 'Economic development of the Indigenous economy and the potential leverage of native title' in B. Keon-Cohen (ed) *Native Title in the New Millennium*, Aboriginal Studies Press, Canberra 2001.

108 Larrakia Nation Aboriginal Corporation, *Saltwater People – Larrakia Nation*, Larrakia Nation Aboriginal Corporation, Darwin. No date.

109 UN Global Compact, available at [www.unglobalcompact.org/.../theNinePrinciples](http://www.unglobalcompact.org/.../theNinePrinciples).





Similarly, Article 1 of the Draft Norms discusses the sphere of influence of companies and highlights the role of government in human rights protection:

States have the primary obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including the rights and interests of Indigenous peoples and other vulnerable groups.<sup>110</sup>

This article addresses the key issues raised by respondents in relation to the role of companies and governments in implementing the rights-based principles set out in the Discussion Paper. It should be noted that Article 1 highlights the responsibilities of these actors specifically in relation to Indigenous peoples. This recognises the vulnerability of these groups to the activities of transnationals when governments provide inadequate protection of the rights of Indigenous peoples.

Article 1 of the Draft Norms and Principle 1 of the Global Compact both use the concept of the 'sphere of influence' of companies' activities, especially in relation to the company's employees and the communities in which they operate.<sup>111</sup> Commentary on the Draft Norms explains that within their sphere of influence and activities, companies must undertake action to ensure their activities do not contribute to human rights violations. These actions include the following precepts:

1. Companies shall inform themselves of the human rights impact of their principal and major activities.
2. Companies must ensure their activities do not contribute directly or indirectly to human rights breaches and they do not knowingly benefit from these breaches.
3. Companies must refrain from activities that undermine the rule of law and government efforts to protect human rights.
4. Companies should use their influence to promote respect for human rights.<sup>112</sup>

This commentary provides four broad areas for a company to address within its operations, particularly in its impact on employees and communities in which it operates. However, consultations on business and human rights conducted

110 United Nations Commission on Human Rights, *Draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, United Nations Economic and Social Council, UN Doc: E/CN.4/Sub.2/2003/12/Rev.1.

111 Rights and Accountability in Development (RAID); World University Service (German Committee) – Forum Menschenrechte; the International Network for Economic, Social and Cultural Rights (ESCR-Net), *Draft Framework for Inputs to OHCHR Report on Human Rights Responsibilities of Business*, 30 July 2004.

112 *Draft Commentary on the Norms of Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/XX, E/CN.4/Sub.2/2003/WG.2/WP.1.



by the UN Office of the High Commissioner for Human Rights and the Global Compact Office, in October 2004 highlighted the need for greater definition of a company's sphere of influence. Participants in the UN consultations noted that practical guidelines were needed.<sup>113</sup> Work on this issue is proceeding.

In our consultations, a number of respondents were particularly concerned that economic and social development should not be the sole responsibility of companies.

Article 1 of the Draft Norms makes it clear that governments have primary responsibility for the protection and promotion of human rights including development. Indeed without government support for human rights and development, company efforts in promoting development for impoverished groups is unlikely to be successful. This was clearly recognised in a profile of Aboriginal communities in north-east Kimberley commissioned by the Kimberley Land Council to help communities and Argyle Diamond Mine negotiate a comprehensive ILUA. The prognosis from this report states:

Clearly, mines such as [Argyle Diamond Mine] can play an important part in regional development by providing a local employment base, by developing local skills, by stimulating local Indigenous business activity, by adding to the stock of regional infrastructure, and more generally by generating regional economic multipliers.

However, the net impact of these inputs will be insufficient in themselves to address the legacy of past neglect and they will not alter social indicators. Deficits in labour force status, income share, educational status, housing and health among Aboriginal people in the region are of a scale that only a partnership approach to regional development involving both industry and government could hope to redress.<sup>114</sup>

Agreements provide the framework by which a partnership approach between traditional owners, government and industry can be constructed. The concept of partnerships is embedded in strategies for sustainable development. The Rio Declaration and its program for implementation, Agenda 21, identify the importance of a partnership approach, declaring that 'States shall cooperate in a spirit of global partnership'<sup>115</sup> to achieve sustainability goals. The role of partnerships was reiterated in the 2002 World Summit on Sustainable Development, where the UN Commission on Sustainable Development (CSD) was given responsibility for promoting initiatives and partnerships to achieve sustainable development.<sup>116</sup>

The CSD's key criteria can provide useful partnership models for economic and social development through agreement making. The criteria require that partnerships:

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113 Office of the High Commissioner for Human Rights and the Global Compact Office, *Consultation on Business and Human Rights*, Geneva 22 October 2004, United Nations Office Geneva.

114 J Taylor, *Aboriginal Population Profiles for Development Planning in the Northern East Kimberley*, Research Monograph No. 23, 2003, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra.

115 *Rio Declaration*, *op.cit.*, principle 7.

116 United Nations, *Report of the World Summit on Sustainable Development*, 26 August–4 September 2002, A/CONF.199/20\*, principle 146.



- are voluntary and can include governments and relevant stakeholders, such as major groups, industry and interest groups,
- contribute to agreed goals and should not divert from those goals,
- are not intended to substitute for commitments by governments but to supplement these commitments,
- reflect the economic, social (cultural) and environment dimensions of sustainable development,
- are based on predictable and sustained resources, and
- are designed and implemented in a transparent and accountable manner.<sup>117</sup>

However, as discussed in the 2003 Native Title Report, unless partnerships between government, industry and traditional owners are based on the recognition of traditional owners' inherent rights, distinct identity and governance structures, they will not be partnerships between equals.<sup>118</sup> Failure to provide meaningful recognition to traditional owners and to recognise and respect traditional owners' control of their own development will only foster the dependency that the government is trying to reduce and threaten traditional owners' development goals.

