



## Introduction

---

This, my first report under s209 of the *Native Title Act 1993* (Cth) (NTA), is part of a larger project that commenced prior to my appointment as Aboriginal and Torres Strait Islander Social Justice Commissioner in July 2004. The project aims to investigate how native title can be utilised to improve the economic and social conditions of Indigenous peoples' lives. I understand that this project represents a change of focus in the work of the Native Title Unit which previously was directed to examining the law of native title and whether it satisfied Australia's human rights obligations at international law.

It seems to me that this change of focus represents a natural progression in the work of the Unit. It has been 7 years since the NTA was significantly amended and there have been no substantial changes to the legislation since then. Nor is it likely that in the foreseeable future there will be changes of the type proposed by my predecessors in past Native Title Reports. This was a clear implication of the Attorney-General's speech in Adelaide at the 2004 Native Title Representative Bodies Conference:

The government remains committed to the smooth running of the native title system. We believe the overall structure of the Native Title Act is well established. Highlighting what the Australian Government is doing and continues to do does not absolve other stakeholder from doing more to ensure that the native title system operates efficiently.<sup>1</sup>

The change of focus from consideration of the legal framework of native title to consideration of the economic and social development outcomes that may be generated through the native title system is a natural progression in our work for reasons other than political utility. It is a move which recognises that the real injustice of denying Indigenous people their traditional land for so long lies in the economic and social degradation that this causes. It is a move that focuses on addressing the consequences of dispossession in a sustainable way with whatever tools are available. It is my hope that the government will see native

---

1 Attorney-General, the Honourable Philip Ruddock, 'The Government's Approach to Native Title', paper presented at the *Native Title Representative Bodies Conference 2004*, 4 June 2004, para 45.



title as just such a tool, available to contribute to what is undeniably the most pressing problem facing Indigenous people: poverty.

In changing the focus of native title in this way a shift must occur in how Australian society sees the relationship between Indigenous and non-Indigenous values and world views. Obviously, within the field of native title, the laws and customs through which entitlement to land is transmitted, represents a point of divergence between Indigenous and non-Indigenous systems and practices. While this is important it should not, and in reality does not, divide our worlds in two. For Indigenous people, respecting traditional law does not render us unable to participate in the modern Australian economy. In order to increase the opportunities for traditional owners and their communities to generate wealth and break the poverty cycle, differences of this kind should not become a basis for exclusion of Indigenous people from the broader economy.

For me as Social Justice Commissioner, specifically charged by statute to report on the effect of the NTA upon the human rights of Indigenous Australians, the challenge is to develop a framework that recognises the distinctiveness of Indigenous identity as it is shaped by our adherence to traditional laws and customs, while at the same time seeking to maximise the capacity of native title to contribute to the economic and social development of traditional owner groups and the communities they live in.

## The legal framework and economic development

While previous reports have made it clear that the NTA needs to provide a just and equitable framework for returning land to Indigenous people, we also need to explore other opportunities to expand the economic and social development outcomes for Indigenous people produced by the native title system. Indeed, limiting the search for these opportunities to within the legal system will, in my view, involve a great deal of investment on the part of Indigenous peoples with very little return in terms of outcomes on the ground.

One reason for this is that the legal system tends to construct Indigenous society as distinct from and untouched by contemporary social and economic forces. Such a society is unlikely to be entitled to rights that facilitate participation in the broader Australian economy. This construction of Indigenous society was particularly striking in the *Yorta Yorta* case.<sup>2</sup>

In that case the High Court held that native title rights defined under the NTA must be rights and interests created by the Indigenous laws and customs that existed before the British acquisition of sovereignty over Australia. This is what is to be understood as 'traditional' in the phrase 'traditional laws and customs' in s223(1)(a) of the NTA. In fastening the recognition of native title to a pre-sovereign system of Indigenous laws, every claimant group must satisfy a court that the contemporary expression of their culture, their religion and their economy does not emanate from Western laws created after the British acquired sovereignty, but only from Indigenous laws created prior to the acquisition of sovereignty.

---

2 *Members of the Yorta Yorta Aboriginal Community v Victoria & o'rs* [2002] HCA 58 (12 December 2002) ('Yorta Yorta').



