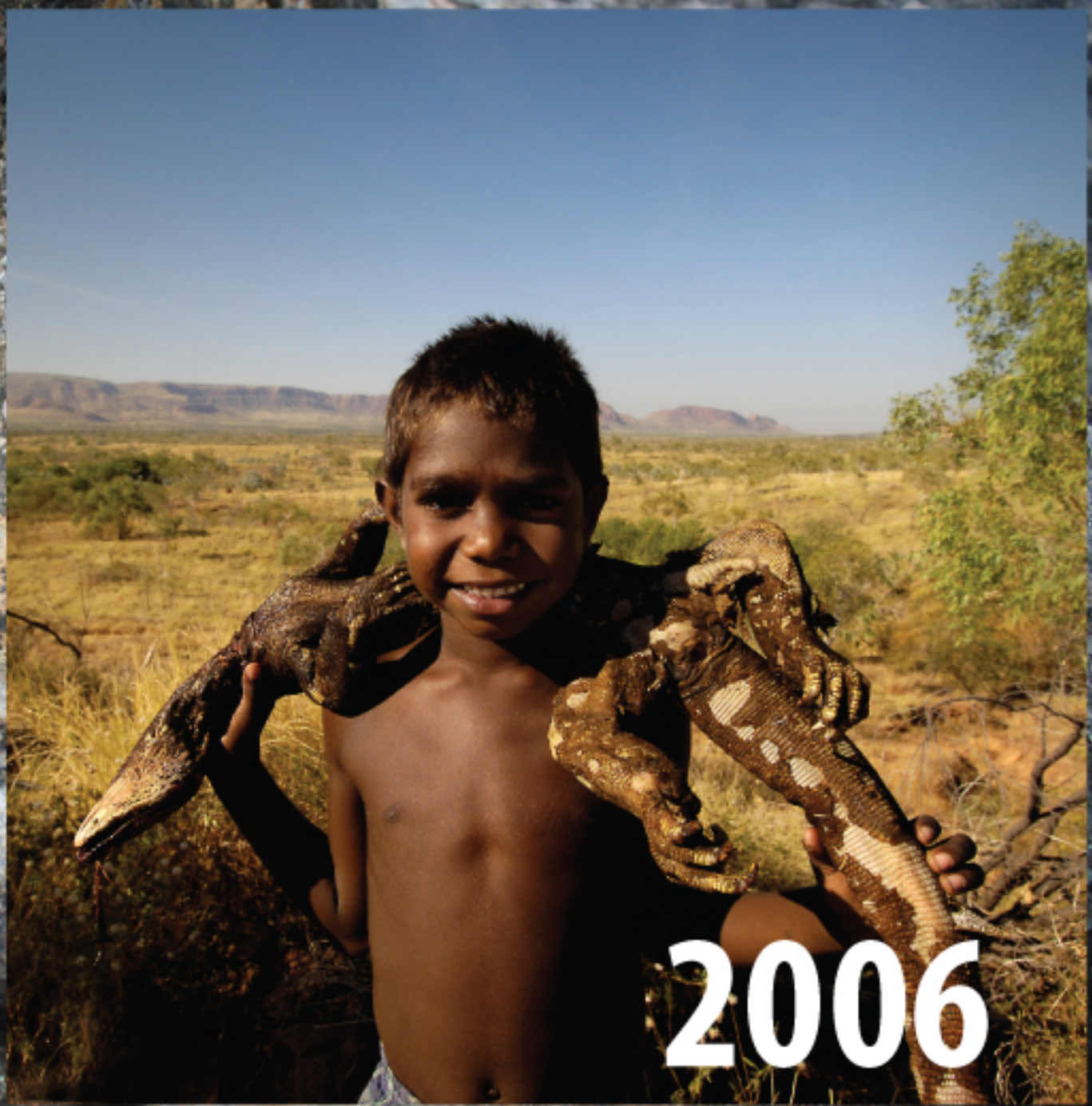
Native Title Report



2006

Aboriginal & Torres Strait Islander Social Justice Commissioner Native Title Report 2006

Aboriginal & Torres Strait Islander Social Justice Commissioner

Human Rights and Equal Opportunity Commission
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Aboriginal & Torres Strait Islander Social Justice Commissioner

Report of the Aboriginal & Torres Strait Islander Social Justice Commissioner to the Attorney-General as required by section 209 Native Title Act 1993.

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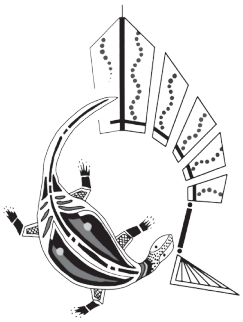
Artist Acknowledgement

The cover photograph is courtesy of the Argyle Diamond Mine. Michael Ramsay Jnr, son of Lena Carey and Michael Ramsay, lives in Bow River. He is cared for by his paternal grandmother Mona Ramsay, a Traditional Owner of the land occupied by the Argyle Diamond Mine.

Cover background photograph taken in the Blue Mountains, New South Wales, by Jo Clark.



About the Social Justice Commission logo

The right section of the design is a contemporary view of traditional Dari or head-dress, a symbol of the Torres Strait Island people and culture. The head-dress suggests the visionary aspect of the Aboriginal and Torres Strait Islander Social Justice Commission. The dots placed in the Dari represent a brighter outlook for the future provided by the Commission's visions, black representing people, green representing islands and blue representing the seas surrounding the islands. The Goanna is a general symbol of the Aboriginal people.

The combination of these two symbols represents the coming together of two distinct cultures through the Aboriginal and Torres Strait Islander Commission and the support, strength and unity which it can provide through the pursuit of Social Justice and Human Rights. It also represents an outlook for the future of Aboriginal and Torres Strait Islander Social Justice expressing the hope and expectation that one day we will be treated with full respect and understanding.

Human Rights and Equal Opportunity Commission
humanrights.gov.au

05 April 2007

The Hon Philip Ruddock MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney

I am pleased to present to you the *Native Title Report 2006*.

The report is provided in accordance with section 209 of the *Native Title Act 1993*. In light of recent developments in land rights during the reporting period, I have also examined the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islander persons in accordance with section 46(1)(a) of the *Human Rights and Equal Opportunity Commission Act 1986*.

The report examines the Australian Government's economic reform agenda on Indigenous communal land by assessing the appropriateness of the reforms to the geographical and human contexts of remote Indigenous Australia. I also provide an assessment of the land leasing provisions in the amended *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and an analysis of the Australian Government's Indigenous home ownership and enterprise development policies.

The report makes a number of recommendations aimed at improving economic development opportunities for Indigenous people. It also includes five case studies that document a range of Australian agreements and enterprises aim to stimulate economic development on Indigenous land.

I look forward to discussing the report with you.

Yours sincerely

Tom Calma
Aboriginal and Torres Strait Islander
Social Justice Commissioner

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Note – Use of the terms 'Aboriginal and Torres Strait Islander peoples' and 'Indigenous peoples'

The Aboriginal and Torres Strait Islander Social Justice Commissioner recognises the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples. There is not one cultural model that fits all Aboriginal and Torres Strait Islander peoples.

Aboriginal and Torres Strait Islander peoples retain distinct cultural identities whether they live in urban, regional or remote areas of Australia.

Throughout this report, Aborigines and Torres Strait Islanders are referred to as **'peoples'**. This recognises that Aborigines and Torres Strait Islanders have a collective, rather than purely individual, dimension to their livelihoods.

Throughout this report, Aboriginal and Torres Strait Islander peoples are also referred to as **'Indigenous peoples'.**

The use of the term 'Indigenous' has evolved through international law. It acknowledges a particular relationship of Aboriginal people to the territory from which they originate. The United Nations High Commissioner for Human Rights has explained the basis for recognising this relationship as follows:

Indigenous or aboriginal peoples are so-called because they were living on their lands before settlers came from elsewhere; they are the descendants – according to one definition – of those who inhabited a country or a geographical region at the time when people of different cultures or ethnic origins arrived, the new arrivals later becoming dominant through conquest, occupation, settlement or other means… (I)ndigenous peoples have retained social, cultural, economic and political characteristics which are clearly distinct from those of the other segments of the national populations.

Throughout human history, whenever dominant neighbouring peoples have expanded their territories or settlers from far away have acquired new lands by force, the cultures and livelihoods – even the existence – of indigenous peoples have been endangered. The threats to indigenous peoples' cultures and lands, to their status and other legal rights as distinct groups and as citizens, do not always take the same forms as in previous times. Although some groups have been relatively successful, in most part of the world indigenous peoples are actively seeking recognition of their identities and ways of life.[1]

The Social Justice Commissioner acknowledges that there are differing usages of the terms 'Aboriginal and Torres Strait Islander', 'Aboriginal' and 'indigenous' within government policies and documents. When referring to a government document or policy, we have maintained the government's language to ensure consistency.

1 United Nations High Commissioner for Human Rights, *Fact sheet No.9 (Rev.1), The Rights of Indigenous Peoples*, www.unhchr.ch/html/menu6/2/fs9.htm

Contents

Executive summary

This is my third Native Title Report as the Aboriginal and Torres Strait Islander Social Justice Commissioner. This year I continue the theme from my previous Reports by focusing on land tenure and economic reform on Indigenous communal lands.[1]

This Report analyses the implementation of the Australian Government's economic reforms by assessing their appropriateness to the geographic and human contexts of remote Indigenous Australia. Chapter 1 contains findings from a survey I conducted in 2006 to determine the aspirations and priorities of traditional owners for their land. Chapter 2 provides information about the location, the provisions and the caveats over Indigenous communal land. Chapter 2 also contains an assessment of the land leasing provisions in the amended *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA), and analysis of the Australian Government's Indigenous home ownership and enterprise development policies. Chapters 3 to 7 contain five case studies that document a range of Australian agreements and enterprises designed to stimulate economic development on Indigenous land.

There is no doubt that sustainable economic development is essential for the well-being of remote Indigenous communities, now and into the future. This is not just my view, it is the view of the majority of Indigenous people who responded to my national survey in 2006.[2] It is also the view of the Australian Government whose ambitious economic reform agenda during 2005 and 2006 is designed to stimulate economic activity on Indigenous owned land. In fact, there is widespread agreement that action is required to assist the many remote, Indigenous families who languish in overcrowded accommodation, welfare dependency and poverty.

Arguably, over the past 30 years, Indigenous Australians on communal land have lived under a form of economic protectionism. Protectionism in first world economies is primarily about protecting politically important domestic industries, or vulnerable sub economies such as those of minority groups and Indigenous peoples. Until now, the permit system (in the Northern Territory), and communal land rights in remote Australia have protected Indigenous economies from competition with the broader Australian economy. Government subsidies in the

1 Note: Indigenous communal land is not owned by individuals. Communal land titles are held by Indigenous land trusts or corporate bodies for the benefit of the traditional owners and people with traditional interests in the land. Under most land rights legislations, decisions over the use of communal land must have the consent of the traditional owners as a group, and the ratification of the relevant representative body. Most communal land in Australia is inalienable, meaning that it cannot be sold.

2 Note: The majority of traditional owner respondents to the 2006 HREOC survey agreed that economic development is important for their land. However, when asked to rank the most important uses for land, traditional owners supported 'custodial responsibilities' and 'access to land' before economic development.

form of housing services and welfare payments have largely supported remote Indigenous communities.

During 2005 and 2006 the Australian Government made policy and legislative changes to reform this protectionist economic model. The Government reforms are aimed to encourage the development of remote market economies by removing the barriers that prevent non-Indigenous economic interests from obtaining a long-term foothold in remote communities.

During 2006, the Government enacted legislative amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) to make 99 year lease tenures possible over Indigenous townships on communal land. The lease provisions are not unlike those over the city of Canberra. The government maintains a 99 year headlease over the township area, and then subleases individual land lots to residents and businesses for a 99 year period. After 99 years the leases can be renewed.

While subleasing has always been possible on Indigenous lands, the new leases will differ from the old in that they are managed by government rather than traditional owners. The Government's rationale for taking control of lease arrangements is to give certainty of tenure to non-Indigenous investors, businesses and residents. These groups are more likely to invest under a government administered lease regime than under a lease regime with traditional owners through their Land Councils.

Indigenous communities will not be compulsorily required to agree to headleases. However, the Government is encouraging agreements by negotiating annual rental payments with families who have the traditional rights to the townships. Additional housing and infrastructure is also being offered to communities that sign to headleases. This is a considerable incentive given that many remote Indigenous communities are chronically short of housing accommodation and overcrowding is causing health and social problems. Once signed, government entities will take administrative control over Indigenous townships and issue 99 year subleases to residents and businesses. Traditional owners can negotiate conditions on a headlease but they will not be able to decide who moves onto their land, nor will they have control over residential, business and infrastructure development under the sub leases.

The Government strategy for remote Indigenous land also includes the reduction of services to smaller, 'unviable' communities. Both the incumbent Minister for Indigenous Affairs and his predecessor have argued that Indigenous people in small, remote communities cannot expect to receive government services and they should become part of the wider Australian economy. As Minister Vanstone argued, the Government is no longer willing to support these so-called 'cultural museums.'[3] While Minister Vanstone referred to communities of less than 100 people as lacking critical mass, there is no policy to date about the size of communities that will be considered unviable. Should homeland communities and outstations be denied government services, Indigenous people will be forced out of these communities and into larger township areas.

3 Vanstone A, (Former Minister for Immigration, Multicultural and Indigenous Affairs), *Indigenous communities becoming 'cultural museums'*, ABC Radio, AM Program interview, 9 December 2005, available inline at: http://www.abc.net.au/am/content/2005/s1527233.htm, accessed 15 March 2007.

In order to stimulate economic growth, the Australian Government, Indigenous Business Australia and the Indigenous Land Corporation have provided some levers to assist remote Indigenous Australians to develop enterprises and to enter the housing market. A number of enterprise development programs are available to Indigenous individuals and entities that are in a position to apply for loans, funds and support. The assistance operates on a self access model. Applicants require English literacy competency, business knowledge and management or governance capacity to be able to apply.

In order to stimulate home ownership, the Australian Government is also building low cost houses in remote communities with 99 year headleases. Home ownership programs are targeted to Indigenous Australians with incomes at a level that can support low interest loans.

According to the Australian Government, the policy and legislative levers are designed to stimulate the dynamic forces of economic and social competition and lift remote Indigenous communities out of their social and economic malaise. By directing incentives to market participation, and by limiting access to subsidised resources, the Government aims to encourage remote Indigenous Australians into employment, home ownership, asset accumulation and higher levels of participation in economic activity. The Government describes these policy reforms as 'normalising' Indigenous communities.

Overall, while I commend the Australian Government for its intensive effort to improve outcomes for remote Indigenous communities, my research demonstrates that the current reform agenda will not provide benefit to the vast majority of remote Indigenous Australians. In fact it has potential to do great harm. My reasoning is as follows:

- Increasing contact between Indigenous and non-Indigenous people is not a strategy in itself to stimulate Indigenous economies. Despite access to employment and all of the benefits of a 'normal' economy in towns like Alice Springs, Moree, Broome, Port Augusta and many of the other large townships across Australia, social and economic dysfunction continues. For remote Indigenous people, relocation to town camps on the fringes of townships increases, rather than alleviates alienation and dysfunction.
- Basic economic modeling demonstrates that the Australian Government's expanded home ownership scheme will be out of reach of the majority of remote Indigenous households. While the scheme may advantage some Indigenous families, the policy will only be effective for families already able to access current programs such as the Indigenous Business Australia home loan assistance scheme. There is no clearly articulated public housing policy for families who are unable or unwilling to purchase a home.
- The home ownership scheme will transfer the considerable costs of remote housing maintenance to Indigenous people on low incomes. 'Cost effectiveness' is the most important design parameter for houses to be built for home ownership in remote communities. Given that structural problems and climatic conditions are proven causes of the majority of maintenance requirements in remote Australia, low cost

housing is likely to exacerbate these problems. Low cost housing is also likely to be more expensive to heat and cool in some of the harshest environments in Australia. In this context, home ownership is likely to put considerable economic strain on low income households.

- International experiences demonstrate that individualising Indigenous communal tenures such as those proposed through the 99 year headleases leads to the loss of Indigenous owned land. The economic benefits are marginal and short-term, and do not compensate in the long term for loss of traditional lands.
- Most Indigenous land tenures are located in very remote desert country, distant from markets and infrastructure to support enterprise development. The current Australian Government policy will not have any impact on these communities.
- Many remote communities currently lack the governance, capacity and skill to access Australian Government enterprise development incentives. In order to be able to apply for funds, applicants must have competent English literacy and financial literacy skills, and be able to develop business plans and grant applications. Many communities require targeted intervention to get to a point of gaining any benefit from policies under the Government's self-access model.
- Under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), (the ALRA), the authorization provisions for 99 year headleases agreements are not adequate to ensure that traditional land owners are giving their free, prior and informed consent. The ALRA does not specify that traditional owner's document and authorise their traditional or agreed decision making processes *prior* to engaging in negotiations for 99 year headleases. Given that 99 year leases have a financial component through annual rental payments, there is potential for more powerful people to coerce others in the interests of monetary gain, disregarding other cultural and social considerations.
- In the majority of remote communities, Indigenous people are not likely to be competitive in an open employment market. Australian Bureau of Statistics data demonstrates that private enterprise is not a reliable employer of Indigenous people. In remote contexts, private enterprise will be under no obligation to employ Indigenous people, the majority of whom have limited skills and education. Given that secondary education is only now being rolled out in remote Australia, Indigenous people are disadvantaged in competition for employment.

The Government's economic strategy for remote areas will only be successful in a minority of Indigenous communities with good governance systems and personnel capable of accessing government subsidies and grants. Communities that are well resourced and well organised may be able to leverage additional benefits for Indigenous residents. Coastal communities on fertile land may also be attractive to investors and attract external business interests under the Government's reforms. Clearly, the benefits of the Government's strategy are directed primarily to individuals and communities that are already advantaged or to non Indigenous

businesses and investors who want to access Indigenous lands for economic gains.

It is likely that communities on marginal land with no history of enterprise development will continue to find themselves economically isolated. In its current form, the Australian Government's economic reform agenda is not targeted to the remote Indigenous communities most in need, where there is compound disadvantage including:

- poor governance or a lack of governing bodies;
- low levels of English literacy;
- reduced access to education and training relevant to support employment;
- marginal land that has not provided income to date and is unlikely to do so in the future; and
- poor community infrastructure.

This Report contains 14 recommendations and five case studies. The case studies document Indigenous agreements and enterprises that support community development as well as economic development on communal lands. Each case study was selected because it describes a participatory model of Indigenous enterprise and economic development.