### **Implementation and monitoring of agreements**

During the consultations, the difficulty of implementing and monitoring agreements was identified by a number of respondents as a substantial barrier to achieving economic and social development. Respondents noted that even if traditional owners and their representatives have negotiated good terms in an agreement, these will not provide any benefits to traditional owners unless they are properly implemented and monitored for compliance.

Traditional owners need skills and knowledge to administer agreements after they have been negotiated. One NTRB was concerned that the group established to negotiate the terms of agreements might not be the appropriate group to monitor the implementation of the agreement and compliance with its terms. The same NTRB discussed the high burn out rate of traditional owners involved in negotiations. Many people commit to a certain stage of the process and then disengage, with very few people staying involved over the long term. This was attributed to the pressure of representing family and dealing with complex native title issues. Traditional owners are not paid to participate in negotiations.

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117 *ibid.*, Principle 23; United Nations, *Partnerships for Sustainable Development*, Department of Public Information and the UN Department of Economic and Social Affairs, August 2003, available at [www.un.org/esa/sustdev/partnerships/partnerships.html](http://www.un.org/esa/sustdev/partnerships/partnerships.html).

118 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, Human Rights and Equal Opportunity Commission, Sydney 2004, pp39-41.



During the consultations, the issues raised in relation to maximising economic opportunities for traditional owners through the agreement making process included:

- Native title rights and interests in land are assets from which economic and social development can flow. However, the native title system should assist traditional owners to commercially exploit the resources on the land rather than restrict the commercial exploitation of these rights.
- Most traditional owners live in communities with other Indigenous people who are not traditional owners. Consideration needs to be given to how benefits accruing to traditional owners out of economic development opportunities from native title will impact on the broader community they are part of, and how these benefits can work in a beneficial way rather than creating or increasing inequities between community members.
- Resource-rich land provides opportunities to traditional owners. However, these opportunities may not be fully realised if traditional owners do not have the time and resources to fully develop their decision making processes or the commitment to pursuing sustainable social and economic development goals. Negotiations and agreements on resource-rich land need to be managed to ensure traditional owners can fully realise their opportunities from resource development.
- Traditional owners whose country is not resource-rich land do not have the same opportunities for economic and social development. However, such development may still be achievable for these groups through small enterprise and innovative development.
- Economic and social outcomes from agreements may be structured to benefit individuals or groups, and to suit the social, cultural and economic development goals of groups. Every group is different and 'one-size-fits-all' models and outcomes will not work. Economic and social development needs diverse strategies.
- Governments and industry have different roles and responsibilities in supporting traditional owners' economic and social development. Governments must retain and satisfy its responsibilities for the provision of fundamental citizenship rights such as the delivery of services in health, education and housing.
- Agreements must include effective implementation and monitoring strategies.



The issue of regional development arose at various times during the consultations. Respondents grappled with the role and significance of traditional owner groups within regions or regional economies. The issue of regional development comes to a head particularly when large resource development projects arise. In some areas, these projects may be the only way in which external money can be brought into the region.

Respondents defined regionalism in different ways. For some regionalism meant a grouping of traditional owners to achieve shared goals and outcomes. For others regionalism may include Indigenous and non-Indigenous people collectively working towards shared goals for a common geographical area. The definition of regionalism seemed to be determined by the area that the region existed within and whether both Indigenous and non-Indigenous people lived there. Different, sometimes overlapping, regional boundaries are formed by the ATSIC Regional Councils (soon to be abolished), NTRBs, Local Government areas, and other state government planning zones.

The issue of a 'regional focus' produced more questions than answers. For instance, some asked why an agreement (e.g., for mining or exploration leading to economic development for the traditional owner group) should be made only with a traditional owner group, or with their interests paramount. They suggested an agreement could be struck more broadly and include the needs of other Indigenous and non-Indigenous people in the region. The alternative posed by one respondent was that resource development should primarily benefit the affected traditional owners, and that the government should separately address the situation of Indigenous people who have no traditional association with resource-rich traditional land.

Various government and industry parties emphasised that the approach to redirecting the native title system to the economic and social development of traditional owner groups could be supported through regional economic development. One respondent urged attention to the concept of a 'rural poor', comprising Indigenous groups and pastoralists, and noted that state governments needed to help both groups through regional development. In one NTRB the approach was more methodical, with the NTRB facilitating a regional audit/research study on Indigenous contribution to the economy of the region. This was intended to provide all parties with a better understanding of the Indigenous input to the region's situation, which could then be used in future negotiations.

The approach to integrating native title processes into regional development strategies would differ depending on the region defined and its economies. The development of a regional strategy for Noongar people in Western Australia illustrates the issues that arise in the complex economics of a region. This is discussed further in chapter 3, *Looking forward – a policy approach to native title*. A different approach to this was illustrated in the models for Indigenous-local government interactions in Western Australia.



Local government areas outside Perth are more self-contained than those in the metropolitan region. For instance, the people who live in a country local government area also work there, and many commercial and public facilities service only that area. The last decade or so has seen various government and private industry operations leave country areas and move to cities. This, combined with decreasing populations in country areas, creates considerable threat to regional economies. Local government can see a mutually beneficial alliance with local traditional owner groups in encouraging economic development in the area. However, these factors are less prevalent in the metropolitan area where populations, industry and services overlap between various local government boundaries. Accordingly, the perception of synergy between a traditional owner group's economic development and that of the region is decreased in the metropolitan area.

During consultations, respondents noted that different judges of the Federal Court have been both supportive of, and antagonistic toward, a regional focus. Some judges have adopted case management plans broader than individual claims. Examples include adjourning proceedings to allow a traditional boundary study to be finalised, making related orders for native title matters clustered into NTRB or cultural bloc regions and planning at a regional level. Other judges have adopted a regional case-management system, enabling all parties to engage in broader planning to agree when different cases in the region should proceed to trial. A different perspective, however, came from parties in one state expressing disquiet about the Federal Court's direction of matters, contrary to the wishes of the peak industry and Indigenous bodies and the State Government.