It was recognised by the High Court that real evidentiary difficulties arise from having to unravel a history of engagement between Indigenous and non-Indigenous society in order to apply the legal tests that will only give recognition to purely 'Indigenous' rights and interests. The questions that arise and which native title claimants must satisfy include: What is the content of pre-sovereign laws and customs?<sup>3</sup> Are the rights and interests presently possessed, rights and interests that were possessed under pre-sovereign laws and customs?<sup>4</sup> Are differences between the rights and interests presently possessed and those possessed before sovereignty differences that result from developments of or alterations to the traditional laws and customs or are they differences that result from new laws and customs that are generated after sovereignty?<sup>5</sup> When does an interruption to the observance of traditional laws and customs amount to cessation of their observance?<sup>6</sup> When can it be said that the observance of laws and customs is by a new society even though the laws and customs are similar to or even identical with those of pre-sovereign society?<sup>7</sup>

Underlying these tests and questions is an assumption about the relationship between law and society that allows little room for Indigenous participation in the broader economy. This assumption is captured in the following extract from the High Court's judgment:

Laws and customs arise out of and, in important respects, go to define a particular society. In this context "society" is to be understood as a body of persons united in and by its acknowledgement and observance of a body of laws and customs... To speak of rights and interests possessed under an identified body of laws and customs is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs.<sup>8</sup>

What this depicts is a hermetically sealed system of laws and social identity, each determinative of the other. There can be no blurring of the lines between a society whose identity is defined by traditional, pre-British sovereign laws, and a society whose identity is defined by the laws of the new sovereign power.

The only exception to these constricting legal tests that could allow a more expansive interpretation of how traditional laws and customs operate within contemporary society, and one that might lead to the recognition of economically useful rights and interests, is the recognition that pre-sovereign laws and customs might develop, adapt and change over time:

The rights and interests in land which the new sovereign order recognised included the rules of traditional law and custom which dealt with the transmission of those interests. Nor is it to say that account could never be taken of any alteration to, or development of, that traditional law and custom that occurred after sovereignty. Account may have to be taken of developments at least of a kind contemplated by that traditional law and

---

3 *ibid.* at [77] & [80].

4 *ibid.* at [86].

5 *ibid.* at [43]&[44].

6 *ibid.* at [83] [87] & [89].

7 *ibid.* at [87].

8 *ibid.* at [49] & [50].

custom. Indeed, in this matter, both the claimants and respondents accepted that there could be 'significant adaptations'.<sup>9</sup>

And later:

The key question is whether the law and custom can still be seen to be traditional law and traditional custom. Is the change or adaptation of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified?<sup>10</sup>

While these passages leave open the possibility that the Court will recognise rights and interests that arise out of traditional laws that have adapted to the economic and social conditions of the dominant society, there is another aspect of the legal framework that reduces the likelihood of the legal system providing recognition of commercially useful rights. That is, the legal test for the extinguishment of native title as set out in the High Court decision in *Ward*.<sup>11</sup>

In that case the Court found that native title may be extinguished, either partially or completely, by laws or acts which create or have in the past created rights in third parties. Where there is an inconsistency between the rights created by the Crown for the benefit of third parties and the native title rights arising out of traditional law and custom, native title will be extinguished, either completely or partially, to the extent of the inconsistency. This test is known as the *inconsistency of incidents test*. It applies not only to determine whether current tenures extinguish native title but also to determine this question as it applies to every tenure that has been created throughout the history of settlement over the land the subject of the native title claim. It is applied in addition to the NTA which also operates to prescribe the extinguishing effect of the creation of particular tenures upon native title.<sup>12</sup>

In the *Ward* decision the application of this test, along with the application of the confirmation and validation provisions of the NTA, resulted in the extensive extinguishment, either completely or partially, of native title. For instance the creation of a nature reserve under Western Australia's *Land Act 1933* extinguished native title completely. Where native title was only partially extinguished, native title rights that best survived the inconsistency of incidents test were those which were expressed at a high level of specificity;<sup>13</sup> were limited to the conduct of activities on the land rather than the control of activities on the land;<sup>14</sup> and confined those activities to traditional activities rather than contemporary activities. Thus, for example, a right to dig for ochre may survive the grant of a mineral lease on the same land while a right to control access to the resources of the land would be extinguished. Similarly a right to hunt and gather may survive the grant of a pastoral lease while a right to control access to the land or make decisions about the use of the land would not.