While the Australian Government's approach is cumulatively distancing Indigenous people from participation, management and governance of our affairs, there are some good practices across Australia that support Indigenous controlled processes for economic development. The case study at Chapter 7, for example, demonstrates an approach to economic development that has some parallels with the Australian Government policy, and some contrasts. Chapter 7 documents the efforts of Yarrabah community to establish a 99 year lease scheme over the township and stimulate home ownership, local employment, and enterprise development, while emphasising Indigenous management and autonomy in all aspects of the project. While the Government model divests administration of 99 year leases to a government entity, the Yarrabah model emphasises local management and control through the Aboriginal Shire Council. The entire Yarrabah community is invited to participate in discussion and decisions about land tenure resolution and economic development, now and into the future.

I am in support of economic development on communal lands. Moreover, I support home ownership and enterprise development for Indigenous Australians who are in a position to achieve these goals. My concerns are not with the intention of the Australian Government policy. My concerns are with diminution of Indigenous autonomy and active participation in achieving these objectives.

The case studies in this Report are a small sample of some of the good practices across Australia that maintain Indigenous control of the policies and processes that affect us. They demonstrate that it is possible and desirable to involve Indigenous people at all levels of policy development and implementation and agreement-making. Furthermore, they demonstrate that the best outcomes for Indigenous people are achieved when policy and agreements are informed by principles and practices that support Indigenous self determination.

The preservation of Indigenous rights to land and an emphasis on Indigenous participation in policy development should be the central points of all future government activity to support economic development on Indigenous land.

Report methodology

Research for this Report included a literature review of relevant publications and policy documents. Interviews of relevant stakeholders added to my research as did information sourced from media reports and government websites. Two surveys conducted by my Office in 2006 provide the primary data to support the findings of the Report. They were the *National Survey on Land, Sea and Economic Development* and the *Survey of Australian Government Departments and Statutory Authorities*.

National survey of traditional owners 2006: *National Survey on Land, Sea and Economic Development*

In May 2006, HREOC conducted a national survey of traditional owners and their representatives designed to elicit information about their experiences and views regarding economic development on their land.

The survey consisted of 19 questions, with a combination of standard quantifiable response questions and open questions aimed at eliciting contextual and qualitative information. All questions gave respondents the opportunity to add their own comments. The survey was designed to identify the following:

- priorities and aspirations for traditional lands;
- capacity to understand and engage in land agreement negotiations;
- barriers to effective participation in land agreement negotiations;
- access to funding and resources; and
- capacity to leverage opportunities on land from other agreements including Shared Responsibility Agreements (SRAs).

Surveys were sent to entities with responsibility to hold, manage and progress land agreements under Indigenous title. These entities included Native Title Representative Bodies and Native Title Services, Land Councils, Community Councils, Shire Councils, Prescribed Bodies Corporate and Indigenous Corporations. Each entity was asked to seek the views of traditional owners represented by their organisation by (a) encouraging individual traditional owners to fill out surveys, and (b) by seeking the endorsement of traditional owners before submitting a response. HREOC received 54 survey responses in total. The survey findings are represented in detail in Chapter 1 of this Report.

Survey of Australian Government Departments and Statutory Authorities

In October 2006, HREOC conducted a survey of Australian Government departments and national, statutory authorities with responsibility to administer programs relevant to economic development on Indigenous lands. Seven Australian

Government departments and two statutory authorities provided information. They were:

- Department of Employment and Workplace Relations;
- Department of Families, Community Services and Indigenous Affairs;
- Department of the Environment and Heritage;
- Department of Agriculture, Fisheries and Forestry;
- Department of Transport and Regional Services;
- Department of Industry, Tourism and Resources;
- Department of Communication, Information Technology and the Arts;
- Indigenous Business Australia; and
- Indigenous Land Corporation.

The survey was conducted by way of a letter which contained ten questions. The questions asked whether:

- programs were designed to implement a particular government policy;
- the department is collaborating with other departments;
- management/monitoring/evaluation systems assess the achievement of program outcomes;
- Indigenous advisory or management committees inform program development;
- the department employs strategies to disseminate program information to Indigenous communities;
- data is available regarding successful and unsuccessful applicants;
- common reasons for unsuccessful funding applications; and
- information about how the program fits into the whole of government strategy to overcome Indigenous disadvantage.

Findings

Findings Chapter 1

1.1 The most important land priority for traditional owners is custodial responsibilities and capacity to either live on, or access the land.

1.2 Economic development is welcomed by traditional owners, though many lack capacity to develop ideas into enterprise.

1.3 There is no consistent and reliable research that identifies the needs and aspirations of traditional owners by location.

1.4 A majority of traditional owners do not have a good understanding of the agreements on land.

1.5 Entities with responsibility or potential to progress economic development are not funded to do so and have numerous statutory obligations that consume existing time and resources.

1.6 Less than 50 percent of the Native Title Representative Body survey respondents claimed to be accessing funds specifically targeted to economic development on land.

Findings Chapter 2

2.1 The Australian Government has begun a process of implementing reforms to Indigenous communal lands that have the potential to radically change the nature of Indigenous communities on these lands.

2.2 The Australian Government's economic reform agenda on Indigenous land will be evaluated by successive COAG reports.

2.3 The marginal nature of the majority of Indigenous land and the legislative restrictions on the resources and the rights of Indigenous tenures, severely limit capacity for economic development.

2.4 The majority of Indigenous communities are located in desert areas where there is limited or no development potential. A minority of Indigenous communities are located in resource-rich areas with well-developed governance structures, experience in negotiating agreements, and capacity to leverage economic opportunities. This means that Indigenous communities have vastly different contexts and capacities and therefore require different forms of support.

2.5 The Australian Government has rejected proposals by Indigenous communities who have put up alternative models to the Government's 99 year headlease model.

2.6 International evidence demonstrates that individualising lease tenures on communal lands such as those proposed under section 19 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) [99 year headleases] leads to a loss of communal lands, and few, if any, economic benefits.

2.7 The Australian Government has signaled an intention to reduce services to homeland communities.

2.8 The home ownership scheme administered by Indigenous Business Australia and central to the Australian Government's economic development strategy is outside the financial reach of the majority of remote Indigenous households.

2.9 The Australian Government has emphasised 'cost effectiveness' as the most important criteria for the provision of homes for purchase under the home ownership scheme.

2.10 Indigenous houses in remote locations have high maintenance requirements due to construction problems, poor choice of building materials and extreme weather conditions.

2.11 Australian housing markets are escalating and investors are increasingly looking to remote markets for capital growth.

2.12 The private sector is not a reliable, proven employer of Indigenous Australians.

2.13 There are a wide range of economic development programs that are targeted to Indigenous people, but there is differential capacity for Indigenous Australians to obtain any benefit from a self access model.

2.14 The capacity of Indigenous people to leverage opportunities from ILUA and SRA agreements is largely dependent on the existence of strong local governance and entities with capacity to progress economic outcomes.

Recommendations

The following recommendations address the concerns raised in this Report. Each recommendation is referenced to relevant international human rights law. Appendix 3 contains full text of the human rights articles cited here.

Recommendations: Chapter 1	**Applicable international human rights law**
1.1 That the Australian Government identify the enterprise aspirations of traditional owners and other Indigenous people and assess their capacity to engage in economic development by: • consulting with communities on a regional basis; • auditing existing resources within regions; • auditing community access to government resources; and • strategically targeting resources to communities according to their relative disadvantage.	*International Covenant on Civil and Political Rights* (ICCPR) and the *International Convention on Economic, Social and Cultural Rights* (ICESCR)*:* **Article 1(1)** and **(2)** ICCPR: **Article 27** *International Covenant on the Elimination of Racial Discrimination* (ICERD): **Article 2(2)** *International Declaration on the Right to Development* (DRD): **Articles 1(1),(2), 3(1)** and **8(2)** *United Nations Declaration on the Rights of Indigenous Peoples* (DRIP): **Article 18, 19, 32(1)** and **(2)** *International Labour Organisation Convention* No. 169 (ILO No. 169)**: Articles 6(1)(b)** and **7(3)**

1.2 That the Australian Government develop a communication strategy to inform all Indigenous Australians, including those who are remotely located, of economic development policy, programs, initiatives and potential sources of funding.	ICCPR and ICESCR: **Article 1(1)** and **(2)** ICESCR: **Article 11(1)**, with reference to **General Comment No. 4: *The right to adequate housing***, para. 9 ICERD: **Article 2(1)** DRD: **Articles 1(3), 3(1)** and **8(2)** DRIP **Articles 19, 32(2)** ILO No. 169: **Article 6(1)(a)**
1.3 In consultation with the states and territories, that the Australian Government develop a mechanism to coordinate the reporting obligations of Indigenous corporations and community councils.	DRD: **Article 2(3)** ILO. No. 169 **Article 6(1)(a)**

Recommendations Chapter 2	**Applicable international human rights law**
2.1 That the Australian Government support a range of land leasing options on communal land including options where leases are held by traditional owners through their elected entities for varying periods of time. That the *Community Homes* program be extended to communities with alternative lease schemes where the lease period is commensurate with the maximum loan repayment period.	ICCPR and ICESCR: **Article 1(2)** ICCPR: **Article 12(1)** ICESCR: **11(1),** also General Comment No. 4 para. 8(a), (c), (d), (f) and (g) DRIP: **Articles 19, 26(1), (2)** and **(3)** and **32(2)** ILO No. 69: **Article 6(1)**

2.2	That all land leasing options on communal land be rigorously and progressively monitored and evaluated and that evaluative research be utilised to inform existing and future lease options.	DRD: **Article 4(1)** DRIP: **Article 39** ILO No. 169: **Article 7(3)**
2.3	That the Australian Government provide evidence of models (domestically and internationally) where individual tenure rights have led to improved economic outcomes for indigenous peoples living on communal lands.	ICESCR: **Article 11(1)** with reference to **General Comment No. 4: *The right to adequate housing*** para. 9 ILO No. 169: **Articles 7(3)** DRIP: **Articles 23, 27** and **39**
2.4	Governments legislate to ensure that consent and authorisation processes for 99 year leases are consistent with those required by sections 203BE(5) and 251(A) of the *Native Title Act 1993* for authorising Indigenous Land Use Agreements (ILUAs).	ICCPR and ICESCR: **Articles 1(1)** and **1(2)** ICCPR: **Article 2(3)(a- c)** ICERD: **Article 5(c)** DRIP: **18, 19, 20(1)** and **(2)** ILO No. 169: **Article 8(1)**
2.5	That the Australian Government remove section 64(4A) from the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).	ICCPR and ICESCR: **Articles 1(1)** and **(2)** ICCPR: **Article 2(1)** and **(2)** ICERD: **Article 5(c)** DRIP: **Articles 4, 18, 20(1)** and **(2), 26(1),(2)** and **(3)** and **28(1)** and **(2)**
2.6	That governments ensure employment contingencies for remote Indigenous employees who are unemployed as a result of a transition from community administration to a shire council model.	ICESCR: **Article 6(1)** and **(2), Article 7(a)(i)** with reference to **General Comment No. 13: *The right to education*** para. 11 and 12 ILO No. 169: **Article 2(2)(c), Article 4(1)**

2.7 In recognition of the continuing disadvantage of remote Indigenous Australians, that governments commit to providing subsidised, quality community housing and public housing according to need, and that no funds from rental housing schemes be redistributed to home ownership schemes.	ICCPR: **Article 12(1), Article 27** ICESCR: **Articles 11(1)** with reference to **General Comment No. 4: *The right to adequate housing***, para. 1, 2, 7, 8(b-g) and 9; and **Article 15(1)(a)** with reference to **General Comment No. 14: *The right to the highest attainable standard of health***, para. 1-3 and 11 DRD: **Article 4(1)** DRIP: **Article 21(1) and (2)**
2.8 That houses constructed under the home ownership scheme be of the highest quality and that regulations be developed to indemnify home owners for agreed periods against structural flaws in the house and the associated infrastructure.	ICESCR: **Article 12(1), (2)(b) and (c)** with reference to **General Comment No. 14: *The right to the highest attainable standard of health***, para. 3,4 and 9 DRD: **Article 8(1)** DRIP: **Article 21**
2.9 That the Australian Government develop a planned, supervised and strategic approach to train CDEP employees working on the house building and maintenance programs by ensuring the highest industry construction standards. That the Government maintain national data on the program. That CDEP employees be provided with award wage employment once they have completed the training.	ICESCR: **Articles 6(1)** and **(2)**, **7(a), (b)** and **(c)**, **Article 13(1)** and **(2)** with reference to **General Comment No. 13: *The right to education,*** para. 11-14 ICERD: **Article 5(e)(i), (iii), (iv)** and **(v)** DRIP: **Articles 17(3), 21(1)** and **(2)** and **23** ILO No. 169: **Article 24**

2.10 That the Australian Government direct ICCs to work with Indigenous land entities (including representative bodies) to strategically link Shared Responsibility Agreements to land agreements in ways that will increase economic development projects and opportunities.	ICESCR: **Article 6(1)** and **(2)** ICERD: **Article 5(e)(i)** and **(v)** DRD: **Article 8(1), (2)** DRIP: **Articles 19, 23, 32(1)** and **(2)** and **39** ILO No. 169: **Article 6(1)(a),(b)**
2.11 That governments provide bilateral support to fund and develop regional Indigenous governance structures that are attached to entities capable of the following: • developing and sustaining an economic development strategy for the region; • applying for funds from governments and other sources; and • coordinating appropriate training and development to support regional economic development.	ICESCR: **Article 6(1)** and **(2), Article 13(2)(b)** and **(d)** with reference to **General Comment No. 13: *The right to education,*** para. 11-14 ICERD: **Articles 5(e)(i), (iv- v)** DRD: **Article 8(1),(2)** DRIP: **Article 4** ILO No. 169: **Article 2(2)(b)**

Note: Appendix 3 of this Report contains full text of the relevant international law provisions.

Native Title Report 2006 overview

Chapter 1

The first chapter contains the findings of a nation-wide survey of Indigenous land owners that was conducted by the Human Rights and Equal Opportunity Commission in 2006. The survey data represents the views of Indigenous land owners about the following:

- aspirations for communal lands;
- understanding of government economic policy;
- capacity to participate in land agreements; and
- capacity to initiate economic development activity on land.

The survey findings are summarised in quantitative data charts, explanatory text and direct quotations.

Chapter 2

The second chapter analyses the Australian Government's actions to implement free market reforms on remote, Indigenous communal lands. The reforms were primarily implemented in the Northern Territory where the Australian Government intends to create a model that can be replicated in other jurisdictions. Chapter 2 covers the following:

- individualising title on Indigenous communal lands through 99 year headleases;
- liberalising public access to Indigenous land through the modification of the permit system;
- home ownership on Indigenous lands;
- centralising government services in large Indigenous townships;
- developing regional shire councils to replace Indigenous community councils
- employment and CDEP reforms; and
- access to capital for Indigenous economic and enterprise development.

Case Studies, Chapters 3 to 7

Chapters 3 to 7 contain five Australian case studies. While each case study documents a very different agreement or enterprise on Indigenous land, they all have economic development in common.

Chapter 3

The Memorandum of Understanding (MoU) between the Australian Government and the Minerals Council of Australia demonstrates a collaborative arrangement between industry and government aimed at improving the life opportunities for Indigenous people. One MoU trial site is profiled in this case study; the East Kimberley Regional Partnership Agreement (the RPA). This case study outlines the ambit of the MoU project and documents the successes and the challenges of the process.

Chapter 4

In order to streamline Indigenous Land Use Agreements (ILUAs), the South Australian Government has implemented a State-wide framework for negotiations. The State-wide approach employs a strategic use of resources that have established State-wide negotiation forums as well as State-wide ILUA templates. The templates contain agreed standards and provisions across areas including pastoral, minerals exploration, petroleum conjunctive agreements, fishing and aquaculture, local government and outback area ILUAs. The templates are designed as useful practical guides to the parties in their attempts to efficiently and cooperatively resolve native title.

Chapter 5

The Argyle Participation Agreement is a high water mark example of a negotiation process for an Indigenous Land Use Agreement (ILUA). The case study demonstrates the ways in which the Argyle ILUA was tailored to meet the needs and aspirations of the traditional owners and the industry parties. The range of relevant, social and economic development opportunities provided by the Argyle Agreement demonstrates the potential for ILUAs to provide good outcomes where there is genuine participation and representation of Indigenous people throughout the negotiations.

Chapter 6

Ngarda Civil and Mining Pty Ltd is an Indigenous owned and managed company that employs an Indigenous workforce to provide contract services to the mining industry in the Pilbara. By employing an Indigenous workforce, the company meets its own objectives while also assisting mining companies to meet their native title Indigenous employment quotas. Ngarda Civil and Mining Pty Ltd profiles innovative practices in recruiting, training and employing Indigenous people in mining and associated industries.

Chapter 7

The Yarrabah community housing project has some distinct parallels with the Australian Government's initiative to individualise tenures on Indigenous communal lands and encourage home ownership. However, while there are similarities in the intention of the Government and Yarrabah initiatives, there are also marked differences in management and governance structures. This case study provides an alternative to the Australian Government model, demonstrating an example of a community determined to locally manage the development of the township while stimulating local economic growth.

Chapter 1

Indigenous perspectives on land and land use

> If a group's traditional country is not in a mining area they escape the injury to country that mining represents but have little opportunity to really develop industry and commerce that could support their communities.[1]

During 2005 and 2006 the Australian Government argued the need for reform to policies and legislations governing Indigenous land tenures. Arguing that Indigenous land has done little to improve the material wealth and well-being of its residents, the Government's proposed a regime to subdivide communal land into individual lease lots and to encourage home ownership and business enterprise. The Government argued that increases in enterprise would have a positive flow-on effect and improve employment opportunities for Indigenous residents.

Markedly absent from this debate has been the perspectives of traditional land owners.

This Chapter puts the views of traditional owners regarding the uses and purposes of their land and seas. This Chapter also contains information about traditional owners' views on economic development and their capacity to engage in economic projects and agreements. Information and data for this Chapter is substantially sourced from a national survey conducted by the Human Rights and Equal Opportunity Commission (HREOC) during 2006.

While the majority of responses to this survey were from traditional owners and their representatives, HREOC also received responses from Indigenous people who live on land that is not theirs traditionally. Their views are also represented in this Chapter.