Another point raised in relation to regional issues was the practicality of an Indigenous regional arrangement. In most areas of Australia, there is no traditional governance structure at a regional level. There are Indigenous regional identities, such as 'Koori' from south-eastern Australia, 'Marlpa' from mid-north-Western Australia, and so on. There can also be common protocols in relation to communication, relationships, and other matters. But, by and large, the responsibilities in relation to country and detailed governance structures occur at a level below the region, at the level of traditional owner groupings. Indigenous organisations that exist at the regional level have been a more contemporary development.

The Australian political and legal system has, in consultation with some Indigenous people, constructed various regional boundaries for Indigenous issues. Two regional structures that exist today are ATSIC's regions and their associated councils, and NTRB regions. A regional Indigenous voice or presence addressing economic development might also occur at this level. There are considerable issues with this, as outlined by some participants. These include:

- Native title limits the focus of NTRBs and traditional owners to addressing the rights and procedures of the NTA. This can be contrasted with other policies affecting Indigenous Australians that aim to adopt an integrated, whole of government approach. For example ATSIC regional plans could be used to indicate the way forward, with traditional ownership being part of the



Plan. This has occurred in two communities in the Northern Territory – Nhulunbuy and Wadeye<sup>119</sup> and provides models that could be considered in other communities.

- NTRBs may not be able to develop effective regional strategies within their areas because many native title claims are being handled by private lawyers.
- Regionalism has to be developed from the grass roots. Traditional owners need to decide that is the strategy they want to adopt.
- There are different views on the ATSIC regional boundaries. One person thought that they should be used in any future regional plans, since they were imposed some time ago and people were familiar with them. NTRB boundaries should be made the same as ATSIC boundaries. Another respondent said that regional boundaries should reflect the traditional owner boundaries that will be established by a new Indigenous regional authority. These regional authorities could be a 'one-stop-shop' similar to local government, and should receive funding directly from Commonwealth grants. Empowering the community with direct funding was seen as a way of preventing administrative waste in the funding of Indigenous issues.

Approaches to regionalism, and traditional owners' economic development within that, are complex because of the large number of variables and parties involved. Many respondents emphasised that economic development models need to be inclusive, bringing opportunities to everyone in the community. Until the form and role of an Indigenous voice and presence at levels above that of traditional owner groups (e.g., regional or national bodies) is settled, it is difficult to make any observations on how native title will operate, or what role there is for it, at a regional level in any post-ATSIC era.

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119 Report of the Review of the Aboriginal and Torres Strait Islander Commissioner, *In the Hands of the Regions – A New ATSIC*, November 2003, available at [www.atsicreview.gov.au/ATSIC%20Review%20report.pdf](http://www.atsicreview.gov.au/ATSIC%20Review%20report.pdf).



The relationship between legal standards and traditional owners' economic development arose in all consultations. As outlined in the Introduction to this Report it is largely because of the legally-imposed limitations on the definition of native title rights that I am focusing on a policy approach to economic development in this Report.

It is relevant to recall some of the legal restrictions on economic and social development. In the *Yorta Yorta* decision, the High Court specified requirements for native title to be recognised: what characteristics the relevant claimant group must have, their connection to land, and the continuity of their observance of culture. The Court's ruling affixed much of the content of native title to the time of British imposition of sovereignty, hundreds of years ago. It is that time, rather than contemporary circumstances, which assume paramount importance in determining what native title rights will be recognised.

- Section 223(1)(a) of the NTA, which requires observance and acknowledgement of traditional laws and customs, has been interpreted by the High Court to require that such observance and acknowledgement be uninterrupted since the acquisition of sovereignty, by a society which has been in continuous existence since sovereignty.<sup>120</sup> These requirements can operate to exclude the contemporary manifestation of Indigenous culture.
- The recognition of native title excludes recognition of the traditional laws and customs and the law-making capacity of Indigenous people from the time of British sovereignty onwards.<sup>121</sup> This means that native title is limited to the rights and interests created under the traditional laws and customs prior to sovereignty. More recent cultural practices and beliefs cannot be accommodated as native title.<sup>122</sup>
- The standard and burden of proving what is required by section 223(1)(a) is a significant barrier to Indigenous people gaining recognition and protection of their traditional rights and interests in land. The difficulty of proof is exacerbated by the statutory requirement that the Court is bound by the rules of evidence "except to the extent that the Court otherwise orders".<sup>123</sup>

The aligning of native title rights with a past era limits its potential to provide economic opportunities for traditional owners in the contemporary economy.

The High Court's ruling in *Yorta Yorta* has been subsequently used by state governments to urge the National Native Title Tribunal not to register claims because the proposed claimant group 'cannot satisfy the description of an identifiable community, the members of whom are identified by one another as members of that community living together under its laws'.<sup>124</sup>

120 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002), (*Yorta Yorta*) per Gleeson CJ, Gummow & Hayne JJ at [47], [50], [87] & [89].

121 *Yorta Yorta*, per Gleeson CJ, Gummow & Hayne JJ at [43].

122 *Yorta Yorta*, per Gleeson CJ, Gummow & Hayne JJ at [44].

123 *Yorta Yorta*, per Gleeson CJ, Gummow & Hayne JJ at [80] & [81].

124 Argument put by Northern Territory Government in *Northern Territory v Doepel* [2003] FCA 1384 (28 November 2003), per Mansfield J. at [34].