9 *ibid.* at [44].

10 *ibid.* at [83].

11 *Western Australia v Ward & o'rs* [2002] HCA 28 (8 August 2002) ('Ward').

12 NTA, Part 2, Division 2, 2A, 2AA, and 2B.

13 *op.cit.*, at [29].

14 *op.cit.*, at [52].



The inconsistency of incidents test operates to remove from the bundle of native title rights those which might provide a basis for commercial enterprise and opportunity. The right to control access to resources on the land, the right to exclusive possession of the land and the right to make decisions in relation to the land are rights that are necessary in order to commercially exploit the land. Yet these are the rights that are unlikely to survive the application of the tests for extinguishment applied by the common law and the NTA.

## Traditional ownership and economic development

In the above analysis I have argued that it is the tests for recognition and extinguishment of native title within the legal framework that seeks to delineate a society based on traditional laws and customs from one based on Western laws and customs. These tests have the effect of restricting the utility of native title rights in the modern economy.

The view proposed in this Report of the relationship between traditional and contemporary law and society is quite different to that coming out of the legal framework. My own situation as an elder from the Kungarakan tribal group and the Iwadja tribal group in the Northern Territory, with responsibilities to country and clan, yet living and working in a modern metropolitan city, illustrates the illusiveness of the meaning of this term 'traditional' and highlights the mobility and shifts in perspective that characterises many Indigenous people's lives. Such a nexus between cultural responsibilities and a perceived alienated modern metropolitan lifestyle eludes many who have romantic notions of what a traditional owner's lifestyle should be and what cultural responsibilities might be. As a Kungarakan elder I am responsible for a number of sacred sites, a custodian of stories and information and I have a responsibility to pass these on and take a leadership role for other Kungarakan and related tribes. These responsibilities are discharged in a manner acceptable to our Group and such practices are replicated by Indigenous peoples throughout the country.

In seeking to reflect the reality of the lives of many Indigenous people in a theoretical framework Martin, referencing the work of Francesca Merlan in *Caging the Rainbow*,<sup>15</sup> highlights the 'intercultural' nature of Indigenous organisations.<sup>16</sup> Rather than seeing the relationship between Indigenous and non-Indigenous values within Indigenous organisations as oppositional, Martin emphasises their dynamic and transformative interaction. His argument in relation to Indigenous organisations is one that is useful in a discussion of the relationship between traditional and contemporary values and practices:

[W]hile we can meaningfully and usefully attempt to delineate distinctive characteristics of the contemporary values and practices of particular indigenous groups, they have been produced and are reproduced, through a complex process of engagement with those of the dominant society. This has involved not just subjugation of that society but also appropriation and incorporation of many of its forms. Furthermore, their

---

15 F. Merlan, *Caging the Rainbow: Place, Politics, and Aborigines in a North Australian Town*, University of Hawaii Press, Honolulu, 1998.

16 D.F. Martin, *Rethinking the design of indigenous organisations: The need for strategic engagement*, Issue Paper No. 248, Centre for Aboriginal Economic Policy Research, ANU, Canberra.



production has also involved the 'mimetic' reflection of the constructions of indigenous people by the dominant society.<sup>17</sup>

Similarly, Marcia Langton and Lisa Palmer have emphasised the dynamism of the engagement between customary institutions and the market place describing it as 'not mere syncretisation of tradition and modernity but a transformation of relationships'.<sup>18</sup>

This is not to say that there is no distinction between Indigenous and non-Indigenous social structures and world views. In particular, where Indigenous people continue to adhere to traditional laws, the 'intercultural' domain will reflect the complexity of appropriating and incorporating non-Indigenous values into traditional norms values and beliefs. As stated, the challenge is to develop a framework that recognises difference not as a basis for exclusion and separation but rather to bring about the transformation in Indigenous peoples' lives that is needed to break the poverty cycle for Indigenous people. Keeping native title locked in the legal framework will not meet this challenge.