Australian traditional land owners and 'historical' people on the Indigenous estate

Indigenous traditional land owners are groups of people who have traditional connections to geographical regions of Australia's land and sea. Traditional owners demonstrate traditional connection to land and sea through their association with, and knowledge of, the landscape and sites of cultural significance. Traditional owners may acknowledge, observe and practice traditional laws and customs of their region. Knowledge of the Indigenous languages of the geographic region

1 North Queensland Land Council Native Title Representative Body Aboriginal Corporation, Survey Comment, *HREOC National Survey on Land, Sea and Economic Development 2006.*

is also an identifier of traditional connection to a region. Traditional owners are identified by their connection or affiliation to ancestors who existed in geographic regions at the time of contact with the European settlers.

Many dispossessed Indigenous Australians live on country that is not theirs traditionally. The successive waves of white settlement and of hostile and then protectionist policies mean that large numbers of Indigenous people have not lived on their traditional lands for generations. Some people were moved into missions that have now become Indigenous townships, and others moved to areas where services such as housing, employment, health and education were more readily available.

In non urban environments, the dispossessed groups of people who live on another tribe's land are referred to as 'historical' people. Historical people have varying rights to the land under land rights statutes according to the jurisdiction in which they live. In the Northern Territory under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) for example, historical people must be consulted about development on land, but cannot veto proposals. In New South Wales, Aboriginal people do not have to prove historical connection to the land in order to claim vacant Crown land under the *Aboriginal Land Rights Act 1983*. Ability to claim land is based on membership of a local Aboriginal land council and residency or association with the area.[2]

The survey

In May 2006 HREOC sent a survey to traditional land owners and their representative bodies designed to elicit information about their experiences and views regarding economic development on their land. The survey covered the following:

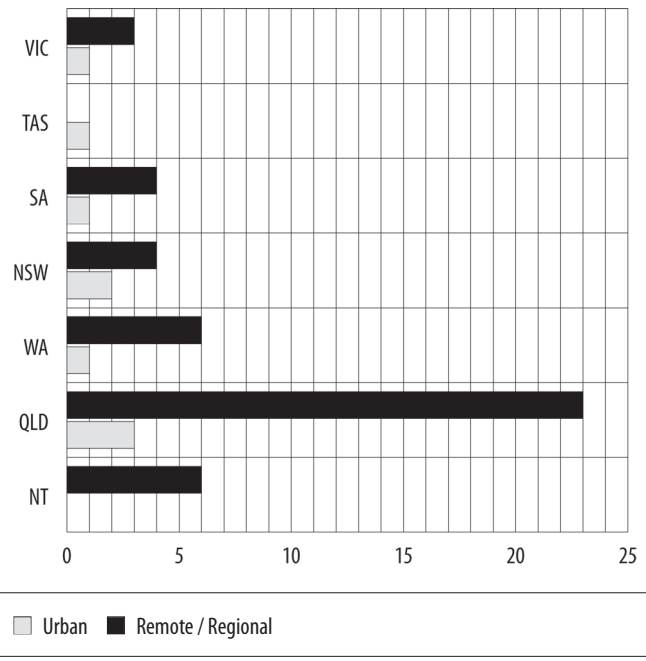
- priorities for / aspirations of / communities, and barriers to their effective participation, in economic development;
- the involvement of different organisations and stakeholders;
- access to funding and resources; and
- negotiations regarding Indigenous Land Use Agreements (ILUAs), Future Acts, Shared Responsibility Agreements (SRAs) and Regional Partnership Agreements (RPAs).

The recipients of the survey included all entities with responsibility to hold, manage and progress land under Indigenous title. These entities included Native Title Representative Bodies and Native Title Services organisations, Land Councils, Community/Shire Councils, Prescribed Bodies Corporate and Indigenous Corporations. Each entity was asked to seek the views of traditional owners represented by their organisation by (a) encouraging individual traditional owners to fill out surveys, and (b) by seeking the endorsement of traditional owners before submitting a response on their behalf in the name of the representative entity. In some instances, we received responses from entities that were representatives of Indigenous people on land, but not necessarily traditional owners. This is represented in the survey data.

2 *Aboriginal Land Rights Act 1983* (NSW), ss53-54, available online http://www.austlii.edu.au/au/legis/nsw/consol_act/alra1983201/s54.html, accessed 13 December 2006.

HREOC received 54 survey responses in total. There were a disproportionately high number of responses from Queensland and this may be explained by the greater number of NTRB organisations in Queensland compared with other states.[3] In addition, NTRBs have statutory reporting responsibilities under the *Native Title Act 1993* (Cth), whereas land councils are predominantly established as land corporations under state legislations without federal reporting responsibilities.[4] The survey respondent rates also demonstrate higher returns from regional and remote regions, reflecting the location of the Australian Indigenous estate as represented in Graph 1.

Graph 1: Survey respondents by jurisdiction and geo-location



Source: *HREOC National Survey on Land, Sea and Economic Development 2006* Urban and Regional/Remote definitions based on ARIA[5] definitions.

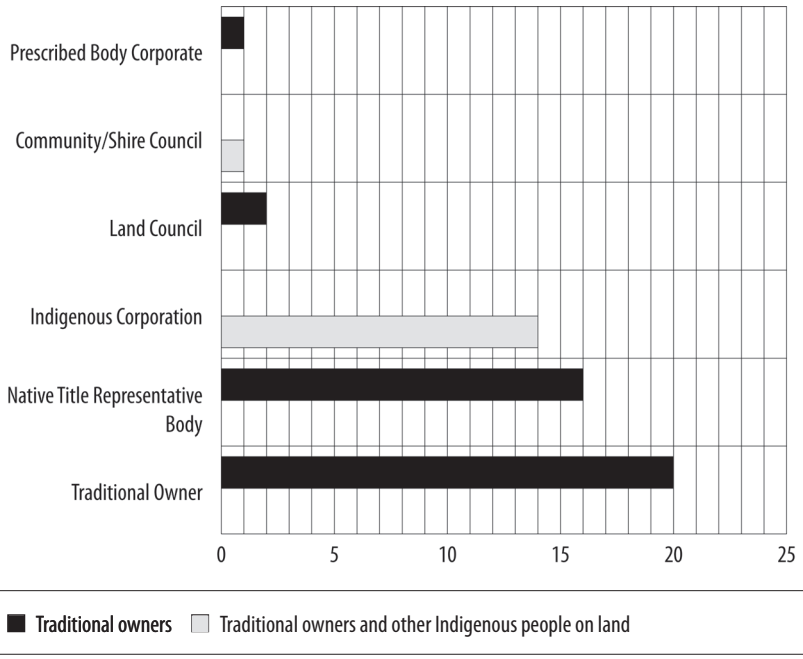
3 There are seven NTRBs in Queensland including the Torres Strait Regional Authority; the highest number in the country. South Australia has one, Western Australia has five, Victoria has one, New South Wales has one, the Northern Territory has two. Neither the Tasmania nor the Australian Capital Territory have NTRBs.

4 Two of the four Northern Territory land councils responded to our survey. Both operate as NTRBs, and both identified as NTRBs for the purposes of our survey data. Of the three Prescribed Bodies Corporate who responded to our survey, two identified as NTRBs, one from the Northern Territory and one from Queensland, and both have been recorded as NTRBs in our survey data.

5 Geo-locations are identified using the Accessibility/Remoteness Index of Australia (ARIA). Urban areas include the Mainland State Capital City regions (ABS Statistical Divisions) and major urban Statistical Districts (those with populations of ≥100,000).
This includes Sydney, Melbourne, Brisbane, Adelaide, Perth, ACT-Queanbeyan, Cairns, Gold Coast-Tweed, Geelong, Hobart, Newcastle, Sunshine Coast, Townsville and Wollongong.
Regional zones include provincial city Statistical Districts plus Darwin Statistical Division and other provincial areas (ABS Collection District ARIA Plus score ≤5.92), with populations <100,000. Remote zones consist of those areas with a CD ARIA Plus score of >5.92 and ≤10.53.

Graph 2 illustrates the groupings of the survey respondents. A large majority of respondents were traditional owners. Graph 2 separates Indigenous Corporations and Community Shire Councils from the traditional owner responses because while they represent traditional owners, their role is not exclusive to that purpose and therefore they are not counted as traditional owners in our data.

Graph 2: Number of survey respondents by entity / group



Source: *HREOC National Survey on Land, Sea and Economic Development 2006.*

In June of 2006 there were a total of 18 Native Title Representative Bodies and Native Title Services[6] (hereon NTRBs) in Australia. We received responses from all but two of the NTRBs. In May 2006 there were 46 registered Prescribed Bodies Corporate (PBCs) in Australia. We received only one response from a PBC despite consistent efforts to engage them. The poor response rate from PBCs is likely due to the fact that so few have staff and the capacity to respond.

6 Native Title Representative Bodies and Native Title Service responses have been grouped together under NTRB responses.

NTRBs, PBCs and Land Councils were required to obtain authorisation of their survey responses from the traditional owners they represent.[7] Along with the traditional owners who provided direct responses to this survey, they collectively constitute the traditional owner responses. We did not receive a representative number of survey responses from land councils.

While the overall number of survey returns is not great, the proportion of responses based on the number of functional land organisations suggests that some early conclusions can be drawn from the data.

Parameters of economic development

The focus of our survey was to assess Indigenous economic activity on Indigenous land tenures. Economic activity can be wide-ranging, including government funded enterprise agreements, multi million dollar private enterprises, small businesses incorporated under the *Aboriginal Councils and Associations Act 1976* (Cth), and Indigenous joint venture projects with non Indigenous partners. While a large proportion of all Indigenous enterprise activity in Australia occurs in urban environments, this report focuses on agreements and development on Indigenous land under communal title, and therefore the context is predominantly remote.

According to the Productivity Commission, in 2005, 'Indigenous owned or controlled land comprised 21.4 percent of the land area of very remote Australia in 2005, but 0.1 percent of the area of inner regional areas and 0.2 percent of the area of major cities.'[8] In 2005 Indigenous Australians owned or controlled 15.9 percent of the Australian land mass. In 2006, the total area has increased to 19.8 percent.

Data in this Chapter provides a picture of the extent of understanding that traditional owners and others have of economic development and their views about its potential on their land.

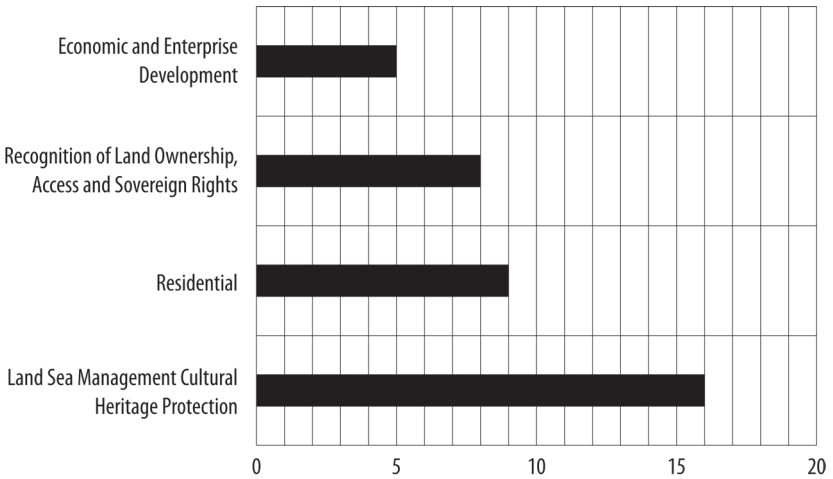
The uses and purposes for Indigenous land

Traditional land owners were asked to identify their most important priority for their land. Graph 3 illustrates these priorities.

7 **Note: Representative bodies including NTRBs, NTSs, Land Councils and PBCs were asked to confirm** that the viewpoints presented in survey responses were endorsed by traditional owners in their representative capacities.

8 **Steering Committee for the Review of Government Service Provision,** *Overcoming Indigenous Disadvantage, Key Indicators 2005 Report*, Productivity Commission, Canberra, para 11.26.

Graph 3: Top land priority for traditional owners



Source: *HREOC National Survey on Land, Sea and Economic Development 2006.*

According to our survey findings, above all other roles, traditional owners are most likely to identify as the custodians and the managers of their land and seas. This means that for the majority, the importance of caring for land, living on land, and the recognition of ownership of land and seas has priority above all other purposes and activity.

The traditional owner priorities for land are a significant finding. They demonstrate a majority of traditional owners are not likely to share the Australian Government's agenda for economic development as a first priority for their land.[9] In fact, out of 39 traditional owner survey responses, only 5 respondents, less than 13 percent, identified economic development as a first priority for land.

> Economic development is an important tool in which to gain self determination and independence, but it should not come at the expense of the collective identity and responsibilities to your traditions, nor the decline in health of your country.[10]

This primary affiliation to land is consistent with the original intentions of the land rights and native title regimes as set out in my *Native Title Report 2005*.[11]

The priorities of traditional owners suggest a potential disjunction between the aims of traditional owners and those of the Australian Government. While this survey can only provide some preliminary findings, it raises questions about how well appraised government and traditional owners are of each others' position. Significant differences in land priorities could compromise objectives and out-

9 Chapter 2 of this Report outlines the Australian Government reforms to Indigenous policy and legislation to facilitate economic and enterprise development.

10 Traditional owner from the Yorta Yorta Nation Aboriginal Corporation, Survey Comment, *HREOC National Survey on Land, Sea and Economic Development 2006.*

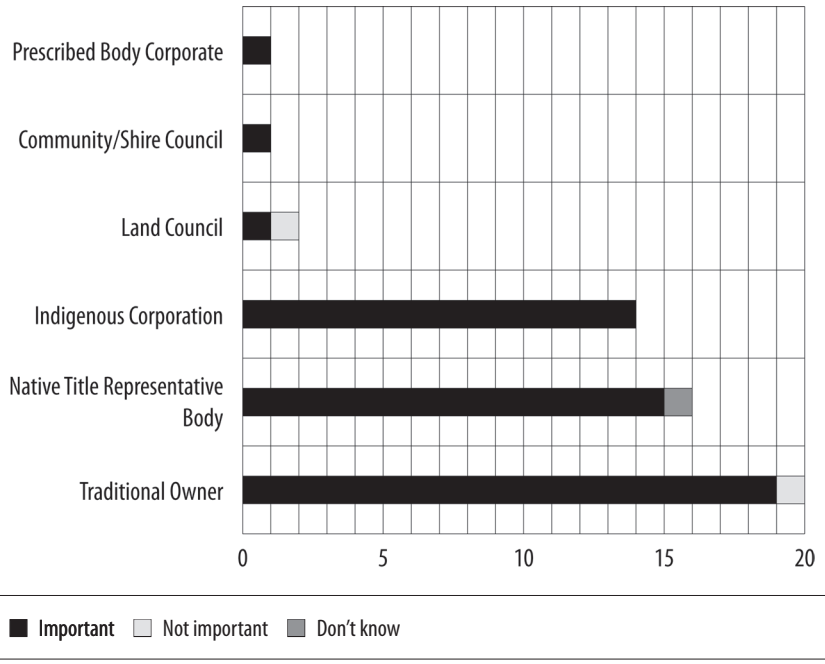
11 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission, Sydney 2005, pp14-30.

comes for both groups and highlights the need for appropriate communication and discussion about government policies at the outset.

Economic development on Indigenous land

Even though the majority of traditional owners did not identify economic development as their first priority for land, they overwhelmingly acknowledged its importance. Graph 4 provides this data by survey respondent group.[12]

Graph 4: Importance of economic development on land



Source: *HREOC National Survey on Land, Sea and Economic Development 2006.*

The importance of economic development on Indigenous land is a significant finding. However, while survey respondents were positive about enterprise development, the majority described a lack of capacity to develop ideas into action.

> [We have no enterprise] as yet but have plans and need support to develop the ideas. We would like to develop fishing, aquaculture and tourism ventures. We need a management plan to include these ideas.[13]

12 **Native Title Representative Body, Prescribed Body Corporate and Land Council Groups all represent** traditional owners. Other survey respondent groups such as Community Councils and Incorporated Bodies represent Indigenous constituents who may or may not be traditional owners. They are therefore separated from traditional owners in the survey findings.

13 **Traditional owner of the Umpila territories, Cape York, Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

The capacity to participate in agreements and to mobilise resources is an essential requirement to realise land aspirations and objectives.

Capacity to engage in agreement making and economic development

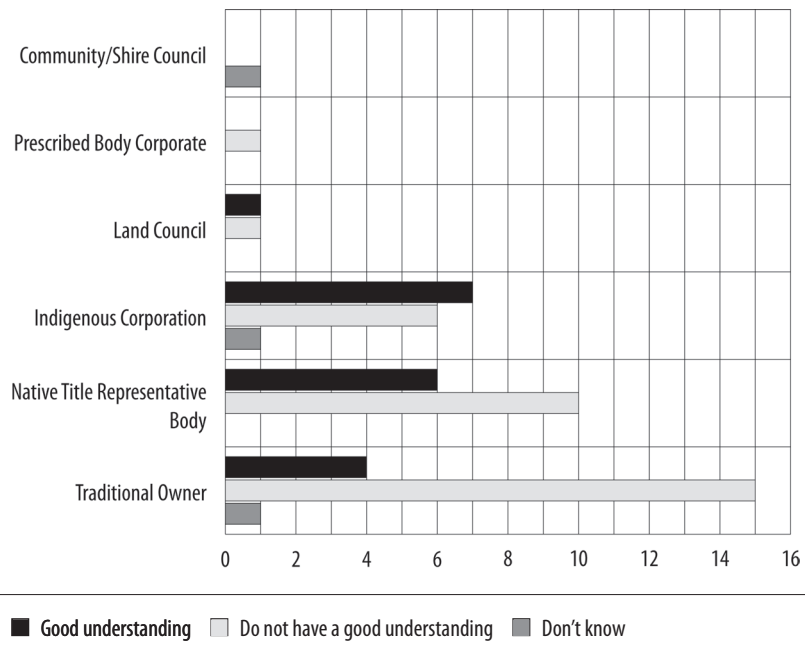
Our survey questions were designed to identify the degree of traditional owner understanding of the policy and legislative contexts of land agreements, as well as ascertaining the extent of their knowledge about programs and funding to support land agreements.

Under the native title regime for example, traditional owners can be parties to Indigenous Land Use Agreements. The extent of their knowledge of the working of these agreements can have bearing on the extent of leverage they obtain in meeting the needs of their family groups and broader communities. In order to be able to obtain every benefit from agreements, it is essential to have an understanding of their potential and their limits.

> Major development is occurring on our traditional lands in one of the fastest growing regions in the world.[14]

Our survey results demonstrate that the majority of traditional owners do not have a good understanding of land agreements as illustrated in Graph 5.