The limitations of the legal system's ability to engage meaningfully with Indigenous culture are well illustrated in the following extract from a National Native Title Tribunal research paper:

In seeking a determination under the NTA applicants are required to come before the courts to have recognised what they have always known to be true. They must do this in a way that is not only culturally unfamiliar but fundamentally antithetical to their own values surrounding the accumulation and dissemination of knowledge. Knowledge, particularly ritual knowledge, in Indigenous societies is an intrinsically valuable commodity. It is gradually accrued over a lifetime and to a large extent is a measure of a person's authority within the group. People do not disclose restricted knowledge to those who ought not to know of such things. To do so risks serious consequences. Yet to succeed in a native title application that is precisely what the law requires Indigenous witnesses to do.<sup>125</sup>

The consultations reinforced the perception that limitations on the full recognition of traditional law and custom exist in the legal system. The most obvious deficiency is that there is an increasing number of situations where traditional owner groups cannot achieve native title recognition. This can occur for a variety of reasons. Their native title rights may have been extinguished by government dealings with the land<sup>126</sup> or their customs in relation to the land may not be linked sufficiently (according to Australian courts) to the customs at the time of English arrival.<sup>127</sup> The former Social Justice Commissioner has criticised these shortcomings elsewhere<sup>128</sup> and it is not an issue to be fully considered here. The point can be starkly put: for many traditional owner groups, there is limited potential of using a determination of native title to assist in economic development.

## Respondents' use of the legal framework

During the consultations, respondents reflected on some of the benefits provided through the legal system and how these can contribute to traditional owners' economic development. Some saw a native title determination, at its most basic, as a formal acknowledgement of the traditional owner group as the legally recognised group in relation to that country. When a determination is made, then that group must be engaged with as of right in matters affecting that land. Others explained that native title has increased Indigenous access to government, and that traditional owner groups now 'come to the bargaining table' with specified rights and protected interests instead of being dependent on the grace of other parties as occurred in the past. Both of these developments put traditional owner groups in a better position to seek outcomes consistent with their development goals. A further benefit seen to arise from the native title

125 J. Byrne, *Indigenous Witnesses and the Native Title Act 1993* (Cth), 2003, National Native Title Tribunal.

126 As in *Fejo v Northern Territory of Australia* [1998] HCA 58 (10 September 1998).

127 As in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002).

128 See, for example, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, 2003, Human Rights and Equal Opportunity Commission, chapters 1 and 2.



system is the experience that has been gained from native title procedures, such as negotiation and agreement making. Another participant said native title experience on governance and similar issues should be used in other areas of government policy, particularly community partnership and Shared Responsibility Agreements under the Commonwealth's New Arrangements for Indigenous Affairs (these are discussed more fully in chapter 3, *Looking forward – a policy approach to native title*).

Various participants emphasised that if economic development is to be based on an agreement making approach under native title, there must be a pragmatic understanding of the contemporary native title system. One respondent observed that, considering most of the native title determinations to date, traditional owner groups have the strongest rights at the time of registration of their claim. However, third parties may be disinclined to negotiate until a connection report is done, or a determination secured, giving them a better idea of who the traditional owner group is and what rights they hold.

One Indigenous group, and its advisers, urged that parties should not seek a strict list of rights in a native title determination. These respondents reasoned that a determination should affirm the existence of title from an Indigenous perspective (e.g., 'the right to speak for and look after country'), rather than be a shopping list of rights. Unless it was absolutely necessary to do so, these respondents thought rights should not be specified in the determination.

It is not surprising that parties' approaches to the law and legal proceedings have an impact on the success or failure of an agreement making approach to traditional owners' economic development. Many respondents felt that nearly all the organisations involved in native title proceedings took an overly legalistic approach to agreement making and that this prevented better outcomes being achieved. Specifically, respondents noted:

- The narrow focus in negotiations on the stringent legal tests for native title rights and the future act procedures of the NTA.
- Pursuit by some state governments of a black-letter law approach to deal with native title in a legally minimalist way,
- Reluctance by the Federal Court to engage with parties outside of the court process because of concerns about undermining the Court's impartiality, and
- Reluctance by various litigating parties to settle claims through negotiation or progress claims in forums other than a court, encouraged by respondent funding arrangements.

These comments are generalisations and it is easy to identify individual examples contrary to these statements. However, the observations serve as a useful reminder for all parties to be more reflective about how their attitudes and approaches to matters might limit the opportunities otherwise available through native title.

One respondent in Queensland explained that most exclusive native title claims are only possible as a result of section 47 of the NTA (which allows the extinguishing effect of a pastoral lease to be ignored if the lease is held by people in the claimant group). While that is a beneficial section, it shows the



limited scope of native title if it is the main way that claimants obtain recognition of exclusive native title, given that, if people in the group hold the lease, the group presumably also has access and other use.

The 'strictly legal' approach was felt to affect negotiations. While there is an increasing number of consent determinations, respondents reported during the consultations that various traditional owner groups considered that, in negotiating a settlement of the claim, they had to compromise some rights because they were uncertain of what a court would determine. They felt that the Federal Court and NNTT expect, and put pressure on the groups to compromise their claims. Additionally, during the consultations in Queensland, one Indigenous group explained that the problem they saw in native title was the necessity for traditional owner groups to continually 'prove' their race and connection to land, which they found offensive. Traditional owner groups are put at a disadvantage in negotiations by always having to 'prove their tenure'.

Even where native title law may allow recognition of some rights in a determination, such recognition should not limit the parties' options. There has been increasing reference over the last couple of years to 'non-native title' or 'related' outcomes, a topic that also arose during the consultations. The terms refer to outcomes that could not be characterised as native title through the understanding given by the NTA and judicial interpretations of it. This could include outcomes in relation to areas where native title has been extinguished, or agreements in relation to interests that fall outside the court's allowed scope of native title interests. Various parties are using these outcomes in conjunction with matters that can be formally addressed through native title determinations, to come to a comprehensive agreement. The NNTT uses its jurisdiction under the NTA to assist parties to reach these comprehensive settlements.<sup>129</sup> The proposed Wotjobaluk settlement is an example of an agreement that uses both native title and non-native-title outcomes. Although the final settlement will not fully address the economic and social development needs of the group, the Victorian Government combined various initiatives it could offer to the group under State legislation (separate from native title), in addition to the proposed terms of a settlement under the NTA.<sup>130</sup>

## The court and legal proceedings

A considerable limitation on how native title can contribute to traditional owners' economic development is that legal proceedings must be commenced when a traditional owner group wishes to assert or protect its interests through the native title system.<sup>131</sup> The group may not intend or desire to proceed to a full-blown trial about their connection to land, and may simply be responding to a future act notice. Nevertheless court proceedings must be undertaken.