### **Commercial utility of Indigenous communal land**

Many of the issues discussed above come together in the current debate over whether the communal and inalienable nature of Indigenous land is perpetuating poverty within Indigenous communities. The debate was spearheaded by the statement issued by Warren Mundine in late 2004 that the communal nature of Indigenous land needs to be altered so that the land can be utilised to generate wealth for Indigenous people.<sup>19</sup> Mr Mundine, a member of the National Indigenous Council and CEO of NSW Native Title Services Ltd, criticised communal ownership under the NSW land rights legislation saying:

[T]he benefits of the ownership is not being spread throughout the community. In fact its retarding economic development. Where you cannot use land for economic benefit, [because] you've locked it away. We've been asset rich but cash poor. It's not putting any food or any clothes or any money in our pockets.<sup>20</sup>

He said that Aborigines had not benefited from the tracts of land they own because the land could not be bought and sold.<sup>21</sup>

This is not the first time that an Indigenous leader has complained about the lack of commercial utility in communal Indigenous land. Francis Deemal gave a presentation at the National Native Title Tribunal's Forum 2001 'Negotiating Country' which pointed out that the property laws which govern Indigenous

17 *ibid.* p8.

18 M. Langton and L. Palmer, 'Treaties, Agreement Making and the Recognition of Indigenous Customary Polities', in *Honour Among Nations? Treaties and Agreements with Indigenous People*, (ed) M. Langton, M. Tehan, L. Palmer and K. Shain, Melbourne University Press, 2004, p48.

19 M. Shaw, New native council 'dangerous' *The Age*, 7 December 2004.

20 Transcript of interview between Mark Molvin from ABC Radio National's PM, and Warren Mundine, and David Ross, 6 December 2004, available online <http://www.abc.net.au/pm/content/2004/s1259072.htm>.

21 M. Shaw, *op.cit.*



land make assets 'un-fungible'<sup>22</sup> beyond the protection of inalienability and are unnecessarily complex and inefficient.<sup>23</sup>

The response to Mundine's criticisms has been mixed, with Mick Dodson,<sup>24</sup> and CEO of the Central Land Council, David Ross,<sup>25</sup> pointing out that making Indigenous land alienable could lead to Indigenous people losing their homeland and the cultural values pertaining to it. The Prime Minister, on the other hand has expressed the view that private land ownership is an advance on everything being owned by the community, giving encouragement to Indigenous families and individuals seeking to own their own property.<sup>26</sup>

I would prefer to see these issues not in terms of a dichotomy between Indigenous communal values and non-Indigenous commercial values but rather as a reflection of the intermingling of both Indigenous and non-Indigenous values that are incorporated in varying ways into the reality of Indigenous people's lives. The challenge expressed above can be equally applied to this issue, particularly in the context of native title; that is, to develop a framework that recognises the distinctiveness of Indigenous identity as it is shaped by Indigenous people's adherence to traditional laws and customs, while at the same time seeking to maximise the economic utility of native title for Indigenous people.

In meeting this challenge it is instructive to look at early native title case law to understand how distinctively Indigenous concepts of land were first incorporated into modern law notions of property.

Directly addressing the question of the inalienability of community-owned land, Justice Brennan in the *Mabo* decision<sup>27</sup> considers whether such characteristics would prevent the common law recognising Indigenous people's unique relationship with the land as a proprietary interest:

Whether or not land is owned by individual members of a community, a community which asserts and asserts effectively that none but its members have any right to occupy or use the land has an interest in the land that must be proprietary in nature: there is no other proprietor. It would be wrong, in my opinion, to point to the inalienability of land by that community and, by importing definitions of 'property' which require alienability under the municipal laws of our society...to deny that the indigenous people owned their land. The ownership of land within a territory in the exclusive occupation of a people must be vested in that people: land is susceptible of ownership and there are no other owners.

What distinguishes this decision from previous ones is that it recognises the distinctiveness of Indigenous concepts of land, communal ownership and

---

22 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.

23 F. Deemal, 'Direct Negotiations with Numerous Native Title Holders and Project Proponents', Presentation at *National Native title Tribunal Forum, 'Negotiating Country'*, Brisbane, 1-3 August 2001.