Graph 5: Traditional owner understanding of land agreements



Source: *HREOC National Survey on Land, Sea and Economic Development 2006.*

14 Traditional owner of the Gubbi Gubbi and Butchulla territories, Survey Comment, *HREOC National Survey on Land, Sea and Economic Development 2006.*

Given the findings represented by Graph 5, it is highly likely that a majority of traditional owners cannot confidently participate in negotiations. This inevitably places limitations on their ability to leverage opportunities. Graph 5 also demonstrates that representative bodies are more likely to assume that traditional owners have a good understanding of land agreements than the traditional owners are likely to claim for themselves.

Only 25 percent of traditional owner respondents claimed an understanding of agreements, while 60 percent of their NTRB representatives claimed that traditional owners were able to understand agreements. This raises questions about the extent to which traditional owners are able to give informed consent to land decisions and whether their representatives are aware of their level of comprehension. These factors impact on the longer term commitment to agreements.

> Stop giving us tonnes of paperwork that we don't understand, put it clearly in simplified plain English, otherwise people sign on the dotted line without understanding what they're signing to.[15]

Another survey respondent noted that poor experiences can lead to disillusionment and withdrawal.

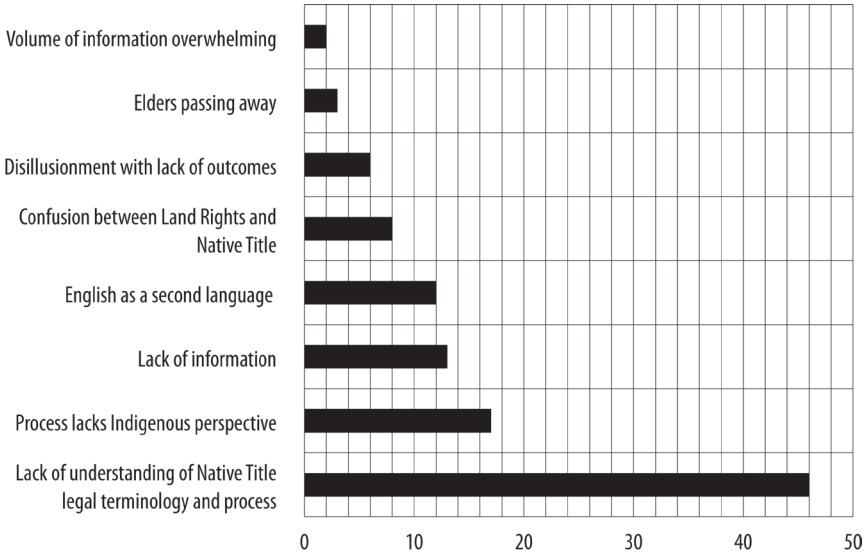
> [The] uncertainty about government processes and requirements is overwhelming for people, and over the top of people's heads, including the lawyers. People want the outcomes and are not really worried about the drawn out processes involved. Bad experiences have led to people not wanting to be involved.[16]

Traditional owners and their representative entities were asked to identify the three most significant factors preventing their understanding of land agreements. Graph 6 illustrates these findings.

15 **Traditional owner from North Queensland (not specified), Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

16 **Traditional owner of the Bega Local Aboriginal Land Council area, Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

Graph 6: Top three reasons preventing traditional owners from understanding land agreements



Source: *HREOC National Survey on Land, Sea and Economic Development 2006.*

Graph 6 demonstrates that the complex and technical terminology of native title and land rights impedes understanding and prevents informed participation. Almost all respondents cited some form of difficulty in understanding agreements.

> We need them to explain the legal process.[17]
>
> [We do] not understand state verses Commonwealth processes. [We do] not understand the different processes and acts. What is native title? The Aboriginal Land Act was set up by lawyers and anthropologists for lawyers and anthropologists, only the professionals can understand it - the lawyers and anthropologists become the gatekeepers and owners of our knowledge, they run everything on our behalf.[18]
>
> We need clear explanations of matters of law, anthropology and political development…The procedures are unfair and biased against Indigenous people. Our people are misled and individuals are paid off to act outside our social and decision-making structures.[19]

The following survey comment from the Eidsvold Wakka Wakka Aboriginal Corporation represents a common view from Indigenous organisations:

17 **Traditional owner of the Juru/Gia People from Bowen to St Helens; traditional owner of the Ngaro People** from Whitsunday Islands; traditional owner of the Kaanju people of Cape York: Survey Comment, *HREOC National Survey on Land, Sea and Economic Development 2006.*

18 **Traditional owner of the Umpila territories, Cape York, Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

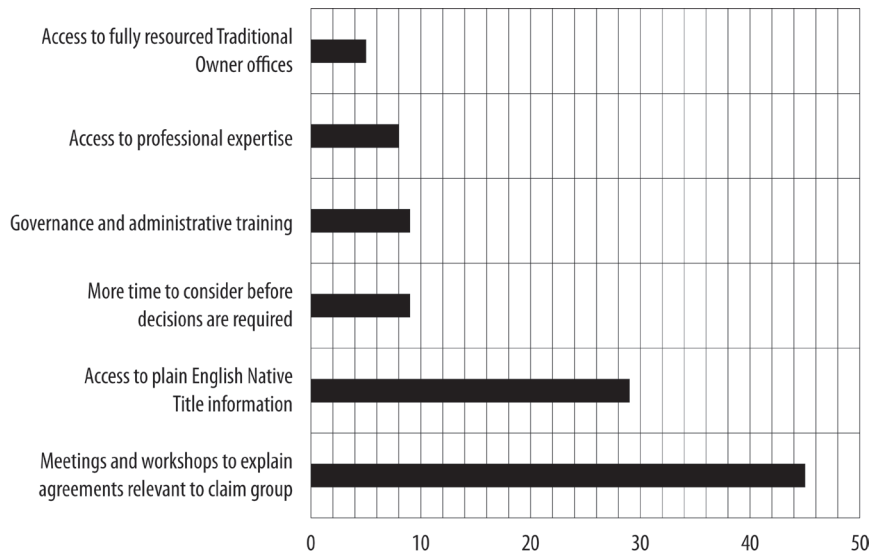
19 **Traditional owner of the Gubbi Gubbi and Butchulla territories, Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

We need to have someone come and talk to us about land and economic development issues.[20]

Improving participation in economic development

Traditional owners and their representatives were asked to identify resources that would assist in overcoming impediments to their participation in land agreements. The responses to these questions provide a mirror image to the impediments. Information and explanation is the key to overcoming the shortcomings as illustrated in Graph 7.

Graph 7: Resources required to improve traditional owner understanding of land agreements



Source: *HREOC National Survey on Land, Sea and Economic Development 2006.*

According to a number of survey comments, time constraints and the large number of matters that need to be resolved in any meeting mean that representative bodies are not able to adequately explain agreements to traditional owners.

> It is very difficult to comply with all of the myriad requirements of funders, courts, the State, other parties as well as spending time on explaining processes to traditional owners. The terminology and concepts are also often very difficult to convey in culturally appropriate ways, with most meetings and discussions having long agendas and little time to spend on detailed discussions.[21]

20 **Eidsvold Wakka Wakka Aboriginal Corporation, Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

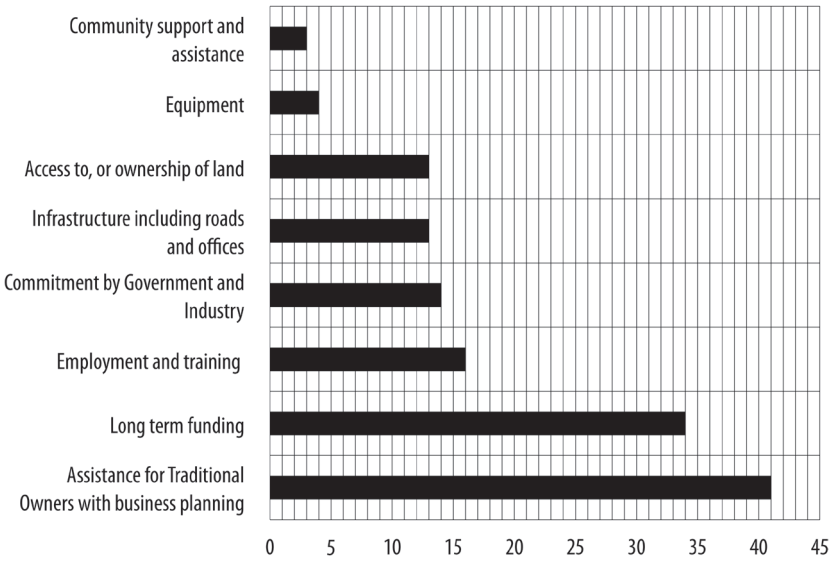
21 **Cape York Land Council Aboriginal Corporation, Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

It is evident from these survey findings that an information campaign is required to improve traditional owner understanding of land regimes and their associated agreement requirements. According to a number of survey comments from traditional owners, there is a sense of being in the dark about what is happening on land.

> We believe that parties are using our land but we receive no feedback or are not consulted. We need more consultation from representatives.[22]
>
> Our native title claim is in progress. An anthropologist came to our land. We are not being told what is happening – people do things and we don't know what is happening. There's economic development (mining) happening on our land, and we don't know whether there are leasing monies coming to us.[23]

Survey respondents were asked to nominate the three most important resources required to progress development on land. Graph 8 provides their responses.

Graph 8: Top three resources required to progress economic development on land



Source: *HREOC National Survey on Land, Sea and Economic Development 2006.*

The need for assistance with business planning is a strong survey finding. Respondents argued that they need skilled personnel, as well as training and funding to progress their economic aspirations. A common comment from survey respondents describes a problem with turnover of qualified staff.

22 **Traditional owner of the Wakka Wakka territory, Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

23 **Traditional owner of the Ngawn territory, Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

> [There is] too much turnover of lawyers and genealogists, and evey time they go there's a new person and they are starting from scratch. This slows things down because the new guy has to learn about things, and he has been taught in a different way so he can't follow the work of the last guy. [24]

An economic base is required for any enterprise. Thirty nine percent of survey responses identified funding, or an income source, as one of the top priorities to progress and support development on land.

Survey respondents also identified infrastructure as a major requirement for economic development, including roads, offices, equipment and capital. The lack of infrastructure in remote locations of Australia must not be underestimated in any discussion about economic development.

> Infrastructure is needed badly. Our capacity is limited to volunteer work and no professional assistance.[25]

Some survey respondents identified land ownership as a precondition for economic development. For those native title holders with limited rights to land, economic development may not be an option afforded by tenure rights. According to the NSW Native Title Services, the three most important requirements for economic development are as follows:

> Increased funding and willingness for State Government to purchase or compulsorily acquire land which can form part of a settlement with native title claimants, specifically freehold grants to traditional owners. Legislative changes to provide a mechanism to grant land directly to traditional owner corporations would support and simplify this process.
>
> Increased funding and willingness of state governments to develop settlements with traditional owners which are creative in the range of settlement options provided including matters such as the grant of commercial fishing licenses and water shares.
>
> And, increased funding for personnel and infrastructure to build the capacity of traditional owners to pursue and progress their economic interests on land and water.[26]

Accessing the funds and resources to progress economic development

As part of our survey, respondents were asked to identify the sources from which they obtained funding from a list of Australian Government department funding bodies including the Indigenous Land Corporation and Indigenous Business Australia.[27] The list of funding bodies is contained at Appendix 2 of this Report. The survey responses illustrated that some NTRBs are not accessing these funds. One traditional owner commented:

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24 **Traditional owner of North Queensland territory (not specified), Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

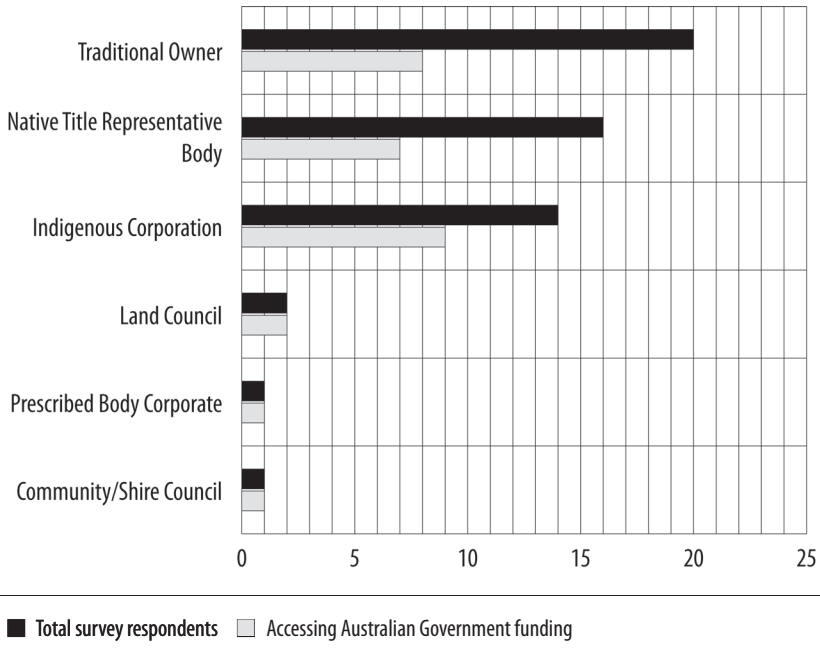
25 **Traditional owner of Gubbi Gubbi and Butchulla territories, Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

26 **NSW Native Title Services Ltd, Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

27 **National Native Title Tribunal,** *Guide to Australian Government Funding Sources,* 2005.

We did not know there were so many potential funders and we live in Victoria, what about those people in remote communities? It is difficult to understand, time consuming to submit to all the different agencies, if we had one regional agreement or treaty over our traditional lands and waters which goes over two states then we would be able to access these departments and have a proper plan that brings in all our aspirations for our people including economic development. We are flat out just protecting our culture and land from getting destroyed.[28]

Graph 9: Survey respondents accessing Australian Government funding to support initiatives on land compared with total respondent numbers



Source: *HREOC National Survey on Land, Sea and Economic Development 2006.*

Of the entities and groups with a potential role to progress economic development on land, our survey demonstrated that less than 50 percent of NTRBs and traditional owners were accessing Australian Government funds. While traditional owners as individuals may be less resourced to seek funding, it is concerning that only 44 percent of the NTRB survey respondents are receiving land development funds or funds for projects on land. As we received survey responses from all but two of the NTRBs operating in Australia, these findings are an accurate representation of actual activity.

Survey comments indicate a further limitation on NTRB ability to fund economic development activity. The following responses from representative bodies illustrate

28 Traditional owner from the Yorta Yorta Nation Aboriginal Corporation, Survey Comment, *HREOC National Survey on Land, Sea and Economic Development 2006.*

difficulty in quarantining resources from their operating funds because funding guidelines prescribe statutory activity and excludes others.

> The Office of Indigenous Policy Coordination (OIPC) sees the funding we receive as relating to core functions, that is, native title claims. We are restricted in the use of funds and are not allowed to help in collateral ways. Any involvement in securing land or use of land other than by the recognition of native title has to be seen to be as a matter incidental to native title and as part of the negotiation of native title rights.[29]
>
> Native Title Services Victoria (NTSV) has no mandate to manage economic development, but only to resolve native title claims. ILUAs with some economic benefits arise from our responsibilities under the Native Title Act.[30]

The statutory obligations of NTRBs under the *Native Title Act* 1993 (Cth) s203BB outline the core functions of representative bodies to:

> (a) research and prepare native title applications, and to facilitate research into, preparation of and making of native title applications; and
>
> (b) assist registered native title bodies corporate, native title holders and persons who may hold native title (including by representing them or facilitating their representation) in consultations, mediations, negotiations and proceedings relating to the following:
>
> (i) native title applications;
> (ii) future acts;
> (iii) Indigenous land use agreements or other agreements in relation to native title;
> (iv) rights of access conferred under this Act or otherwise; and
> (v) any other matters relating to native title or to the operation of this Act.[31]

While these functions do not preclude other activity, Government funding is linked to these native title functions.

Indigenous Land Use Agreements

Increasingly the states and territories are promoting ILUAs as a way to achieve outcomes from native title and to provide alternative settlements to native title claims. According to the National Native Title Tribunal, from July 2005 to July 2006 there were 68 ILUA registrations,

> the highest ever registered in a reporting period…with [a total of] 250 ILUAs registered on the Register of Indigenous Land Use Agreements at the end of the reporting period.[32]

Table 1 provides the number of lodged and registered ILUAs from July 2005–July 2006.

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29 **North Queensland Land Council Native Title Representative Body, Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

30 **Native Title Services Victoria, Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

31 *The Native Title Act 1993* (Cth), s203BB.

32 **The National Native Title Tribunal,** *Annual Report 2005 – 2006*, Commonwealth of Australia, 2006, p72, available online at http://www.nntt.gov.au/publications/AR_20052006/preliminary.asp, accessed 16 November 2006.

Table 1: ILUAs lodged or registered by state and territory 2005-06

ILUAs	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
Lodged	0	1	2	19	4	0	12	4	42
Registered	0	1	34	19	4	0	8	2	68

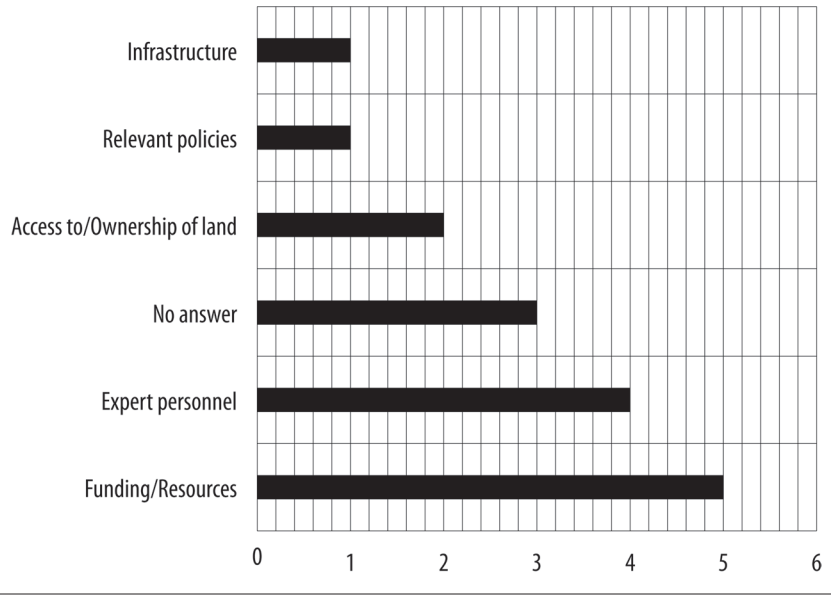
Source: *The National Native Title Tribunal Annual Report 2005-2006, p72.*

Our survey respondents were positive about the potential of ILUAs.