The Federal Court's management of native title cases affects the degree to which parties can pursue an approach promoting economic development for

129 Under s.86F NTA.

130 See *Native Title Report 2003*, pp76–77.

131 For instance, a native title claim (under s61 of the NTA) could be a response to a notice of a proposed future act under s29 of the NTA; or the activity asserted to be a native title right by traditional owners could be the subject of prosecution and dealt with under s211 of the NTA.



traditional owner groups. Various respondents reported that the Court is taking an increasing role in determining the progress of native title cases by setting frequent review directions hearing or programming matters to trial. This is occurring even in cases where all major parties are encouraging the Court not to push matters to trial. The difficulty can be due partly to the situation in which the Court finds itself – a single native title proceeding can involve hundreds respondent parties. Even where all peak or representative bodies, on both the Indigenous and non-Indigenous sides, agree to a particular course, a few individual parties may encourage the Court to progress differently.

## Summary

The native title system provides a mechanism for the legal recognition of traditional owner groups and their traditional rights. Legal rights, including the right to negotiate, are an important asset for development. They also assist in ensuring that meaningful negotiation occurs and not simply consultation. A central issue remains: how to address matters and people that do not meet the legal tests established in order to obtain recognition and protection within the native title system. The consultations indicated various relevant points:

- Attention must be given to groups that are acknowledged as traditional owners but are unable to obtain a native title determination.
- Parties should constantly seek to build into native title agreements, opportunities for economic and social development that may be available under state and other laws, in addition to the NTA. The use of non-native title agreements or 'related agreements' should be encouraged as a mechanism to complement consent determinations that are unable to provide a basis for economic and social development.



## 8 Effective relationships

In nearly all consultations, participants emphasised the importance of relationships between the various parties when talking about native title and economic development. Effective relationships help parties communicate and understand others' positions and interests, facilitating more sustainable agreement making. The centrality of relationships is further reinforced because after a native title determination by the court (by agreement or litigation) there are many details still to be finalised by the parties. A court determination does not usually direct parties on how their rights interact 'on the ground'. For example, a determination may not indicate when and how access to land should occur where interests are held to 'coexist'.

The consultations covered a wide variety of initiatives used by parties to help build and strengthen their relationships. One respondent spoke approvingly about negotiations over pastoral arrangements in northern Queensland, where the parties excluded lawyers from meetings and agreed to spend a substantial portion of each meeting building relationships between pastoralists and native title claimants. This sort of arrangement acknowledges and aims to strengthen relationships, beyond the specific negotiation. A similar aim can be seen in the cross-cultural workshops between the executive bodies of the South Australian Chamber of Minerals and Energy, Farmers' Federation and the Aboriginal Legal Rights Movement.<sup>132</sup>

In several of the consultations, respondents were eager to emphasise the benefit to non-Indigenous parties of some of the approaches covered in the Discussion Paper (at Annexure 1). Respondents considered that ensuring time and resources for effective community input benefits non-Indigenous parties as well as traditional owners. For instance, where a traditional owner group has prepared its own development plan, governments and companies can frame their proposals in response to the priorities the community has independently identified, saving time and resources. Other respondents pointed out that many of the outcomes consistent with economic development for traditional owner groups, such as scholarships, apprenticeships, employment, and business opportunities, can also assist the external parties' business. In South Australia, one respondent explained that the state-wide negotiation process has assisted in government policy formulation and development, providing input and a better focus to government initiatives. Examples of this include the joint work on criteria for native title connection reports and a proposal to develop an alternative settlement policy.

### Community relationships

Various respondents emphasised the importance of education and raising awareness of native title among non-Indigenous communities. They perceived a lack of public understanding about native title, leaving traditional owners 'behind the starting line'. Endeavouring to change community views to see

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132 P. Agius, *Towards a Fiscal Relations Framework for Community and Regional Governance: Getting It Right*, paper to Indigenous Governance Conference, Canberra, 3-5 April 2002.



more value in native title should be a priority for a public education program, as it would allow non-Indigenous parties to consider benefits that extend beyond the strict boundaries of native title. This respondent suggested a greater role for the NNTT in this type of awareness raising, although it should be noted that the NNTT already devotes considerable resources to public education material.

One aspect of relationship building that is sometimes overlooked in the native title context is the position of parties other than those directly negotiating a native title agreement or determination. In several instances respondents stated that negotiations between government and traditional owner groups over native title and economic development should also involve non-Indigenous parties. One participant cautioned that, in seeking economic development outcomes for traditional owners, negotiators needed to be careful not to alienate any local 'white community'. Initiatives designed specifically to assist local traditional owners should be encouraged, but they would best occur in association with some education and awareness-raising for the wider public. This participant saw the need to break down an 'us and them' perspective, which is 'not assisted by lawyers and politicians'. Various Indigenous groups explained the substantial work they put into positive public relations within the larger urban centres. Another Indigenous group considered that government has a legitimate role in explaining government-Indigenous agreements to the broader community.

### **Information exchange**

Various respondents discussed the importance of information exchange in building and strengthening good relationships. One individual with considerable experience in national park issues explained that when negotiating agreements or joint management arrangements, the non-Indigenous negotiators rarely know what capabilities and skills exist in the Indigenous community. It was suggested that more use of skills-audits and strategic planning could help parties recognise and use the skills and capabilities of the traditional owner group. This is discussed in more detail above in section 3, *Capacity development*.