24 M. Shaw, *op.cit.*

25 Transcript of interview between Mark Molvin from ABC Radio National's PM, and Warren Mundine, and David Ross, *op.cit.*

26 ABC NEWS ONLINE. PM backs push to encourage Indigenous land, December 9, 2004.

27 *Mabo and Ors v Queensland* (No 2) (1992) 175 CLR 1.



inalienability, while at the same time incorporating these concepts into the non-Indigenous domain of property. In so doing, both domains, Indigenous and non-Indigenous are transformed. Such an approach transcends the approach of previous decisions which denied Indigenous people recognition of their relationship to land unless they could demonstrate that it had the same characteristics that pertained to non-Indigenous proprietary interests, including alienability.<sup>28</sup>

However, it would be wrong to think that, by bringing Indigenous notions of 'country' into non-Indigenous notions of property, its meaning has been reduced to that of a 'thing' with no social context. In *Yanner v Eaton*<sup>29</sup> the High Court, citing K Gray and S F Gray, *The Idea of Property in Land*,<sup>30</sup> pointed out that 'much of our false thinking about property stems from the residual perception that 'property' is itself a thing or resource rather than a legally endorsed concentration of power over things and resources'.<sup>31</sup> The Court applied the Grays' description of property as 'a perception of socially constituted fact as well as comprising various assortments of artificially defined jural right', to native title as follows:

[A]n important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land.

The recognition by the Court that property, both Indigenous and non-Indigenous, is a social fact involving relationships of power and legitimacy, is instructive in meeting the challenge of increasing the commercial utility of native title while retaining that which is valuable to Indigenous culture.

It implies that decisions about the nature and utility of Indigenous land should be decided within the institutions and social structures of the titleholders themselves. This does not prevent Indigenous titleholders from utilising land for commercial purposes. It simply says that this is a decision that titleholders themselves should make bearing in mind the authority by which their entitlement to the land is derived, the traditional laws and customs of their ancestors. Several models have been suggested which respect the social context of traditional owners entitlement to land while maximising the land's commercial utility.

Francis Deemal, in the paper referred to above,<sup>32</sup> proposes that Indigenous Land Use Agreements (ILUAs) have a potential to be utilised as a commercial asset with a capital value. He encourages an imaginative approach to turning procedural instruments like ILUAs into commercial assets. His imagination goes beyond simply converting Indigenous interests, such as native title, into non-Indigenous land titles, such as alienable freehold.

The Nisga'a First Nation in British Columbia, Canada have also adopted an imaginative approach on this issue. For Nisga'a the question of alienation of their traditional land is dealt with through the documents and laws which form

28 *Milirrpum v. Nabalco Pty. Ltd.* (58) (1971) 17 FLR 141.

29 *Yanner v Eaton* [1999] HCA 53, 1999.

30 K. Gray and S.F. Gray, 'The Idea of Property in Land', in (ed) Bright and Dewar, *Land Law: Themes and Perspectives*, (1998) 15 at 27.

31 *Yanner v Eaton*, *op.cit.*, at[18].

32 F. Deemal, *op.cit.*





the foundation of the Nisga'a nation; the treaty, the Nisga'a Constitution and Nisga'a law.

The instrument by which Nisga'a land is made alienable is the treaty between the Nisga'a nation, the province of British Columbia and the Canadian government. The treaty is a comprehensive document covering all aspects of the life of the Nisga'a nation.<sup>33</sup>

Under the terms of the treaty, Nisga'a may, under certain conditions, dispose of the whole of its estate in fee simple.<sup>34</sup> However, disposal under the treaty does not result in the land ceasing to be Nisga'a land.<sup>35</sup> This means that Nisga'a land can be sold to a person or entity outside of the tribe, and that, on payment of the purchase price to the Nisga'a people, the purchaser gets freehold title to the land. However, once any estate or interest in the land reverts to the Crown, there is an obligation on the Crown to transfer it back to the Nisga'a people.<sup>36</sup>

The treaty also ensures that decisions regarding the alienation of land are made through appropriate decision-making processes which form part of the broader governance structures.<sup>37</sup> For further protection, the decision-making processes and governance structures are enshrined in a constitution. Finally, alienation under the treaty must be in accordance with Nisga'a law.<sup>38</sup> This law may be contained in stories and songs or other forms. Where the land is of particular cultural significance Nisga'a law will operate to ensure it is not alienated.