> ILUAs are empowering Aboriginal people to enter into negotiations and have a say about land use in their claim area. ILUAs in South Australia include capacity building and inclusiveness of the claim group, that is, [the claim group] has ownership of the process.[33]

Overall, while NTRBs are increasing their participation in ILUA agreements the majority of them are not accessing other funds to enhance economic opportunities. NTRB respondents to our survey identified the most important priority for increasing economic development is funding and resources as illustrated by the survey responses in Graph 10.

Graph 10: NTRB priorities to progress economic development on land



Source: *HREOC National Survey on Land, Sea and Economic Development 2006.*

33 **Aboriginal Legal Rights Movement Native Title Unit, Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

> The funding NQLC recieves is from OIPC and in accordance with our Program Funding Agreement there is no opportunity to assist traditional owner groups with economic development initatives, this is very frustrating.[34]

The Office of Indigenous Policy Coordination (OIPC) outlines the following parameters for NTRB funding:

> Funding to Native Title Representative Bodies (NTRBs) under the Native Title Program (NTP) is not formula driven.
>
> Within the constraints of the funding available within the Native Title Program ($55.1M in 2006/07 funding year), funding to individual NTRBs is determined on the basis of operational plans developed by NTRBs that identify and cost prioritised native title activities to be progressed in the funding year. Funding is also provided to meet the operational overheads associated with implementing/delivering the funded operational plans. It is open to NTRBs to seek additional funding to meet unforseen native tile matters during the course of the funding year and to seek variations to operational plans to meet emerging/changed priorities.[35]

A further limit to NTRB's capacity to leverage economic opportunities is the high burden of work associated with the future act regime. This is explained in the following survey responses.

> Prior to each financial year NTRBs are required to submit an operational plan which reflects what work is to be undertaken regarding the core functions set out in the *Native Title Act 1993* (Cth). The amount of future acts that are received by the North Queensland Land Council (NQLC) is numerous which means meeting with traditional owner groups every day of the week. The NQLC represents up to 30 native title claims in its region, not only is there difficulty in justifying financial resources, but also human professional resources which equate to funding an operation overall.[36]
>
> Most groups consider [economic development] fundamental… [though] funding is insufficient for core functions, let alone economic development activity.[37]

The functioning capacity of each NTRB can have implications for outcomes on land, economic and otherwise.

> There is no NTRB for this region. The native title service does not seem to have capacity to operate as an NTRB. The lack of capable NTRB leaves the area open to exploitation without Indigenous people's interests being considered. It is very doubtful the service organisation even has sufficient capacity to deal with future acts let alone land acquisition, land management, socio-cultural development, resource management, economic development.[38]

PBCs have no dedicated source of funding from the Australian Government. The recent 2006 Native Title Act Amendment Bill does not appreciably change this

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34 **North Queensland Land Council Native Title Representative Body Aboriginal Corporation, Survey** Comment, *HREOC National Survey on Land, Sea and Economic Development 2006.*

35 **Office of Indigenous Policy Coordination,** *Correspondence with Aboriginal an dTorres Strait Islander Social Justice Commissioner*, Email, 3 June 2006.

36 **North Queensland Land Council Native Title Representative Body Aboriginal Corporation, Survey** Comment, *HREOC National Survey on Land, Sea and Economic Development 2006.*

37 **Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

38 **Foundation for Aboriginal and Islander Research Action, Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

status. PBCs receive assistance from Native Title Representative Bodies to establish and incorporate to the point where they are able to conduct the first annual general meeting. Beyond this, assistance from NTRBs is for functions under s203BB(1)(a) of the NTA that include:

> Assisting PBCs in consultations, mediations, negotiations and proceedings relating to the following:
>
> (i) native title applications
> (ii) future acts
> (iii) Indigenous land use agreements or other agreements in relation to native title
> (iv) rights of access conferred under the NTA or otherwise, and
> (v) any other matters relating to native title or to the operation of the NTA.[39]

Section 58 of the NTA requires Agent Prescribed Bodies Corporate to carry out functions in relation to agreements on behalf of native title holders. A lack of funding currently means that some are not able to operate at the level of responding to future acts.

> PBCs are not funded to function... In particular PBCs of groups in areas where there is no mining happening and hence little or no income from mining or other agreements are particularly disadvantaged. They have the legal responsibility of responding to future act notices post determination yet most can't afford a phone line, fax or postage let alone an office, secretary and computer.[40]

In its 2006 report to the Australian government on PBCs[41] the Office of Indigenous Policy Coordination outlined the following:

> It should also be recognised that, while a determination of native title rights may offer economic opportunities, many PBCs are unlikely to have a capacity to be self-funding, even over the longer term. In a number of regions subject to native title determinations, there may be few if any future acts proposed that will affect the determined native title for some years. Not all future acts concern economic activities or can offer economic benefit to a PBC. In other regions, however, the extent of future acts may be intensive. While this may impose greater demands on the PBC, it may also offer further avenues of support to meet such demands.[42]

The lack of a reliable source of funding for PBCs is a form of double disadvantage for native title holders on marginal land with no other economic activity. In circumstances where the possibility of an ILUA with an industry group is negligible, there is effectively no source of income for the PBC. Obviously little can occur without a functioning body to represent traditional owners in enterprise development or to access funding for projects on land.

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39 **Office of Indigenous Policy Coordination,** *Structures and Processes of Prescribed Bodies Corporate*, October 2006, p11, available online at http://www.oipc.gov.au/NTRB_Reforms/docs/final-PBCs-report.pdf, accessed 13 December 2006.

40 **North Queensland Land Council Native Title Representative Body, Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

41 **Office of Indigenous Policy Coordination** *Structures and Processes of Prescribed Bodies Corporate*, October 2006, available online at http://www.oipc.gov.au/NTRB_Reforms/docs/final-PBCs-report.pdf, accessed 13 December 2006.

42 **Office of Indigenous Policy Coordination,** *Structures and Processes of Prescribed Bodies Corporate*, October 2006, p17, available online at http://www.oipc.gov.au/NTRB_Reforms/docs/final-PBCs-report.pdf, accessed 13 December 2006.

PBCs continue to be reliant on overburdened NTRBs to initiate ILUAs with government in the absence of other parties. The likelihood of self-initiated economic development activity seems remote given that NTRBs currently claim lack of authority and capacity to do the same.

Red tape

Survey respondents identified a further obstruction to potential economic activity as onerous administrative obligations.

> At one stage the Cape York Land Council were required to respond to three audits in twelve months. This practically put a hold on all other matters while significant human resources and time were directed to the auditing processes. NTRBs are funded to conduct native title business and it is a significant waste of resources to be constantly going through audits rather than conducting the business they are set up to do. These processes then force timelines to be extended and the traditional owners are forced to wait longer for outcomes to their land needs and aspirations.[43]

Ken Henry, the Secretary to the Australian Treasury, comments:

> I was struck during a visit to one of the Cape York communities last year, that the principal concern of its leaders was the red tape burden of reporting and compliance arrangements arising from a multiplicity of government intervention programmes and delivery agencies. Compliance with red tape was absorbing all of the administrative capacity of the community. Reducing the red tape burden on indigenous communities must be a national reform priority. [44]

It is difficult to know whether the Cape York situation is an isolated experience, though there is some evidence to suggest otherwise. In 2006 the Australian Government conducted an evaluation into Indigenous administration: *Red Tape Evaluation of Selected Indigenous Communities.* The 22 subjects of the evaluation were not NTRBs but Indigenous Community Councils, local community councils and corporations with amongst other functions, a potential role to support development on Indigenous land. The evaluation found that 'red tape or unreasonable burden is created when applications for funding have to be made every year and when the funding amounts were small. Levels of accountability were not reduced based on the size of the grant.'[45] Administrative and reporting accountability may be one disincentive to accessing Australian Government funding for land development projects.

Traditional owner capacity

A prominent finding from our survey was the financial and time burden placed on traditional owners to participate in meetings related to land agreements. In circumstances where there is significant mining and other industry activity, this

43 **Traditional owner from the Kaanju/Birria Gubba peoples, North Queensland and Cape York regions,** Survey Comment, *HREOC National Survey on Land, Sea and Economic Development 2006.*

44 **Henry K., (Secretary to the Treasury), 'Managing Prosperity'**, *Address To The 2006 Economic And Social Outlook Conference,* Melbourne, 2 November 2006.

45 **Morgan Disney & Associates Pty Ltd,** *Red Tape Evaluation of Selected Indigenous Communities*, May 2006, pp6-7.

can mean regular, even weekly meetings. There is strong incentive for traditional owners to remain informed about activity on their land.

> If we have to meet with the Qld government and they don't pay us, we get nothing. Usually we don't get paid at all. I am a single dad of 3 kids, if I have to go away to a meeting, my dad has to mind the kids, and I pay out of my own pocket and I can't affort to do it. It limits what I can do.[46]
>
> Many of our clients suffer from meeting burnout from having to attend meetings and many have difficulty attending due to costs of travel or limited ability to take time off work.[47]
>
> They don't notify us – we are called into meetings, we are asked to make decisions at the meeting – some people might be representing a whole clan and they have to make a decision on the spot. The applicant has to make the decision, there is no steering committee.[48]

In addition to the practical burden of the time and cost of meetings, our survey found that the lack of land management skill and knowledge of traditional owners impedes their capacity to assume the titles of land that is earmarked for divestment. In Western Australia, the majority of Aboriginal land that is currently held in trust for Aboriginal people cannot be divested because trusts do not have the capacity to manage the land.[49]

According to the WA Aboriginal Land Trust Department and the Indigenous Land Corporation, the following are the greatest obstacles to divestment:

1. the poor condition of the land and the requirement for its rehabilitation;
2. the readiness of Aboriginal people to take over the management of the land, including their capacity for governance of the land;
3. the lack of opportunity for economic development on the land because of its very remote location, its distance from markets, its lack of infrastructure and its lack of resources from which to generate income; and
4. the lack of traditional owner trust funds to resource and sustain the ongoing land management requirements, including fire management, feral weed and feral animal control, and water management.[50]

46 **Traditional owner from North Queensland (not specified), Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

47 **North Queensland Land Council Native Title Representative Body Aboriginal Corporation, Survey** Comment, *HREOC National Survey on Land, Sea and Economic Development 2006.*

48 **Traditional owner of the Juru/Gia People from Bowen to St Helens, of the Ngaro People from Whitsunday** Islands, of the Kaanju people of Cape York, Survey Comment, *HREOC National Survey on Land, Sea and Economic Development 2006.*

49 **Aboriginal land for divestment in WA includes land purchased by the Indigenous Land Corporation and** Aboriginal reserves held by the Native Welfare Department and a number of other State government agencies are vested in the Aboriginal Lands Trust (ALT) under the Aboriginal Affairs Planning Authority Act 1972 (WA).

50 **Padgett, A., (Indigenous Land Corporation) and Thomas, R., (Aboriginal Land Trust, Department of** Indigenous Affairs, WA) communication with the author, 10 November 2006.

Lack of finance to pay rates, to maintain existing infrastructure, to maintain the land and manage pests and weeds, insurance and other associated costs with land is a problem identified by one Queensland survey respondent:

> The Geike Aboriginal Corporation has had the Geike Station purchased back by the Indigenous Land Council. We don't have the deeds to the land but are expected to pay the rates without any funding or ability to develop an income to raise money to cover the costs.[51]

If NTRBs are not funded to carry out activity not strictly prescribed under s203 of the NTA, and if PBCs are lacking access to any form of secure funding, there are some serious concerns about the capacity for native title holders to manage existing land assets.

Our survey demonstrates that there are distinct impediments to economic development for traditional owners and their representative bodies. Despite these impediments, there is potential for governments to harness the interest of traditional owners in economic projects. By utilising the existing land holding governance structures, whether they be native title representative bodies or land councils and land trusts, governments have an opportunity to work in partnership with Indigenous Australians to address some of their key policy objectives.

There is potential for governments to buttress land agreements with employment, education and training initiatives. This may increase Indigenous employment rates and create economically autonomous communities. The case studies in this Report provide examples of how this is being achieved in Australia today.

The Australian Government requires reliable information about traditional owner priorities for land to ensure that its policies are appropriately targeted to achieve mutual objectives. In the same way, traditional owners require information about the Government's strategy in order to make informed decisions about land and future economic opportunities. There is currently no mechanism or communication strategy for this to occur.

Findings

1.1 The most important land priority for traditional owners is custodial responsibilities and capacity to either live on, or access traditional land.

1.2 Economic development is welcomed by traditional owners though many lack capacity to develop ideas into enterprise.

1.3 There is no consistent and reliable research that identifies the needs and aspirations of traditional owners by location.

1.4 A majority of traditional owners do not have a good understanding of the agreements on land.

1.5 Entities with responsibility or potential to progress economic development are not funded to do so and have numerous statutory obligations that consume existing time and resources.

51 **Traditional owner of the Kaanju people, Cape York Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2006.*

1.6 Less than 50 percent of the Native Title Representative Body survey respondents claimed to be accessing funds specifically targeted to economic development on land.

Recommendations

Recommendation 1.1

That the Australian Government identify the enterprise aspirations of traditional owners and other Indigenous people and assess their capacity to engage in economic development by:

- consulting with communities on a regional basis;
- auditing existing resources within regions;
- auditing community access to government resources; and
- strategically targeting resources to communities according to their relative disadvantage.

Recommendation 1.2

That the Australian Government develop a communication strategy to inform all Indigenous Australians with a targeted campaign to inform those who are remotely located, of economic development policy, programs, initiatives and potential sources of funding.

Recommendation 1.3

In consultation with the states and territories, that the Australian Government develop a mechanism to coordinate the reporting obligations of Indigenous corporations and community councils.

Chapter 2

Economic development reforms on Indigenous land

Introduction

In 2006 the Secretary of the Department of Prime Minister and Cabinet made a revealing statement about Indigenous affairs. He argued that his own government's policy performance in the Indigenous portfolio had been a failure. He went further to say that while well intentioned, the policies and approaches of the past 30 years had contributed to poor outcomes for Indigenous people.

> I am aware that for some 15 years as a public administrator too much of what I have done on behalf of government for the very best of motives has had the very worst of outcomes. I and hundreds of my well-intentioned colleagues, both black and white, have contributed to the current unacceptable state of affairs, at first unwittingly and then, too often, silently and despairingly.[1]

This statement was made in the context of the Australian Government's ambitious reform agenda aimed at significantly recasting Indigenous policy in remote Indigenous Australia.

During 2005 and 2006 the Government implemented legislative and policy reforms that will change the face of Indigenous communities located on communally titled land. The Government argued that communal tenures prevent Indigenous people from improving material wealth and economic circumstances. According to the Government, individual property rights will allow Indigenous Australians to accumulate assets and participate in market economies. The Government's reforms are designed to emphasise the individual as an agent in economic self development through 'building wealth, employment and an entrepreneurial culture.'[2] According to the Minister for Indigenous Affairs:

1 **Shergold P., (Secretary of the Department of the Prime Minister and Cabinet),** *Indigenous Economic Opportunity: the Role of the Community and the Individual*, Speech delivered at the First Nations Economic Opportunities Conference, Sydney, 19 July, 2006.

2 **Brough M., (Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the** Prime Minister for Indigenous Affairs), *Blueprint for Action in Indigenous Affairs*, Address to the National Institute of Governance: Indigenous Affairs Governance Series, Canberra, delivered 5 December 2006, available online at http://www.facs.gov.au/internet/minister3.nsf/content/051206.htm, accessed at 18 December 2006.

> It is individual property rights that drive economic development. The days of the failed collective system are over.[3]

This Chapter focuses on the Government's economic reform agenda with discussion about the following:

- individualising title on Indigenous communal lands through 99 year headleases;
- liberalising public access to Indigenous land through the modification of the permit system;
- home ownership on Indigenous lands;
- centralising government services in large Indigenous townships;
- developing regional shire councils to replace Indigenous community councils
- employment and CDEP; and
- access to capital for Indigenous economic and enterprise development.

The government policy framework

The Australian Government's policy agenda is contained in the 2006 *Blueprint for Action in Indigenous Affairs* (hereon referred to as the Blueprint). The Blueprint defines the Government's intention to replace protectionist, welfare-based approaches to Indigenous affairs with market-based approaches to land, housing, enterprise development and employment. This means opening up Indigenous land to the wider Australian public and creating more interaction between remote communities and the Australian economy. The discourse that accompanies the Government's policy reforms defines a need to 'normalise' Indigenous communities through mainstreaming service delivery and creating market economies.

> We will need to remove barriers to economic opportunity. But we are not proposing to use government programs to create artificial economies. It doesn't work. We are talking about creating an environment for the sort of employment and business opportunities that exist in other Australian towns…
>
> Land tenure changes will be progressively introduced, subject to the agreement of traditional owners, to allow for home ownership and the normal economic activity you would expect in other Australian towns.
>
> In places like Wadeye, Cape York and Groote Eylandt this is just beginning to happen. We want to get to the point where people living in these remote communities are not solely dependant on community or public housing. They should be able to buy their own homes. Those who don't should make a fairer contribution in rent.[4]

In 2005 the Australian Government announced legislative amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (hereon referred to as ALRA). One significant addition to the ALRA was a provision that permitted Governments to negotiate 99

3 **Brough, M., (Minister for Families, Community Services and Indigenous Affairs), as quoted in ABC Online,** *The World Today*, 'Government to reform Aboriginal land rights', available online at http://www.abc.net.au/worldtoday/content/2006/s1652229.htm, 31 May 2006, accessed 8 December 2006.

4 **Brough M., (Minister for Families, Community Services and Indigenous Affairs),** *Blueprint for Action in Indigenous Affairs*, Address to the National Institute of Governance: Indigenous Affairs Governance Series, Canberra, 5 December 2006, available online at http://www.facs.gov.au/internet/minister3.nsf/content/051206.htm, accessed at 18 December 2006.

year headleases over Northern Territory townships under Indigenous communal land rights tenure. The headleases would then be divided into sub leases for individual tenants, home purchasers, businesses and government service providers.

Accompanying the tenure reforms in 2006 were proposed changes to the ALRA permit system. The ALRA permit system currently requires all visitors, non Indigenous residents and non residents to obtain a permit to enter and stay on Indigenous land. The Australian Government's aim in reforming the permit system is to liberalise land access so that the providers of goods and services can enter Indigenous land without restriction.

Integral to the government's 'normalisation' strategy are proposed changes to the Indigenous housing system and housing markets. The intention is to increase home ownership and reduce reliance on government subsidised rental accommodation. According to the Government, these reforms are dependent on 99 year leases. The Minister for Families, Community Services and Indigenous Affairs has determined that funding for home ownership schemes will be contingent on the states and territories amending their land rights legislation to make provision for 99 year headleases.