Exchange of information should not be limited to the subject matter being negotiated. It can also increase parties' understanding and acceptance of the situation and processes of others. For instance, it was explained that the state-wide negotiation process in South Australia has increased governments' and industry's understanding of the time and effort needed to ensure proper community involvement in matters.

### **Parties' motivations and interests**

Some respondents emphasised that before parties can build effective relationships they need to acknowledge that stakeholders have different interests. They doubted that a durable relationship can be directed solely, or even primarily, towards the economic and social development goals of Indigenous people, without other interests being acknowledged and accommodated. It was also seen as important to acknowledge the different contexts within which third parties operate.



A number of respondents reflected on the effect of parties' motivations for negotiating agreements, and the significance of this for relationships and outcomes. It was observed that Indigenous agreements with companies tend to be more forward-looking, focusing on arrangements for the future, and government tends to be more backward-looking, focusing on the rights being asserted and proof of connection to the area. These differences are reflected in the content of agreements, and also in procedural matters, such as the timing of negotiations. For instance, a resource development agreement may be negotiated under more time-pressure from the developer. Situations where parties' motivations change over time also came up in the consultations. In one instance, an industry group was usefully involved in negotiations, but during the negotiations there was a change in the group's management and direction, and the same organisation became less engaged and supportive of the negotiation process.

Parties' motivations were also discussed in Queensland consultations. Various pastoral interests in that State are using the native title process to obtain benefits from the State Government such as tenure upgrades, especially lease upgrades. The NTRB acknowledged the legal and political strength of the pastoralists' position in negotiating for the upgrade but emphasised that, for a durable relationship with traditional owners of the area, pastoralists should recognise and respect those areas of particular cultural or spiritual significance.

## **Managing and building relationships**

Various respondents talked about the need for relationships to exist at an organisational level. If relationships are dependent on particular individuals, they risk faltering with any change in those individuals or their roles. An enduring relationship requires more than just goodwill and particular personnel. Participants from each group consulted, including Indigenous groups, NTRBs, government agencies, companies, and local government were in agreement on this issue. Third parties need to ensure that representatives engaging with traditional owner groups have the skills, ability and authority to negotiate on behalf of and bind the company or government department.

One interesting perspective was that parties should ensure that pre-existing relationships are not prejudiced in trying to formalise arrangements. Obviously, where parties are negotiating, one or both are seeking to change the status quo. However, it is important to ensure current relationships do not deteriorate as a result of the negotiation.

Where possible, parties should endeavour to keep their negotiation expectations commensurate with their relationships. One land council discussed the complexities of negotiating and finalising a large-scale ILUA. It is unrealistic to expect this type of agreement to be achieved in a short time between parties who do not have good working relations, and it may be preferable to focus on smaller scale agreements in the early stages. Evidence of the benefits of this approach can be seen in the various side agreements and arrangements coming



through the South Australia state-wide negotiations<sup>133</sup> and the British Columbia incremental treaty-making process.<sup>134</sup>

Relationships also need dependability and commitment. When a party fails to carry out the obligations it has agreed to, the long term relationship will suffer. This has particular relevance in relation to fulfilment of or compliance with an agreement – some of these issues were discussed above (see section 5, *Maximising opportunities for economic development*). So, for instance, Indigenous parties may be happy with an agreement reached with government at a policy level, but in the longer term may justifiably expect that the agreement will receive some legal protection (for instance, registration as an ILUA, or legislative protection). This should not be an unrealistic expectation, given the prevalence of state agreements that have historically been used to further the relationship between mining interests and state governments.<sup>135</sup> Another respondent pondered the potential, where local governments are involved, for the council commitments to become by-laws. A person subsequently doing something in contravention of the agreement would then be breaching local government regulations.

When considering the importance of relationship building to the economic and social development of traditional owners, one should also consider relationships that exist between parties separate from the traditional owner group. The arrangements between various government agencies, private enterprise and other parties will have their own significance. As one respondent stated, the arrangement between a mining company and government in relation to mining royalties is likely to influence the company's attitude to supporting Indigenous development aspirations. For instance, the company may be more inclined to expect government to address Indigenous development issues where a substantial amount from a project is already being paid to government in royalties. Similarly, the government resources available to assist Indigenous people with native title matters influence companies' relations with Indigenous groups. As one participant noted, if the government provided greater assistance, less would be needed from companies and they would have greater assurance about the structure supporting their engagement.

## Summary

The consultations reinforced the importance of relationships in moving toward outcomes that assist the economic development of traditional owner groups, and also provided a number of key points to consider:

- Attention must be paid to building and strengthening the parties' relationships separate from the particular transaction, and ensuring that relationships exist at an organisational level and not just an interpersonal one.

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133 *Native Title Report 2003*, pp67-68.

134 *Native Title Report 2003*, pp178-180.

135 See, for example, Auditor General for Western Australia, *Developing the State: The Management of State Agreement Acts*, June 2004, Western Australia Government.





- It is unrealistic to expect that the main aim of companies and third parties will be to achieve economic and social development of traditional owner groups. Traditional owner groups need to recognise the interests of third parties, and structure the content and process of agreement making to give the best chance of reaching mutually beneficial outcomes.
- Negotiation expectations should be commensurate with the relationship between parties – parties should not aim for too much at the start.
- All parties have to do more work promoting Indigenous rights and economic development as appropriate areas of government attention. More effort should be devoted to improving understanding and acceptance of these matters in the general community (and also among parties to native title matters). The NNTT and the Federal Court are key players.