The Nisga'a treaty is an example of how the alienation of Indigenous land can take place within the context of nation building and treaty making. This is far preferable to a legislative approach which converts native title land to alienable freehold. Indigenous people need to establish decision-making processes and governance structures that are appropriate to their own group so that important questions, like the alienation of land, can be given the consideration they deserve by the particular group who own the land. Further, through treaties, consideration is given to the role of the State in the nation building project.

In Australia, native title agreement making has become a significant aspect of the native title system and presents an opportunity to direct native title towards the economic and social development goals of traditional owner groups. As pointed out by Langton and Palmer it provides a vehicle for a dynamic engagement between Indigenous and non-Indigenous polities and for a transformation of the relationship between tradition and modernity:

The insertion of customary institutions and jurisdictions into the marketplace through agreement making, such as Aboriginal heritage management agreements, consultation protocols and intra-Indigenous agreements over boundaries of native title applications, is not mere syncretisation of tradition and modernity, but a transformation of relationships. These postcolonial forms of inter-polity engagement are underwritten by both customary exchange and market considerations.

---

33 Nisga'a Final Agreement, 4 August 1998, chapter 3, paragraphs 3-8.

34 *ibid.*, paragraph 4.

35 *ibid.*, paragraph 5.

36 *ibid.*, paragraph 7.

37 *ibid.*, chapter 11.

38 *ibid.*, chapter 3, paragraph 4.



Commercial agreements negotiated by Indigenous parties in the resource sector, state and regional-framework agreements relating to service delivery and a comprehensive agreement making approach negotiated as a result of rights, conferred by the beneficial effect of *Mabo* and subsequently the NTA, are increasingly important in the political and legal landscape of agreement making in Australia.<sup>39</sup>

Agreement making in the native title context can also have an operation that is not tied to the restricted legal nature of native title rights but that is directed to outcomes that parties want to achieve. The negotiation process also provides an opportunity for governments to learn and understand the complexity of the social and cultural context for the development objectives of the group.

Native title agreement making is a focus of the project presently conducted by the Native Title Unit. This project aims to investigate how the native title system can be utilised to improve the economic and social conditions of Indigenous peoples' lives. The *Native Title Report 2004* is a part of this project.

## **Economic and social development through native title**

As indicated above, my Native Title Unit has been investigating the issue of economic and social development through native title prior to the commencement of my appointment as Social Justice Commissioner in July 2004. It is useful to outline the work that has been done both prior to and since this date.

### **Native Title Report 2003**

The *Native Title Report 2003* targeted two areas of research as a basis for developing a framework which meets the two pronged challenge that, in my view, native title must meet. That is, recognising Indigenous identity in all its complexity; and maximising the capacity of native title to contribute to the economic and social development of traditional owner groups and the communities they live in.

First the Report explored the human right to development through international discourses which underlie this right as it is defined in the Declaration on the Right to Development and the dialogue on sustainable development. This research also included an examination of international development theories, and in particular the model for development based on capacity development utilised in the United Nations Development Program (UNDP) programmes in developing countries. A summary of this research can be found at Annexure 2.

The principles and concepts of sustainable development are particularly useful in meeting the two pronged challenge that native title must meet. Fundamental to the process of sustainable development is the integration of environmental protection with economic and social development; conservation of resources; equity; quality of life and participation. These principles weave environmental considerations, economic outcomes and social justice into a holistic development model. Through this approach the social and cultural meanings of native title can be intertwined with economic and social development goals.

---

39 Langton and Palmer, *op.cit.*, pp48-49.



The critical importance of the sustainability dialogue lies not only in the concepts which make up the discourse, but the location of this dialogue in the institutions that drive economic development within capitalism: the private sector. In contrast to the human rights dialogue which targets the relationship between the state and the citizen, the sustainability dialogue primarily seeks to provide an ethical underpinning of rights to the relationship between a developer and those affected by, or participating in the development. In the current climate of economic rationalism, with capitalism not so much the dominant paradigm but the only paradigm, the sustainability dialogue, through its emphasis on corporate responsibility is extremely important in shaping companies' dialogue with Indigenous people.