Finally, the Blueprint sets out the Australian Government's intention to limit the supply of services and financial support to small 'unsustainable' Indigenous communities. If Indigenous people on homelands and outstations want to access health and education services they will have to move to the larger townships.

The precursor to the Blueprint is the 2003 Council of Australian Governments report, *Overcoming Indigenous Disadvantage, Key Indicators* (The COAG Report). The Report is the framework on which the Indigenous reform agenda has been developed. The COAG Report has a dual focus. It maps the extent of Indigenous disadvantage using 2001 census data and it provides a framework for the focus of government action. 'Economic participation' is the apex of the tripartite COAG framework, along with creating healthy families and early childhood. The COAG Report recommends: 'improved wealth creation and economic sustainability for individuals, families and communities.'[5]

> A key finding of the *Overcoming Indigenous Disadvantage Key Indicators*
>
> *2003 Report* is that economic development is central to improving the well-being of Indigenous Australians.
>
> A strategic goal of the Australian Government's Indigenous policy is to increase Indigenous economic independence, through reducing dependency on passive welfare and stimulating employment and economic development opportunities for Indigenous individuals, families and communities.

The COAG Report aims to implement 'economic participation and development' through seven specific areas for action. These are contained in the COAG *strategic areas for action* and include the following:

- employment (full-time/part-time) by sector (public/private), industry and occupation;
- CDEP participation

5 SCRGSP (Steering Committee for the Review of Government Service Provision) 2003, *Overcoming Indigenous Disadvantage: Key Indicators 2003*, Productivity Commission, Canberra, s2.4.

- long term unemployment;
- self employment;
- Indigenous owned or controlled land;
- accredited training in leadership, finance or management; and
- case studies in governance arrangements.[6]

The COAG Reports on *Overcoming Indigenous Disadvantage* will be issued on a two yearly basis and will be formulated from a range of data sources including the Australian Bureau of Statistics (ABS), the Australian Institute of Health and Welfare and the Productivity Commission as well as government departments. Successive Reports will be used to evaluate the reform agenda.

> Progress will be monitored through the *Overcoming Indigenous Disadvantage* reports, which measures key indicators in Indigenous social and economic well-being from a whole-of-government perspective. In particular, the increased participation of Indigenous Australians in employment and increased wealth of Indigenous Australians—collective and individual—will be monitored. In addition, improvements will be continually monitored through agencies measuring their contributions against each initiative in the strategy.[7]

Indigenous land tenures

The Australian Government's reforms must be considered with full knowledge of the location, infrastructure, and legislative parameters of communally titled Indigenous land. As of June 2006, Indigenous Australians held communal rights and interests to land encompassing 19.8 percent of the Australian land mass.[8] While there is no doubt that the Indigenous 'estate' is now considerable, most of the land that has been returned to Indigenous people since the 1970s is remote, inhospitable and marginal. The process of colonisation over two centuries ensured that the best land was granted, taken or purchased by non-Indigenous Australians. The Crown land that was still unallocated by the 1970s remained so for good reason. However, in recent times some of the remote, coastal land under Indigenous tenure has become attractive to developers, governments and non-Indigenous residents. This trend is likely to continue as residential markets spread along the Australian coastline. Land in the central desert belt of Australia is unlikely to attract residential markets, now or into the future.

There are three ways that Indigenous land has been returned to Indigenous people. It has been allocated by governments through statutory land rights, claimed under the native title regime, or purchased on behalf of Indigenous people with funds established to provide land to the dispossessed. Indigenous Australians have also purchased land as individuals, in the same way as non-Indigenous Australians and

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6 **SCRGSP (Steering Committee for the Review of Government Service Provision) 2003,** *Overcoming Indigenous Disadvantage :Key Indicators 2003*, Productivity Commission, Canberra, s2.5.

7 **The Australian Government,** *Achieving Indigenous Economic Independence, Indigenous Economic Development Strategy, Targeting jobs, business and assets*, 2005, available online at: http://www.workplace.gov.au/NR/rdonlyres/B7206570-9BFD-4403-B4A3-6649065FAE5A/0/IEDStrategyBooklet_revised_FINAL.pdf accessed 5 March 2007.

8 **National Native Title Tribunal,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 7 December 2006, p1.
Note: These percentages are approximate as the information is based on broad land tenure and some small areas, usually less than 50 sq kms, are not necessarily captured.

through land councils in some states. Land that has been returned to Indigenous Australians is largely unallocated Crown land. The majority of the land is located in very remote desert regions with limited or no infrastructure, roads or utilities.

Native Title

Indigenous traditional owners have varying rights and interests to just over 8.5 percent of the Australian land mass as a consequence of native title determinations.[9] By June 2006 there were 60 determinations that native title exists. However, in the majority of cases the traditional owners do not have exclusive possession of the land. Traditional owner rights to land are limited to the same customary activities as those that were practiced centuries ago and recorded by the 'first contact' non-Indigenous colonisers. The claimable land that exists under the native title regime includes unallocated Crown lands, some reserves and park lands, and some leases such as non-exclusive pastoral and agricultural leases, depending on the state or territory legislation under which they were issued.

Across Australia, just over 96 percent of all native title land is classified as very remote by the *Accessibility Remote Index of Australia* (ARIA), the most widely used standard classification and index of remoteness.[10]

In terms of the size, Western Australia has by far the largest areas of native title land of any Australian jurisdiction. Ninety two percent of the area of native title determinations is in Western Australia (WA). A large proportion of native title land in WA is in the Gibson, Tanami and Great Sandy Desert regions as well as in the Kimberley.

In the other states and territories native title rights and interests have been recognised over smaller parcels of land.

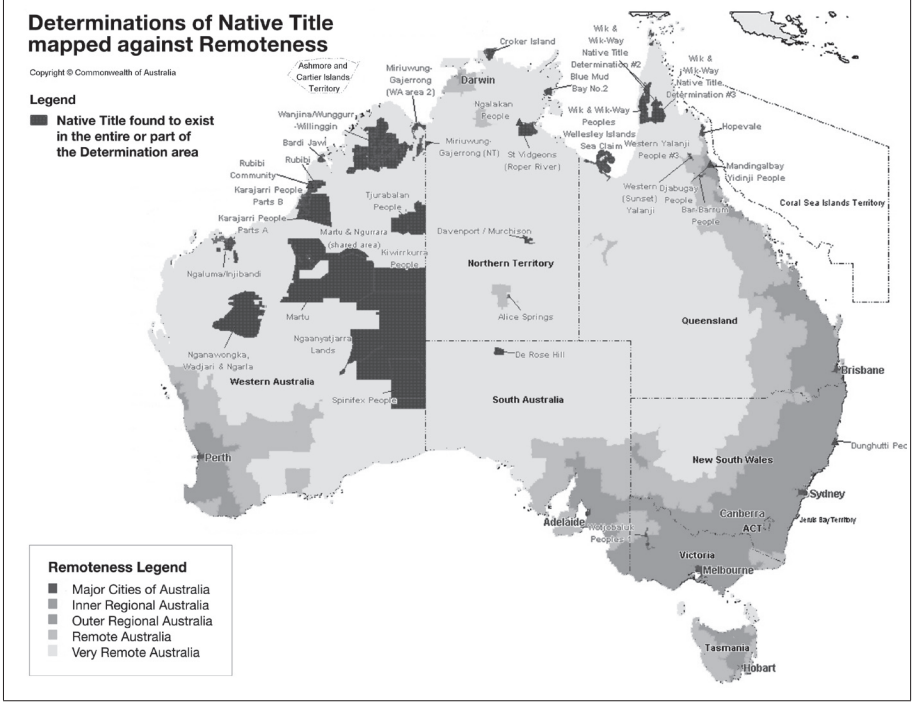
- In Queensland land under native title is in the 'very remote' Cape York region, in Far North Queensland and in the Torres Strait.
- In South Australia native title interests and rights have been recognised in the 'very remote' north central region of the state which is partially located within desert regions.
- In the Northern Territory native title interests and rights have been recognised over land and seas in 'very remote' regions, and in Alice Springs, classified as an 'outer regional' by ARIA.
- In Victoria, native title land is located 'remote' and 'outer regional' areas.
- In Tasmania there are no successful native title claims to date.
- By June 2006, New South Wales was the only jurisdiction that successfully achieved a native title determination in an 'inner regional' area. The land parcel is very small comprising 1 square kilometre on the New South Wales Coast.

9 **National Native Title Tribunal** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner,* Email, 7 December 2006.

10 **National Native Title Tribunal** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner,* Email, 22 January 2007.

Overall, the land over which native title interests and rights have been recognised is some of the most marginal and inhospitable land in Australia. Map 1 shows the location of Indigenous land under native title by remoteness.

Map 1: Determinations of Native Title mapped against remoteness – 2006



Source: *National Native Title Tribunal 2006.*

Note: Remoteness areas are based on the Accessibility Remoteness Index of Australia (ARIA), Developed by the Department of Health and Aging (Austn Govt) and the National Key Centre for Social Applications of GIS (GISCA).

Disclaimer: The Registrar, the Native Title Tribunal and its staff and officers and the Commonwealth, accept no liability and give no undertakings, guarantees or warrantees concerning the accuracy, completeness or fitness for purpose of the information provided.

Data statement and acknowledgements: Spatial data and/or tenure information sourced from and used with permission of: Landgate WA; Dept of Natural Resources and Water, Qld; Dept of Lands NSW; Dept of Planning and Infrastructure NT; Dept for Environment and Heritage SA; Dept of Sustainability and Environment Vic; Geoscience Australia and Australian Bureau of Statistics, Austn Govt.

Indigenous land rights statutes

Indigenous lands granted under state, territory and federal statute constitutes 14.4 percent of the Australian land mass.[11] Land under statute has been granted or purchased by governments for Indigenous people since the 1970s. Like land under native title tenure, while the land area is extensive, the vast majority of it is marginal, located in desert regions or in remote locations in the north of Australia.

Map 2 demonstrates that the land under statutory land rights is overwhelmingly represented in the central desert regions of Australia. Vast tracts of Indigenous land traverse Western Australia, the Northern Territory and South Australia. There are also large tracts of Indigenous land in the remote north eastern regions of the Northern Territory, in the coastal regions of Western Australia's northern belt and the coastal Cape York areas of Northern Queensland.

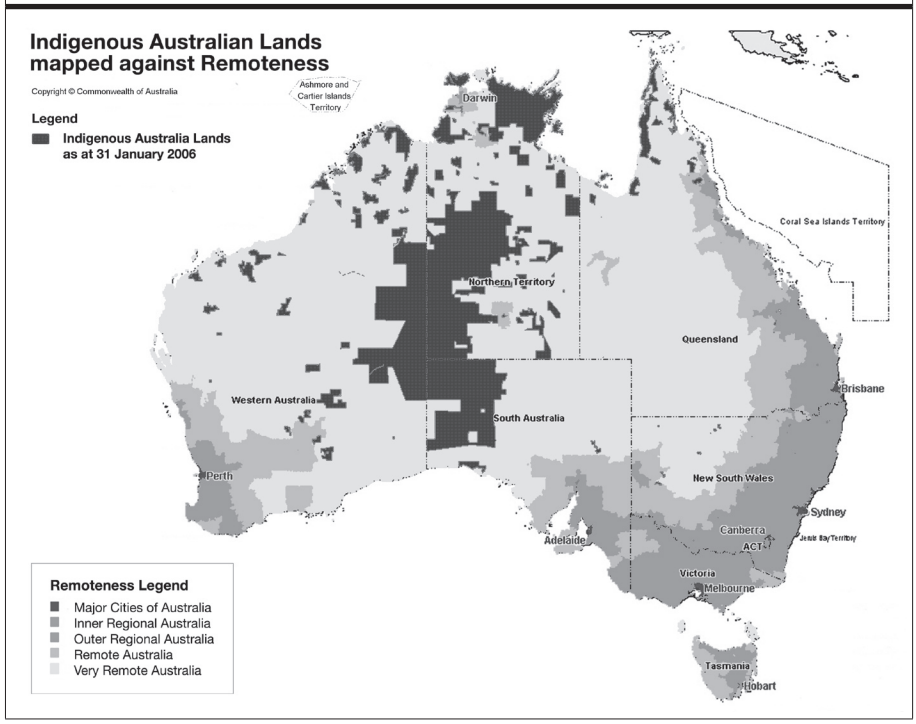
The high commercial value of the land in New South Wales (NSW) provides an exception to the trend for land to be remote and marginal. While the land granted to land councils in NSW is in many small parcels rather than large areas of country, some of it is very valuable in terms of its potential for development, both residential and commercial.[12]

Map 2 shows the location of Indigenous land under statutory land rights.

11 **National Native Title Tribunal,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner,* Email, 7 December 2006, p1.
Note: These percentages are approximate as the information is based on broad land tenure and some small areas, usually less than 50 sqkm, are not necessarily captured.

12 **Office of the Registrar, NSW Aboriginal Land Rights Act,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner,* Email, 31 January 2007, p1.
Note: Lands granted to Local Aboriginal Land Councils in New South Wales are of high commercial value due to their development potential for either residential or commercial use. The land claimed under the NSW *Aboriginal Land Rights Act 1983* is currently valued at approximately $800million. This is despite the fact that land parcels claimed in NSW are relatively small when compared to jurisdictions like the Northern Territory.

Map 2: Statutory land rights areas mapped against remoteness – 2006



Source: *National Native Title Tribunal 2006.*

Note: Remoteness areas are based on the Accessibility Remoteness Index of Australia (ARIA), Developed by the Department of Health and Aging (Austn Govt) and the National Key Centre for Social Applications of GIS (GISCA).

Note: This map does not include Indigenous Land purchased by the Indigenous Land Corporation

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Data statement and acknowledgements: Spatial data and/or tenure information sourced from and used with permission of: Landgate WA; Dept of Natural Resources and Water, Qld; Dept of Lands NSW; Dept of Planning and Infrastructure NT; Dept for Environment and Heritage SA; Dept of Sustainability and Environment Vic; Geoscience Australia and Australian Bureau of Statistics, Austn Govt.

Other Indigenous communal land tenures

In addition to native title and land rights tenures, Indigenous land has been purchased on behalf of Indigenous people by the Indigenous Land Corporation (ILC) since June 1995. Indigenous Australians can apply to the ILC for purchase of land under the categories of cultural, social, environmental and economic benefit. Applicants must identify the ways in which the land purchase addresses dispossession. They must also define a specific purpose for the land under one of four categories and set achievable milestones and outcomes.

- Applicants are asked to enter into a lease while the ILC owns the land. The terms of the lease include a staged work plan, including capacity development activities, and applicants are required to report on and monitor how work is going.
- Progress towards a land grant depends on successful completion of the work plan. It is the ILC's opinion that it is usually reasonable to grant land within three years of buying it.
- The ILC's purchase and divestment policy is aimed at ensuring that the land purchased will remain Indigenous-held and can provide future generations with cultural, social, environmental or economic benefits.
- The ILC must grant title to land to an Aboriginal and Torres Strait Islander Corporation as defined in the Aboriginal and Torres Strait Islander Act 2005.[13]

Land purchased by the ILC covers over 5.5 million hectares and cost almost $170 million by June 2006. Since 1995 the ILC has made a total of 201 land acquisitions, 27 have been acquisitions in urban locations[14]

The size and location of Indigenous communities

The 2001 census data identifies a total of 458,520 Indigenous people in Australia. Of these 121,163 were residents in remote and very remote regions.[15] There are 1,139 discrete communities in remote and very remote regions, of which more than half (577 in total) have populations of less than 20 people.[16] In most cases, larger communities represent Indigenous living areas formerly constituted as government and mission settlements. The smaller populations are outstations or homeland communities.

> [O]utstation communities… had their origins in voluntary and spontaneous resettlement of Aboriginal country commencing the 1970's. These settlements are found predominantly in central Australia, the Kimberly, the top end of the Northern Territory and the Cape York Peninsula.[17]

Table 1 provides information about the number, population size and location of Indigenous communities.

13 **Indigenous Land Corporation, The ILC and Land Acquisition, Website, available online at:** http://www.ilc.gov.au/site/page.cfm?u=2 accessed 12 March 2007.

14 Indigenous Land Corporation, *Annual Report 2005-06*, 2006, p34.

15 **Australian Bureau of Statistics,** *Population Characteristics of Aboriginal and Torres Strait Islander Australians*, 2001, ABS 4713.0, Canberra, p22.

16 **Australia Bureau of Statistics,** *Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities*, 2001, ABS cat no. 4710.0, Canberra.

17 **Taylor, J.,** *Population and Diversity: Policy Implications of Emerging Indigenous Demographic Trends*, Centre for Aboriginal Economic Policy Research, Discussion Paper no. 283/2006, Australian National University, Canberra, 2006, p48.

Table 1: Number of discrete Indigenous communities by settlement size and remoteness region – 2001

Settlement Population Size	Major Cities	Inner Regional	Outer Regional	Remote	Very Remote	Total
1-19	0	0	6	33	577	616
20-49	0	1	8	36	228	273
50-99	1	7	13	17	64	102
100-199	3	5	12	9	51	80
200-499	1	6	11	11	77	106
500-999	0	0	0	1	17	18
1000+	0	0	3	2	16	21
Total	5	19	53	109	1,030	1,216

Source: Australia Bureau of Statistics, *Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities*, 2001, ABS cat no. 4710.0, Canberra.

Economic development limitations of Indigenous land

The Indigenous land base is not comparable with land in urban environments and large regional townships. In remote Indigenous communities almost all services are provided by governments or by church organisations. The land is inhospitable, and usually cut off from markets and cities by distance and poor road infrastructure. The tropical north is inaccessible by road during the wet season which can extend to four months each year. The climate, soil and weather are not conducive to cultivation, and tourist markets are limited in the majority of the desert regions. It is therefore difficult to develop and maintain significant enterprise ventures on Indigenous land.

> Experience in remote Australia suggests that a goal of developing under-developed Indigenous-owned land will not of itself be the driver of private-sector finance availability. On its own terms, whether this land was freely alienable or not, much of this land is in the poorest land classes and is remote from markets.[18]

Economic opportunities are further limited by the fact that land rights regimes in Australia provide only the most minimal rights to subsurface minerals. The New South Wales *Aboriginal Land Rights Act 1983* (NSW) provides rights to minerals though significantly excludes rights to gold, silver, coal and petroleum. In Tasmania

18 Linkhorn C., *Maori Land and Development Finance*, Discussion Paper 284/2006, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2006, p25.

under the *Aboriginal Lands Act 1995* (Tas), minerals other than oil, atomic substances, geothermal substances and helium are the property of Indigenous people to a depth of 50 metres. No other land rights regime in Australia provides rights to subsurface minerals. Indigenous land holders have to apply for licences for mining activity in the same way as anyone else.