## 9 Engagement between parties

Various respondents emphasised the importance of engagement and understanding between negotiating parties. Having a rights-based approach is one thing, my staff were told, but where parties are unable to effectively engage with others, explain their own position and understand others' positions, it is unlikely either party will move toward a mutually acceptable situation. This will constrain opportunities to further economic development for traditional owner groups. Points about engagement that arose during the consultations are grouped under four headings:

- frameworks for engagement
- Indigenous engagement with government
- traditional owners' relations with other Indigenous parties
- the role of intermediaries, such as NTRBs and other agencies through which traditional owner groups engage

### Frameworks for engagement

Effective engagement between two parties is limited by the environment within which they engage. Engagement can be hampered by the influence of impending litigation, even for parties who are not involved. For instance, one participant observed that in Western Australia, there was little meaningful discussion over national park management until after the *Miriuwung Gajerrong* decision in 2002 which clarified the native title position in relation to national parks.<sup>136</sup>

While the native title system exists as a nationwide framework for engagement between traditional owners, government and third parties, it need not be the sole basis of government–traditional owner engagement. In the Northern Territory, the government began negotiations over proposed future acts well before formal

136 *Western Australia v Ward and O's* [2002] HCA 28 (8 August 2002).



notification under the NTA. In that case the government operated on the basis that native title exists. This compares favourably to some other states, where the government simply provides the relevant notice and prepares to proceed with the proposed development unless any response to the notice arises.

Parties can use the native title system differently. In South Australia, for instance, the NTRB's facilitation of the state-wide congress has produced a robust structure for it to engage with the South Australian government on policy issues.

Representatives from South Australian industry saw benefits coming from the native title framework and their state-wide negotiations. Prior to native title, engagement in South Australia was at a local level, between a particular traditional owner group and an individual company. Utilising the native title system, a broader approach involving all the parties means the effort and cost of engagement is decreased, freeing up resources to be applied more fruitfully to long-term benefit between the parties.

A key issue, in the consultations, was the role of native title and traditional owner groups in the post-ATSIC era. Many respondents pondered this, with little certainty as to what may occur. Some saw the situation as providing an opportunity to expand the role of traditional owner groups in regional governance structures.

## Indigenous engagement with government

Most respondents emphasised an important role for state governments, with one NTRB describing it as a 'crucial factor in the process of promoting economic and social development for Indigenous people'. The Western Australian Government developed a guide with ATSIC, entitled *Engaging with Aboriginal Western Australians*,<sup>137</sup> which contains some useful observations on government-Indigenous engagement:

Effective engagement...is not always easy and will probably not result in immediate praise and support for a new Government policy or measure. In fact, a commitment to engage may well bring initial criticism of Government and expressed anger about past practices. All this reinforces the need for the commitment to engage to be reflected throughout the organisation, in particular to have the support of the most senior levels of management.<sup>138</sup>

Various respondents criticised governments that engage only after a native title claim is lodged and connection is established. Another NTRB complained that, even where government agencies had good intentions, there is no coordinated approach. Various Indigenous respondents and NTRBs reported that state governments are manipulating native title holders to get the outcomes they want, with native title holders being 'negotiated down to the lowest level'. One NTRB explained that the relevant state government's approach to native title agreements is to quarantine the most valuable areas, and agree to limited rights, such as protocols over hunting and ceremonial rights.

137 Available at [www.citizenscape.wa.gov.au/docs/ochre\\_guide.pdf](http://www.citizenscape.wa.gov.au/docs/ochre_guide.pdf).

138 *Engaging with Aboriginal Western Australians*, Department of Indigenous Affairs, Western Australian Government, Perth, 2004, p21.



A whole of government approach was a topical issue in the consultations. The importance of consistency and collaboration in the approach of government agencies was emphasised at various times during the consultations. However, respondents were also apprehensive that where coordinating agencies, such as the new Office of Indigenous Policy and Indigenous Coordination Centres at the Commonwealth level, are not adequately resourced they will be unable to fulfil the coordinating role and parties will need to deal directly with the various agencies. One NTRB expressed surprise at government negotiators wanting to establish direct relationships with traditional owners when other agencies of government will actually have the long-term relationship.

One respondent outlined his framework for characterising Indigenous engagement with government. He perceived three levels of engagement:

- representation,
- expert policy/program development, and
- service delivery

This person thought it impossible for an organisation to be involved in representation and service delivery at the same time. His view was that it was not necessary to have Indigenous control of service delivery, but it was critical at the higher levels of program development and representation. A contrary view was expressed in Queensland, that, wherever possible, the service delivery level should also be managed by Indigenous people.

Respondents generally agreed that agreement making and economic development needed adequate time to take hold. Against this, however, a couple of NTRBs emphasised that if Indigenous groups and those assisting them are able to move quickly, they may be able to achieve better benefits than from a more considered approach. In government negotiations, this may occur as a result of a minister's attention to an area at a particular stage in the political cycle that cannot be assured at another time.

Earlier sections discuss the use of connection reports (section 1, *Identification of the traditional owner group*) and state governments' legalistic attitudes (section 7, *Legal issues*). While many respondents were recommending that state governments take a broader and less legalistic approach to connection and native title negotiations, there was caution about allowing a process where the state identifies the traditional owner groups itself. This was perceived to lead to a situation where governments could choose the group they want to deal with, enabling them to avoid dealing with NTRBs and engage directly with traditional owners. This was seen as dangerous.

Commendably, some state governments are explicitly guiding their various departments and agencies to engage with traditional owner groups as a particular part of the broader Indigenous community. The Western Australian Government's guide to engagement emphasises the importance of government engagement with Indigenous organisations.<sup>139</sup> The guide lists types of

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139 'Recognition of Aboriginal organisations is an essential part of the commitment to engage, as they reflect the unique nature and structure of local Aboriginal communities and their interests. ...These structures present an opportunity for active engagement with a population of diverse geographical, political, social, cultural and economic interests', *ibid.*, p24



organisations with which government should engage on various matters, including ATSI bodies, sectoral organisations (e.g., community-controlled health services, CDEP, media, Aboriginal Legal Services, cultural organisations), women's and youth groups, and business networks. Significantly, the list also includes 'Native Title Representative Bodies, title holding bodies or native title working groups'.<sup>140</sup>

Respondents were keen to see state governments pay more attention to social and economic development issues during native title negotiations, and bring in participation from all relevant areas including health, employment and education. Some state governments, however, were seen as reluctant to negotiate and enter into agreements with native title claimants who do not pass the High Court's *Yorta Yorta* requirements (see section 7, *Legal issues*).