The second area of research in the *Native Title Report 2003* is native title policy development at the state and federal level. Our examination in this area focused on whether, within the policy setting, native title is utilised as a tool for economic and social development. In this regard the Report concluded that overall, although there are some exceptions at the state level, native title policy is not sufficiently targeted towards the economic and social development of the traditional owner group. While a universal theme of native title policies across Australia is to negotiate rather than litigate, the objectives of the negotiation process have not been clearly defined at a policy level. Many governments are not yet clear what they want native title agreements to achieve, either for the claimant group or other parties. This means that the agreement making process takes place largely within a legal framework, with legal tests establishing the threshold for the commencement of negotiations between a traditional owner group and the government, and legal definitions of rights setting limits on the outcomes that may be achieved.

While there are many examples of native title agreements that do provide economic and social development outcomes for traditional owner groups these are not usually a result of applying native title policy goals, but rather come out of the intersection of native title with the States' other policy priorities. For instance, it was noted in the Report that negotiations between the state and native title claimants are often conducted where the State, as managers of land and resources, seeks to utilise land or permit the public or private interests to utilise land that is also the subject of a native title claim. While there is specific provision under the NTA for native title party involvement in these land management decisions, and traditional owner groups often benefit from the pragmatic approach adopted by the state in these negotiations, the Report notes that there are limitations to this approach particularly where it is the only opportunity for economic and social development through native title agreements.<sup>40</sup>

Native title is in a policy vacuum. There are few policy parameters to ensure consistent and dependable outcomes for traditional owner groups. Rather, native title is dealt with on a case by case basis with outcomes varying according to the strict legal merits of the case rather than the goals of the particular traditional owner group.

---

40 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, p132.



## Discussion Paper

Drawing from the research and analysis contained in the *Native Title Report 2003* a discussion paper was released in June 2004, entitled *Promoting Economic and Social Development through Native Title*. The paper proposed a number of principles for native title agreement making which are aimed at meeting the two pronged challenge of recognising Indigenous identity and maximising economic and social development. These principles require native title agreements to:

- **Respond to the group's goals for economic and social development**

Unless Indigenous development policies are designed and implemented with the effective participation of the Indigenous people for whom they are intended to benefit they are unlikely to succeed. Native title agreement making provides an opportunity for the traditional owner group to bring to the negotiation table its agenda for economic and social development. Through this process governments come to understand and respond to the social and cultural context for the development objectives of the group.

- **Provide for the group's capacity to set, implement and achieve their development goals**

Relocating control of the development process to the traditional owner group requires capacity in the group to set, implement and achieve development goals. Native title agreements provide an opportunity for the parties to develop a framework to enable the traditional owner group to build the capacities and the institutions necessary to achieve their development goals.

- **Utilise the existing assets and capacities of the group**

The emphasis of development driven by the group is on building the skills of people within the group rather than using external skills to identify and drive the achievement of objectives. It also seeks to tailor development to the group's skills and values.

- **Build relationships between stakeholders**

If native title negotiations are to contribute to the development goals of the group, key stakeholders within the native title system must build relationships based on this common objective. The most important relationship for Indigenous people pursuing their development goals is their relationship with government. A partnership with government is essential to traditional owner groups realising their development goals. However, it is critical that this partnership is one where the group retains control of the development process with the government adopting a facilitative role to assist the group to achieve its development goals.

- **Integrate activities at various levels to achieve the development goals of the group**

The model of development advocated in the discussion paper proposes a locally driven process that occurs within a system of interrelated levels and understandings, including the local, regional, state, national and international



levels. Agencies within State and Commonwealth governments, DIMIA's Office of Indigenous Policy Coordination, NTRBs, the National Native Title Tribunal, the Federal Court and industry bodies are the key actors within the native title sector. Native title agreement making provides a process to co-ordinate the goals of the various institutions operating at different levels within the overall native title system so as to support the native title claimant group achieving their development goals.