While for the most part Indigenous Australians have no mineral entitlements, the existence of a mining tenement can provide royalty payments to traditional owners. Information outlining mineral rights under the land rights legislations of all Australian jurisdictions is provided at Appendix 1 of this Report.

Although commercial rights are not specifically excluded from the *Native Title Act 1993* (Cth), sections 211(2) and (3) indicate that native title interests and rights are generally expected to encompass traditional activities. These include hunting, fishing, gathering, participating in spiritual or cultural activities and acting for the purpose of satisfying personal, domestic, non-commercial or communal needs.

The case law that has defined and interpreted the *Native Title Act 1993* (Cth) clarified that subterranean minerals and petroleum are the property of the states and held this property right is sufficient to extinguish native title rights. The High Court judgement in *Ward*[19] determined that native title entitlements should be characterised as a 'bundle of rights' rather than an 'underlying title to land.' The practical effect of *Ward* is that the potential economic entitlements of the claimants are severely restricted. The 'bundle of rights' interpretation limits the legal recognition of economic and resource rights. Only exclusive possession under native title vests land ownership rights in traditional owners, including the right to exploit mineral resources within the existing restrictions and caveats of Australian law.

Economic development has never been primary aim of land rights legislations. If it were, valuable mineral rights would have accompanied the return of the land as it has in countries with treaties such as Canada, the USA and New Zealand. In these countries the treaty relationship means that governments have an obligation to negotiate in good faith and recognise their fiduciary duties to compensate for dispossession. This has led to large scale financial compensation settlements that have provided indigenous peoples with a solid foundation for economic development.

The real value of land returned to Indigenous ownership under Australian land rights legislation has always been strongly connected to its potential to compensate for dispossession, restore Indigenous peoples' spiritual relationship with the land, and recognise the right to self-determination. These findings are strongly reinforced by the findings of HREOC's survey of traditional owners in Chapter 1 of this Report.

Strategies for economic development on Indigenous land must therefore be made in full cognisance of the limitations of both the land itself and the land rights legislative frameworks. The topographic and location limitations of Indigenous land are integral to any considerations or policy approaches to improve economic outcomes for Indigenous people. Strategies that work in cities or on resource rich land are not applicable to the remote, marginal country that characterises much of

19 *Western Australia v Ward & Ors* (2002) 191 ALR 1.

the Indigenous 'estate.' Governments must look to approaches that have worked in environments that broadly approximate those for Indigenous Australians.

99 year headleases over Indigenous townships

During 2006, the Australian Government began implementing land reforms in the Northern Territory where the land rights legislation is the jurisdiction of the Commonwealth. Underpinning the land rights reforms was the 2005 National Indigenous Council's (NIC) *Land Tenure Principles* which were discussed extensively in last year's *Native Title Report 2005*. The NIC Principles supported the maintenance of inalienable, communal tenure rights for Indigenous land, but argued to amend land rights legislations 'in such a form as to maximize the opportunity for individuals and families to acquire and exercise a personal interest in those lands, whether for the purposes of home ownership or business development.'[20]

In 2006 the Australian Government added a new section 19A to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) to provide that with ministerial consent a Land Trust may grant a 99 year headlease over an Aboriginal township to an approved entity of the Commonwealth or the Northern Territory Government.

The 99 year leasing provision of s 19A of the ALRA has the practical effect of 'alienating' Indigenous communal land. While a lease is not alienation in fact, it will have the same effect in practice. Ninety nine years is at least four generations. With potential to create back-to-back leases, there is a high probability that the leases will continue in perpetuity.

Amendments of the nature of the ALRA are likely to be replicated in other Australian jurisdictions. During 2006 the Australian Government announced that it intended to encourage other states and territories to make similar amendments to their land rights legislations through home ownership funding incentives and bilateral agreements.

> I hope these changes (amendments to ALRA) motivate other state governments to amend their Indigenous land legislation to facilitate similar opportunities for Indigenous Australians who reside on community land,' Mr Brough said.
>
> The 2006-07 Budget sees the allocation of $107.5 million towards the expansion of the Indigenous Home Ownership on Indigenous Land Program.
>
> The new tenure arrangements contained in the Bill will enable Aboriginal people in the Northern Territory to access this new program.[21]

Obtaining consent for 99 year headleases

The 99 year lease agreements are voluntary. In order to establish a 99 year headlease, section 19A(2) of the ALRA provides that governments must consult with the wider Indigenous community of the township, and obtain consent for the

20 **Gordon, S., (Chairperson, National Indigenous Council, Office of Indigenous Policy Coordination),** *Indigenous Land Tenure Principles*, Media release, 3 June 2005, available online at: http://www.atsia.gov.au/NIC/communique/default.aspx, accessed on 14 January 2007.

21 **Brough M., (Minister for Families, Community Services and Indigenous Affairs), Media Release,** *Historic reforms to NT land rights,* 31 May 2006, available online at http://www.atsia.gov.au/Media/media06/3506.aspx, accessed 28 November 2006.

headlease from traditional owners through their representative Land Councils. The provisions for 99 year headleases are as follows:

> A Land Council must not give a direction under subsection (1) for the grant of a lease unless it is satisfied that:
>
> (a) the traditional Aboriginal owners (if any) of the land understand the nature and purpose of the proposed lease and, as a group, consent to it; and
> (b) any Aboriginal community or group that may be affected by the proposed lease has been consulted and has had adequate opportunity to express its view to the Land Council; and
> (c) the terms and conditions of the proposed lease (except those relating to matters covered by this section) are reasonable.[22]

Section 77A of the ALRA specifies the circumstances under which traditional owners can give consent as a group.

> Where, for the purposes of this Act, the traditional Aboriginal owners of an area of land are required to have consented, as a group, to a particular act or thing, the consent shall be taken to have been given if:
>
> (a) in a case where there is a particular process of decision making that, under the Aboriginal tradition of those traditional Aboriginal owners or of the group to which they belong, must be complied with in relation to decisions of that kind – the decision was made in accordance with that process; or
> (b) in a case where there is no such process of decision making – the decision was made in accordance with a process of decision making agreed to and adopted by those traditional Aboriginal owners in relation to the decision or in relation to decisions of that kind.[23]

Under traditional or agreed decision-making processes, a minority group may be able to consent to a 99 year headlease on behalf of the majority. Given what is at stake, it is essential that agreement and consent processes are documented and authorised by the wider traditional owner group ***prior*** to any negotiations for a headlease.

Agreement about what constitutes traditional decision-making, or agreed decision-making, should be decided in a *separate* and *documented* process. Unfortunately the ALRA does not contain a provision that specifies a discrete process to authorise decision-making. The step to authorise decision-making is a crucial check and balance.

Given that 99 year headleases provide pecuniary benefits to traditional owners, there is potential for money matters to override traditional considerations. Therefore, traditional owners must have certainty about *who* has authority to make decisions, and *how* those decisions should occur. This will also ensure that traditional owners control the pace of decision-making and cannot be rushed into giving consent by governments who operate on different timetables and imperatives.

The Commonwealth *Native Title Act 1993* (Cth) affords greater legislative protections to claimants and native title holders in negotiating consent for land use. The authorisation process for native title Indigenous Land Use Agreements (hereon referred to as ILUAs) provides a relevant threshold. Before an ILUA can be registered,

22 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s19A(2)(a)(b)(c).
23 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s77A(a)(b).

the Registrar of the National Native Title Tribunal must be satisfied that all reasonable efforts have been made to ensure persons who hold, or may hold, native title in relation to land or waters in the area have been identified, and that all persons so identified have authorised the making of the agreement.[24] Authorisation can occur through a traditional decision making process, or through an agreed process by all persons who hold common or group native title rights.[25] The National Native Title Tribunal provided the following explanation of the authorisation process:

- The Native Title Act 1993 requires that one form of Indigenous Land Use Agreement, the *area agreement*, be 'authorised' by *all* the persons who hold or may hold native title to the area covered by the agreement.
- The first step is to make all reasonable efforts to identify *all* persons who hold, or may hold, native title to the area covered by the agreement. The second step is to obtain the authority of persons identified in the first step (the native title group) to make the agreement.

The authorisation of the native title group may be given in one of two ways:

- In accordance with a traditionally mandated process under the traditional laws and customs of the native title group to make decision of this kind, for example if decisions must be made by a council of elders (possibly a few people who can bind the rest of the group).
- If there are no traditionally mandated decision-making processes, then the group must agree upon and adopt a decision-making process that will be used to authorise the decision.

In looking at whether an agreement has been appropriately authorised the courts have considered:

- Whether there is a body existing under customary law that is recognised by the members of the group and the nature and extent of that body's authority to make decisions binding the members of the group and the fact that that body actually authorised the relevant action (*Moran v Minister for Land and Water Conservation for NSW)*.[26]
- Where the process is one agreed to and involves the holding of meetings, the purpose of, and agenda for, the meeting where authorisation was apparently given, and how and to whom notice of the meeting was given, as well as who attended the meeting and with what authority (*Ward v Northern Territory)*.[27] [28]

Provisions of this nature should be adopted under the ALRA to ensure that Indigenous communities and traditional owners are able to give free, prior and informed consent to 99 year headleases.

The amended ALRA also provides that under section 21C a new Land Council can be established on a slim 55 percent majority vote of people in a Land Council region

24 *Native Title Act 1993* (Cth) s203BE(5).

25 *Native Title Act 1993* (Cth) s251A.

26 [1999] FCA 1637.

27 [2002] FCA 171.

28 National Native Title Tribunal, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 28 February 2006.

or 'qualifying area.'[29] Previous to the 2006 amendments, a substantial majority was required to establish a Land Council.[30] The 55 percent majority is of particular concern for traditional owners of large townships.

Due to dispossession, the mission movements, and the centralisation of government resources in larger communities, many Aboriginal townships are regional hubs that accommodate large numbers of Indigenous people, many of whom are not the traditional owners of the town area. Therefore, there are many townships where traditional owners would not constitute a 55 percent majority.

The following example demonstrates the potential problems of setting 55 percent majority. The Wadeye region is home to over 2,300 people, though population numbers vary.[31] The Kardu Diminin people are the traditional owners of the Wadeye township area. They share their town with members of 19 other clan groups of the broader Thamarrurr region. Members of regional clans first began to move to the Wadeye township in the 1930s with the establishment of the mission. This has caused, and continues to cause tension in the region. The traditional owners do not constitute a majority of the people in the township. Hypothetically, if a vote to establish a new Land Council was to occur in the Wadeye Thamarrurr region, the traditional owners would not have the numbers to override a community decision to establish a new Land Council. Should such a Land Council agree to a headlease and fail to appropriately consult with traditional owners, under s 19A(3) of the ALRA, this would not nullify the headlease agreement.

Alternative lease models

The Australian Government will not consider alternative lease models to its 99 year scheme and in 2006 rejected an alternative 40 year lease proposal from the Wadeye Thamurrur Council. The Wadeye proposal would vest the land title and governance with the Wadeye Thamurrur Council. The traditional owners argued that the 40 year model was preferable because it gave them ongoing decision-making authority over land. According to the CEO of Wadeye's Thamarrurr Council:

> The concept of a Town Corporation controlled by the traditional owners, the Diminin people, is a critical aspect of the lease… The community had a right to govern itself, and would continue to oppose federal government plans.[32]

The Wadeye proposal was prepared with expert legal advice, though the Minister for Families, Community Services and Indigenous Affairs rejected it on the grounds

29 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s3, "qualifying area" means an area that: (a) is wholly included in the area of a Land Council; or (b) is partly included in the area of one Land Council and partly included in the area of one or more other Land Councils.

30 *Aboriginal Land Rights (Northern Territory) Act* 1976, Act Compilation (superseded), 24 March 2005 – 4 September 2006, ID:C2005C00223.

31 Taylor J., *Social Indicators for Aboriginal Governance: Insights from the Thamarrurr Region, Northern Territory,* Research Monograph No. 24, Centre for Aboriginal Economic Policy Research, ANU E Press, Canberra, 2004, Chapter 2, available online at: http://epress.anu.edu.au/caepr_series/no_24/mobile_devices/ch02.html, accessed 17 January 2007.

32 National Indigenous Times, *Wadeye says it will fight against government lease plan,* 4 December 2006, available online at: http://www.nit.com.au/breakingNews/story.aspx?id=8969, accessed 12 February 2007.

that banks would not provide finance for mortgages and business proposals on 40 year lease tenures.[33]

> It's been rejected on economic grounds, it's simply unsustainable…You don't get, and will not get, banks to back the sort of financial investments that they may be asked to make in regards to substantial businesses.[34]

Despite differing views on the views on the financial viability of lease terms, the Minister will have the last word on this matter as $9.5 million in housing funding for Wadeye is contingent on the Thamurrur Council agreeing to a 99 year headlease.

> [T]he Minister is using as a bargaining chip, money that has already been allocated to Wadeye. He's held up $9.5 million in housing funding,… Initially he said he was holding it up until our people stop fighting and we're told the day before yesterday that the $9.5 million that's been frozen in a trust account in Darwin won't be freed up until this lease is signed.[35]

The Australian Government's intransigence over the Wadeye proposal is evidence that it will not take a research-based approach to land reform by trialing different land tenure schemes such as the one proposed at Wadeye.

In fact, there are many alternative options to 99 year leases. In my *Native Title Report 2005* I provided evidence that it is currently possible to set up leases under every piece of land rights legislation in Australia except one (the *Victorian Aboriginal Lands Act* 1991). Leases can be for both residential and commercial purposes. Under land rights statute, leases require traditional owner consent, and depending on the length of the lease, Ministerial consent may also be required. Under the native title regime, leases may be issued by governments if the native title representative body agrees through an Indigenous Land Use Agreement.[36]

In many Indigenous townships these leases are currently operating on communal lands. The benefits of these leases are that traditional owners retain decision-making control over the land. Under the Government's 99 year headlease plan, the 'established entity' will make the decisions affecting all future development on Indigenous land.

International experience

Perhaps one of the most compelling arguments against the Australian Government's individualised land lease scheme is that it is not based on successfully evaluated models elsewhere in the world. In fact, international evidence demonstrates poor outcomes for Indigenous people when communal tenures are individualised. While individual title may provide appropriate structures for asset management

33 **National Indigenous Times,** *Wadeye says it will fight against government lease plan,* 4 December 2006, available online at: http://www.nit.com.au/breakingNews/story.aspx?id=8969, accessed 12 February 2007.

34 **ABC News Online,** *Govt rejects 20-yr lease proposal*, 1 December 2006 available online at http://www.abc.net.au/news/newsitems/200612/s1802425.htm accessed 14 February 2007.

35 **ABC Northern Territory Online,** *Brough 'bullying' Wadeye into signing 99-year lease,* **Thamurrur Council's** acting chief executive Dale Seaniger, 17 November 2006, available online at http://origin.abc.net.au/news/items/200611/1791655.htm?nt, accessed 14 February 2007.

36 **Aboriginal and Torres Strait Islander Social Justice Commissioner,** *Native Title Report 2005*, Human Rights and Equal Opportunity Commission, pp66-80, available online at http://www.hreoc.gov.au/social_justice/ntreport05/ch2.html#indigenous0, accessed 6 March 2007.

and accumulation in Western urbanised economies, it is not a model that is readily transferred to economies based on communal rights. There is ample evidence from New Zealand, the United States and the World Bank confirming these shortcomings.[37]

I covered this issue extensively in last year's *Native Title Report 2005* providing detailed examples of the problems associated with this approach. It is difficult to comprehend the Australian Government's determination to implement a strategy that has been trialed, tested and shown to be flawed in other OECD countries. In fact, due adverse outcomes, the United States, New Zealand and World Bank are reversing past policies that facilitated individual titling. During the 1970s, the World Bank evaluated individual tenure reforms and found that they led to:

- significant loss of land by indigenous peoples;
- complex succession problems – that is, who inherits freehold or leasehold land titles upon the death of the owner;
- the creation of smaller and smaller blocks (partitioning) as the land is divided amongst each successive generation; and
- the constant tension between communal cultural values with the rights granted under individual titles.[38]

Recent research about similar reforms in Kenya in the 1950s corroborates the findings from New Zealand, the United States and the World Bank.[39] The findings from 40 years of individual titling in Kenya demonstrate no real economic benefit and limited economic leverage opportunity. In fact, formal, individual title made the land more vulnerable to bank foreclosure to recover debt. Some of the recorded disadvantages include:

- there was no evidence supporting a link between formal title and access to credit;
- that only a very small minority of Kenyans had used title to secure loans and they were generally the richer and more productive farmers;
- there had been some loan defaults leading to foreclosure and loss of the asset;
- families were hesitant in using the asset as collateral for enterprise development for fear of losing the family land;
- in passing the asset on to family members there were negative distributional consequences, including the sale of the asset;
- that the sale of the asset occurred in emergencies such as a need to pay medical expenses; and

37 **See generally, Aboriginal and Torres Strait Islander Social Justice Commissioner,** *Native Title Report 2005*, Human Rights and Equal Opportunity Commission, Sydney, 2005, available online at http://www.hreoc.gov.au/social_justice/ntreport05/.

38 **Aboriginal and Torres Strait Islander Social Justice Commissioner,** *Native Title Report 2005*, Sydney, 2005, pp103-104, available online at http://www.hreoc.gov.au/social_justice/ntreport05/.

39 **Nyami-Musembi, C.,** *Breathing Life into Dead Theories of Property Rights: De Soto and Land Development in Rural Africa,* Discussion Paper No. 272, Institute of Development Studies, University of Sussex, Brighton, 2006, available online at: http://www.gsdrc.org/go/display&type=Document&id=2580 accessed 25 February 2007.

- that women were significant losers when titles were formalised due to customary practices that ensured absolute legal ownership with the male head of the family.[40]

The idea of utilising the 'dead capital' of communal land is an argument put by many modern nations struggling to economically engage indigenous populations. Some of the arguments that promote individual title come from the difficulties encountered by Maori and Australian Indigenous corporations in attempting to use communal land as security for business development.[41] Hernando de Soto's documented research into the formalising land title in Peru is perhaps at the forefront of arguments advocating individual land title.