### **Traditional owner groups' relations with other parties**

Some respondents cautioned that when redirecting native title to the economic and social development of the traditional owner group care needs to be taken that people holding existing rights in those areas are not disadvantaged. For instance, the Queensland heritage laws have recently been changed. A respondent in Queensland was concerned that the new laws 'give primacy to registered native title claimants'. Another response was that it may be easier to use native title as a framework for economic development in areas where almost all of the traditional owner group lives on the land (with little other population there), and much more difficult where the traditional owner group is scattered or many other people live on the land.

While there was caution about the role of native title in economic development, other respondents saw the dilemma arising more broadly when contemplating economic development initiatives associated with the land. One person explained that where economic development involves use of land (or impacts on that), then traditional ownership is central. If economic development is planned or implemented without reference to traditional ownership, then it will fail. However, going too far the other way, with economic development initiatives only involving traditional ownership (maybe through native title), may also fail because it will exclude many people and capabilities in the community. An NTRB representative suggested a possible resolution by considering the particular issues being negotiated. This person suggested that the traditional owner group should have primacy in relation to:

- land use issues,
- land, cultural activities, and heritage, and
- benefits from development on land.

All other matters should be dealt with by the wider community (including traditional owners).

Despite the complexities of the situation, various respondents suggested strategies for using native title as a tool for economic development of traditional owners and other Indigenous people. Most emphasised the importance of

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140 *ibid.*, p25.



agreement making in developing a working relationship between different groups, Examples of this included the Wadeye community ILUA, or less formal arrangements in Hopevale, Queensland.

A similar approach was suggested from some respondents in Victoria, where there is a proposal to change heritage laws from a Commonwealth to Victorian scheme. Currently, under the Commonwealth laws, the heritage scheme has established cooperatives for nominated regions throughout Victoria.<sup>141</sup> Each cooperative has heritage responsibilities but also obtains funding and conducts operations on a wider basis, engaging in social and health issues as well. Cooperatives are made up of traditional owners, other Indigenous people and, we were told, sometimes non-Indigenous people. One respondent noted that cultural heritage is considered to be a native title right and it must be in the hands of traditional owners.

At various times, respondents raised concerns about government and companies' engagement with Indigenous people who are not traditional owners. For example, a company may agree that specified percentage of its workforce at a mine site will be Indigenous and then employ some Indigenous people who are not traditional owners from that area. Another example might be where a local government consults widely with Indigenous people in relation to a proposed development and its effect on Indigenous heritage. Traditional owners have been unhappy in both circumstances at the involvement of Indigenous people other than themselves.

The issue of integrating traditional owner concerns and interests with broader Indigenous community concerns and interests is discussed in detail in chapter 3, *Looking forward – a policy approach to native title*.

## The role of intermediaries

NTRBs are important intermediaries for many traditional owner groups around Australia, as few groups have all the necessary information and skills to engage with external parties in relation to the range of issues that can arise in native title and economic development contexts. One respondent during the consultations explained the useful role that an effective Indigenous leader can have, working with a NTRB assisting traditional owner groups. Sometimes, an Indigenous group is reluctant to negotiate robustly in light of the future relationship between the company and group. The group may, however, have strongly-felt grievances against the company. A competent intermediary can allow these issues to be raised and addressed, with minimum prejudice to the parties' long-term relationships.

Various respondents in South Australia commended the role of the State's NTRB, the Aboriginal Legal Rights Movement (ALRM). It was observed that the constructive relationship between ALRM and the State Government enabled these two parties to work cooperatively on the new SA policy on connection reports, *Consent Determinations in South Australia: A Guide to Preparing Native Title Reports*. We were told that the NTRB was involved in the drafting and

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141 Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cwlth).



finalisation of this policy to an unusual extent. This high level of Indigenous input gives the resulting document greater legitimacy with traditional owners.

Determining the degree to which an NTRB should have an ongoing role in a traditional owner group's engagement with other parties involves many variables. One NTRB explained how its assistance to a PBC was gradually tapering off to encourage the PBC to deal with matters itself. At times this had been difficult but both the PBC and NTRB are learning about their new relationship, roles and responsibilities. Also NTRB support for the PBC is limited by funding guidelines which allow the NTRBs to assist in the establishment of PBCs only up to and including the holding of the PBC's first annual general meeting.<sup>142</sup>

## Summary

The following key points about engagement and its importance for economic development through native title arose from the consultations.

- Parties should be prepared to engage beyond the legal minimum and should also meet or implement their undertakings or obligations in any agreement.
- The environment within which relationships between stakeholders are developed are often characterised by ongoing litigation, state government policies towards native title and other factors such as the demise of ATSIC. This type of environment often determines the types of relationships between stakeholders. To prevent these issues taking over the relationship, stakeholders need to establish agreed goals and directions.
- Native title negotiations provide state and territory governments with an important opportunity to engage with traditional owners on a broad ranges of issues including health, education and employment.
- NTRBs often have an important intermediary role between traditional owners and other stakeholders. However, this role can change over time as traditional owners develop their capacity and knowledge to make decisions and effectively engage with other stakeholders.

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142 This term was set out in the *ATSIS, 2003-04 General Terms and Conditions of Grant to Bodies Recognised as a Native Title Representative Bodies under the Native Title Act 1993*, 1 July 2003. Respondents noted during consultations that this provision was still in force in October 2004.