## Native Title Report 2004

The *Native Title Report 2004* builds on and develops the above principles by utilising the ideas generated in a series of consultations which took place from August to October 2004. In this period 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. I am aware that the consultations conducted thus far do not 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. However, given my limited resources, I considered it necessary, in the first instance, to obtain the views of those who represent Indigenous interests in the native title process.

The consultations were structured as follows. First NTRBs, through their managers, policy officers, future act officers, lawyers, field staff, Indigenous liaison officers, and community development officers provided an overview of the significant issues of concern to the organisation. My staff then 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 groups' economic and social development goals?

Inevitably, the response to these questions differed significantly between organisations, depending on a range of factors including:

- 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 and Federal Government to native title and the negotiation of 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.

Despite these differences NTRBs repeatedly raised key issues that must be considered to enable native title to operate as a vehicle for the economic and social development of the traditional owner groups in their areas. These issues, set out below, are discussed in depth in **Chapter 1** of the Report:



- Identification and role of the traditional owner group,
- Capacity development and governance issues,
- Resourcing of the native title system,
- 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.

Overall there was general support for the principles as a way forward although there was a clear understanding that no model could provide a 'fix-all' solution for the problems that beset many Indigenous communities. What was needed was a series of options for communities and a willingness from government to work with them to help achieve their goals. However, there was a clear message from NTRBs that economic and social development is a goal that many of their clients, the traditional owner groups in their area, did want to achieve. The question that I will be exploring through future consultations with government at all levels is whether economic and social development for traditional owner groups is a goal that they want to achieve from the native title system, and if so, how it can best be done.

The consultations generated a body of ideas and material on which to elaborate, refine and advance the principles proposed in the Discussion Paper. This work is done in **Chapter 2** of the Report which utilises the material obtained through the consultations to build the principles into a framework for redirecting the native title system towards the economic and social development goals of the group. It is a framework however that does not mandate that the traditional owners adopt particular strategies or prioritise particular goals for economic and social development. Indeed it argues strenuously against a 'one size fits all' approach, preferring that a wide range of options for economic and social development are available to traditional owners through agreement making. The emphasis in the model is on process. It takes an approach to development that seeks to build the capacity and power of the traditional owner group to determine its own development goals.

Achieving economic and social development through the framework of principles proposed in chapter 2 requires support and contribution from other stakeholders in the native title process. **Chapter 3** of the Report identifies the role that government and others can play in facilitating the achievement by traditional owners of their development goals. In relation to governments in particular it is important that their focus on the legal system give way to more effective policy strategies for improving traditional owners' social and economic wellbeing.

An opportunity presently exists to reappraise native title policy, its direction and its processes. This opportunity comes out of a combination of two factors. First, the public sector is making significant and radical changes in the way it develops and implements government policy. Native title policy can be reinvigorated by responding to the new processes and concepts that are emerging from public sector reform. Second, these new processes and concepts



are being tested in the Indigenous policy arena. It is open to the government to extend the ideas generated, the lessons learned and the outcomes achieved in Indigenous policy and extend these to native title policy.

Chapter 3 examines the principles that underlie the new arrangements for Indigenous policy and seeks to develop these principles into a foundation for redirecting native title policy towards the economic and social development goals of traditional owner groups. It is proposed that chapter 3 form the basis of ongoing consultations between my office and governments and other stakeholders in the native title system. In those consultations I will be asking whether economic and social development for traditional owner groups is a goal that others are willing to support and, if so, how that support can best be provided.

The failure to co-ordinate the goals of native title negotiations with the State's strategies to address the economic and social development of Indigenous people not only limits the native title process; it also limits the capacity of the broader policy to achieve its objectives. Native title can be seen as an asset in the development process, contributing social and cultural capital through traditional governance structures, property rights and a national network of representative bodies specialised in assisting the group to achieve its goals.

Overall, the *Native Title Report 2004* seeks to develop a framework that recognises the distinctiveness of Indigenous identity as it is shaped by an adherence to traditional laws and customs, while at the same time seeking to maximise the contribution that the native title system can make to the economic and social development of traditional owner groups and the communities they live in. For Indigenous people to break the poverty cycle it is essential that we use every tool available to increase our participation in the modern Australian economy. The native title process can provide the basis for a sustainable relationship between customary institutions based on traditional law and the institutions of the market place.