> [B]ecause the rights to these possessions are not adequately documented, these assets cannot readily be turned into capital, cannot be traded outside of narrow circles where people know and trust each other [and] cannot be used as collateral for a loan.[42]

At a Land and Development Symposium in August 2005, these theories for the use and registration of customary land were discussed in relation to the Asia Pacific. Academic representatives from the Asia Pacific School of Economics and Government, the University of the South Pacific and the Australian National University promoted the formalisation of customary title, arguing for secure individual title.[43]

> [C]ustomary land is dead capital, the declining productivity of land would cause higher poverty and insecure access to land had dissuaded long-term investment into fixed infrastructure.[44]

Arguing against this position was the Papua New Guinean Land Titles Commissioner, Josepha Kanawi, who put forward an argument for the registration of land to protect customary title. Along with other PNG representatives, he argued that customary title provides security, that the registration of customary land should be voluntary, and that customary titles should be able to be used as security for bank loans.[45]

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40 **Nyami-Musembi, C.,** *Breathing Life into Dead Theories of Property Rights: De Soto and Land Development in Rural Africa,* Discussion Paper no. 272, Institute of Development Studies, University of Sussex, Brighton, UK, 2006, available online at: http://www.gsdrc.org/go/display&type=Document&id=2580 accessed 25 February 2007.

41 **Linkhorn, C.,** *Maori Land and Development Finance*, Discussion Paper no. 284/2006, Centre for Aboriginal Economic Policy Research, the Australian National University, Canberra, 2006.

42 **de Soto, H.,** *The Mystery of Capital: Why Capitalism Triumphs in the West and fails everywhere else*, Basic Books, New York, 2000, pg 6 as reprinted in Manders, J., 'Sequencing Property Rights in the Context of Development: a Critique of the Writings of Hernando De Soto', *Cornell International Law Journal,* vol 177, 2004, p178.

43 **'Unused Capital is Dead Capital-Doctor', Post Courier, 25/08/05, pg 4 as cited in Rusanen, L.,** *Customary Landowners rights Under Threat in Papua New Guinea: An update on the land debate and amendments to forestry and mining legislation,* Background Paper No. 10, Aid Watch, p1, December 2005, available online at: http://www.aidwatch.org.au/assets/aw00839/png%20land%20dec%2005.PDF accessed 5 March 2007.

44 **Rusanen, L.,** *Customary Landowners rights Under Threat in Papua New Guinea: An update on the land debate and amendments to forestry and mining legislation,* Background Paper No. 10, Aid Watch, p1, December 2005, available online at: http://www.aidwatch.org.au/assets/aw00839/png%20land%20dec%2005.PDF.

45 **Rusanen, L.,** *Customary Landowners rights Under Threat in Papua New Guinea: An update on the land debate and amendments to forestry and mining legislation,* Background Paper No. 10, Aid Watch, p1, December 2005, available online at: http://www.aidwatch.org.au/assets/aw00839/png%20land%20dec%2005.PDF.

> Customary land ownership…[provides]…security for the people, but … it is under pressure from social and economic change, and therefore must be protected by registration.[46]

Banks in Papua New Guinea and Kenya have rejected the use of customary lands as security for loans. PNG banks 'made it clear that they would not accept customary land as security for loans until it was converted to either freehold or state land.'[47] In New Zealand banks indicated that 'business proposals involving Maori land might be of lower priority for institutions able to obtain easier business elsewhere.'[48] However, while communal title has been rejected by banks to leverage loans, formal title on small land holdings has not necessarily convinced banks of sufficient loan security. For example in Kenya, 'banks tend to shun small scale (particularly rural or agriculture-dependent) land holders [and land title] does little to change these biases.'[49] The associated potential for loss of the land asset through loan default is further disincentive to using land title for collateral.

It is essential that governments ensure that all stakeholders in lease negotiations are well informed of potential pitfalls as well as benefits and opportunities. Ultimately traditional land owners should be well armed with information and able to give informed consent to whichever economic model suits their purposes. There may be groups of traditional owners who decide to give consent to 99 year leases once they have considered all available evidence about its likely impacts. The concern under the current ALRA provisions is that the consent threshold is too low and it lacks the necessary checks and balances. ***In a non-Indigenous context, such standards for negotiation and consent over land title would never be tolerated***. It is essential that the Australian Government provide the highest level of protections for traditional land owners.

Use of the Aboriginal Benefits Account to pay for government 99 year headleases

A further concern about the administration of 99 year headleases is that they are to be funded, at least initially, from the Aboriginal Benefits Account (ABA). The ABA is an account that contains Aboriginal mining royalty monies. The only express direction on the use of ABA is that it is to be used 'to or for the benefit of Aboriginals living in the Northern Territory.'[50] Under the amendments to ALRA, a new s 64(4A)

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46 **Rusanen, L.,** *Customary Landowners rights Under Threat in Papua New Guinea: An update on the land debate and amendments to forestry and mining legislation,* Background Paper No. 10, Aid Watch, p1, December 2005, available online at: http://www.aidwatch.org.au/assets/aw00839/png%20land%20dec%2005.PDF.

47 **Post Courier,** *Banks refuse to accept land as security*, 26 August 2005, p2, cited in Rusanen, L., *Customary Landowners rights Under Threat in Papua New Guinea: An update on the land debate and amendments to forestry and mining legislation,* Background Paper No. 10, Aid Watch, p1, December 2005, available online at: http://www.aidwatch.org.au/assets/aw00839/png%20land%20dec%2005.PDF accessed 27 February 2007.

48 **Linkhorn, C.,** *Maori Land and Development Finance*, Discussion Paper no. 284/2006, Centre for Aboriginal Economic Policy Research, the Australian National University, Canberra, 2005, p11.

49 **Nyami-Musembi, C.,** *Breathing Life into Dead Theories of Property Rights: De Soto and Land Development in Rural Africa,* Discussion Paper no. 272, Institute of Development Studies, University of Sussex, UK, 2006, p16 available online at http://www.ids.ac.uk/ids/bookshop/wp/wp272.pdfhttp://www.ids.ac.uk/ids/bookshop/wp/wp272.pdf.

50 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s64(4).

states that payments must be debited from the ABA to be used for acquiring, administering and paying rents on 99 year leases.[51] To quote Minister Vanstone:

> The scheme is designed to be self financing in the longer term with sub-lease rental payments covering the costs. Until then all reasonable costs will be met from the NT Aboriginals Benefit Account (ABA), subject to consultation with the ABA Advisory Committee.[52]

Northern Territory Land Council estimates expect head leasing to costs up to $15 million over 5 years. Other commentators suggest that this is a conservative estimate.[53] This is a significant portion of the ABA which provides approximately $30 million in royalties per year. Spending ABA money to pay for headlease rental will significantly reduce the overall amount available for Land Councils and the range of land management and other programs that are funded through ABA. Minister Brough's Second Reading Speech for the ARLA Amendments Bill ominously observed that 'in future, Land Councils will be funded on workloads and results.'[54]

The use of ABA funds to pay for headleases is contrary to its purpose. The purpose of the ABA is to provide benefit to Indigenous people *above and beyond* basic government services. The administrative costs of land leasing are basic government services. Furthermore, the use of the ABA for headleases is targeted distribution of funds to communities that sign to the leases, while others will not benefit at all.

> By taking control of Indigenous land and the ABA funds, the Australian Government is limiting the capacity for Indigenous Australians to be self determining and self managing. On the one hand the Government has argued that it is promoting a culture of Indigenous economic independence through amending ALRA, and on the other it takes away the discretionary funds and control of land that provide the capacity to do so. In 1999, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs report *Unlocking the Future* recommended:
>
> As a reflection of its core principles, the Committee agrees that Aboriginal people should take as much responsibility as possible for controlling their own affairs. This applies too, for the administration of the… (ABA).[55]

Modifications to the permit system

Under the current permit system in the Northern Territory, traditional owners can regulate and restrict access to people entering Indigenous land. Visitors require a permit in writing from the relevant Land Council or traditional owners.[56] However,

51 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 64(4A)(a)(b).

52 **Vanstone, A., (Former Minister for Indigenous Affairs), Media Release,** *Long term leases the way forward for NT Aboriginal townships*, 5 October 2005, available online at http://www.atsia.gov.au/Media/former_minister/media05/v0535.aspx, accessed 28 February 2007.

53 **Snowdon W.,** *Hansard,* Second Reading Speech, *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, Commonwealth House of Representatives, 19 June 2006, p56.

54 **Brough M., (Minister for Families, Community Services and Indigenous Affairs),** *Hansard,* Second Reading Speech, *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, Commonwealth House of Representatives, 31 May 2006, p5.

55 **Standing Committee on Aboriginal and Torres Strait Islander Affairs,** *Unlocking the Future – The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, *Hansard-House of Representatives*, August 1999.

56 **Northern Territory of Australia** *Aboriginal Land Act* 1978 (NT), s15.

in 2006, the Minister for Families, Community Services and Indigenous Affairs responded to a question in Parliament by announcing that it was time to remove the permit system.[57] Within a month the Minister issued a media release calling for written submissions in response to an Australian Government discussion paper on the permit system in the Northern Territory.

> …the permit system has created closed communities which are restricting the ability of individuals to interact with the wider community and furthermore to participate in the real economy.
>
> The permit system has not acted to protect vulnerable citizens, including women and children, and in fact makes scrutiny over dysfunctional communities more difficult.[58]

The Governments *Permit Discussion Paper*[59] contains five options for action. In summary they are:

1. authorise access for people with estates or interests granted under section 19 of the ALRA ;
2. provide open access to communal or public space and maintain the current permit-based system of restricted access to non-public spaces;
3. widen the current permit-based system by expanding the categories of people eligible to enter Aboriginal land without being subject to permission.
4. reverse the current restrictive permission-based access system to a liberal system with specific area exclusions. Access to Aboriginal Land would not require a permit unless a particular area was designated as restricted; and
5. remove the permit system altogether and replace with the laws of trespass, with any necessary modification for Aboriginal land.

Amendments to the permit system are part of the Government's 'normalisation' of Indigenous townships. The Government intends to open up Indigenous land to people who are neither traditional owners nor current residents and thereby increase interaction between remote Indigenous people and with the wider Australian economy.

At the heart of debate about the permit system is the right of traditional owners, through their representatives, to decide who to include or exclude from entry onto Indigenous land. Along with this is the right to information about who is entering or exiting Aboriginal land. As the Minister for Families, Community Services and Indigenous Affairs correctly observes that:

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57 **Brough M., (Minister for Families, Community Services and Indigenous Affairs),** *Hansard,* House of Representatives, 12 September 2006, p17.

58 **Brough M., (Minister for Families, Community Services and Indigenous Affairs),** *Discussion Paper on Indigenous permit system released*, Media Release, 4 October 2006, http://www.atsia.gov.au/Media/media06/6507.aspx accessed 5 October 2006.

59 **Office of Indigenous Policy Coordination,** *Access to Aboriginal Land under the Northern Territory Aboriginal Land Rights Act – Time for a change? Discussion paper,* Canberra, October 2006.

> given the vastness of the Aboriginal land estate and the consequent difficulties in applying normal laws of trespass, the permit system has operated to respect the privacy and culture of Aboriginal people.[60]

The permit system operates as a kind of passport system allowing Aboriginal people to exercise property rights on an equal footing with other Australians. The Northern Land Council made this point in its submission to the Reeves inquiry:

> Traditional Aboriginal owners of Aboriginal land, like any other landowners, have as part of their title to the land the right to admit and exclude persons from their land. This is a fundamental aspect of land ownership under the general law and is also fundamental to the achievement of the aims of the Land Rights Act.[61]

The question of whether a permit system is discriminatory was examined in the High Court case of *Gerhardy v Brown*.[62] While the High Court found that the permit system established by s19 of the *Pitjanjatjara Land Rights Act* was a racially discriminatory measure, contrary to s10 of the *Racial Discrimination Act,* it also found that s19 was a 'special measure' pursuant to s8 of that Act and was therefore valid. Consequently, the permit system provides equality before the law and is a special measure to ensure non-discrimination.

Section 8 of the *Racial Discrimination Act 1975* (Cth) is modelled on Article 2(2) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) [63] which obliges parties to the Convention to undertake, when warranted, special measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of rights and fundamental freedoms. Special measures should not bring about the maintenance of separate rights for different racial groups after the objectives of the measures have been achieved.

The Minister's argument that the permit system has prevented economic development, and that its abolition will provide economic benefits requires close scrutiny. The FaCSIA Discussion paper, *Access to Aboriginal Land under the Northern Territory Aboriginal Land Rights Act – Time for a change?* Observes that,

> [m]any Aboriginal communities on Aboriginal land in the Northern Territory are already remote geographically. The permit system has operated to maintain or even increase that remoteness – both economically and socially. It has hindered effective engagement between Aboriginal people and the Australian economy.[64]

60 **Department of Families, Community Services and Indigenous Affairs,** *Access to Aboriginal Land under the Northern Territory Aboriginal Land Rights Act – Time for a change? Discussion paper,* Canberra, October 2006, p4.

61 **Reeves J.,** *Building on land rights for the next generation, the Review of the Aboriginal Land Rights Act (Northern Territory) Act 1976*, (2nd edn.), Aboriginal and Torres Strait Islander Commission, Canberra, 1988, p302.

62 *Gerhardy v Brown* (1985) 159 CLR 70.

63 **Rees N,** *Gerhardy v Brown, Aboriginal Land Rights legislation - Pitjantjatjara Land Rights Act (SA) - operation of ss8, 9 and 10 Racial Discrimination Act (Cth)*, Case note, 28 February 1985, available online at http://www.austlii.org/au/journals/AboriginalLB/1985/20.html, accessed 20 October 2006.

64 **Department of Families, Community Services and Indigenous Affairs,** *Access to Aboriginal Land under the Northern Territory Aboriginal Land Rights Act – Time for a change? Discussion paper,* Canberra, October 2006, p4.

> Liberalisation would also bring economic benefits that would help to promote the self reliance and prosperity or Aboriginal people in remote communities.[65]

The Minister argues that if Indigenous lands are opened to non-Indigenous interests, there is *a high probability that* outside operators will take the opportunity to develop businesses, especially because the commercial competition in these communities is very limited. However, I believe the economic benefits to the Indigenous community are likely to be minimal. They may include greater choice as consumers and, at most, the ability to secure waged employment with a business operator. Nevertheless, ABS data demonstrates that the private sector is not a good employer of Indigenous people.[66]

There is therefore some risk and great cost in giving private operators free reign on communal lands and assuming that they will assist in improving employment outcomes for Indigenous people. By giving private operators access to Indigenous lands, an opportunity is lost for the Indigenous residents. In the case of enterprises involving tourism for example, rather than owning the business, Indigenous land owners become the employees of companies who in turn capitalise on Indigenous land and culture. The most likely consequence of the Government reforms will be the profit of non-Indigenous operators from undeveloped markets.

To continue the tourism example, an alternative arrangement would be for governments to support the maintenance of the permit system while providing opportunity for Indigenous people to develop or become partners in joint venture tourism enterprises. Maintaining restricted access to the land *adds* rather than detracts from the unique nature of the tourism experience and ensures that Indigenous Australians don't have to compete in an open market with highly resourced operators. A strategy such as this one actually achieves the Government's objective of improving economic outcomes for Indigenous Australians.

There are also environmental impacts to be considered. The land degradation caused by unchecked tourism and four wheel drive activity would be impossible to monitor in national parks and on Aboriginal lands without a permit system. Open access would require greater vigilance in protecting cultural heritage, sites of significance, and sacred sites. This too is a resource issue and one that is not addressed in the Australian Government's Discussion Paper. Ultimately, the degradation of the land is the degradation of the most precious asset of Indigenous Australians, both in economic and cultural terms.

As it stands, the Discussion Paper does not canvass enough options for economic development. It does not consider for example, charging fees for the issue of permits. Currently there are some instances where permit fees are charged to visit areas such fishing spots, (on a per car basis), and art centres.[67] If the Government is concerned about increasing economic opportunity for Aboriginal people, one

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65 **Department of Families, Community Services and Indigenous Affairs,** *Access to Aboriginal Land under the Northern Territory Aboriginal Land Rights Act – Time for a change? Discussion paper,* Canberra, October 2006, p2.

66 **Australian Bureau of Statistics,** *4713.0 – Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2001*, available online at http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/2B3D3A062FF56BC1CA256DCE007FBFFA?OpenDocument, accessed 8 December 2006.

67 **Reeves J.,** *Building on land rights for the next generation, the Review of the Aboriginal Land Rights Act (Northern Territory) Act* 1976, (2nd edn.), Aboriginal and Torres Strait Islander Commission, Canberra, 1988, p300.

option under the permit system could be to charge entry to popular sites. Ultimately the Government has responsibility to canvass the widest range of options and to engage Indigenous Northern Territorians in the development of an economic development plan.

Discontinuation of funding and services to homelands

As a consequence of the Homeland Movement of the 1970s, thousands of Indigenous Australians moved out of missions and settlements and back onto traditional lands. The decision to return to country was primarily to resume cultural, spiritual and ceremonial connections and responsibilities to land.

It is estimated that approximately 20, 000 Indigenous Australians live in communities of less then 100 people. The size of homeland communities varies, some with less than 50 people, and others with 100 and more.[68] According to the ABS, 70 percent of Indigenous Australians over 15 years of age recognise homelands or traditional country. Affiliation with traditional country increases with remoteness; 86 percent of people living in remote areas claim affiliation compared with 63 percent in non-remote areas.[69]

In 2005 and 2006 the Australian Government signalled an intention to reduce or withhold services to homeland communities. The Minister for Families, Community Services and Indigenous Affairs asserted:

> The investment and effort will focus on remote Aboriginal communities or towns that have access to education and health services. This will include many small settlements. However, if people choose to move beyond the reach of education and health services noting that they are free to do so, the government's investment package will not follow them. Let me be specific – if a person wants to move to a homeland that precludes regular school attendance, for example, I wouldn't support it. If a person wants to move away from health services, so be it – but don't ask the taxpayer to pay for a house to facilitate that choice.[70]

National policy does not determine formulae for health and education service provision. These are determined by the states and territories. For example, education provision in the Northern Territory is based on a student to teacher ratio. A fully qualified teacher is provided when there are 22 attending students aged between six to twelve years of age. Homeland communities are usually serviced by larger 'hub' communities. The school at Maningrida in the Northern Territory provides services to 12 'satellite' homeland communities and attracts a teacher formula based on the total number of students attending in region. Teachers visit homelands for varying numbers of days per week depending on the teacher allocation that the homeland attracts under the formula.

68 **Taylor J.,** *Population and Diversity: Policy Implications of Emerging Indigenous Demographic Trends, Discussion Paper 283/2006*, Centre for Aboriginal Economic Policy Research.

69 **Australian Bureau of Statistics,** *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples,* ABS series cat. No. 4704.0 Commonwealth of Australia, 2005, p1.

70 **Brough M., (Minister for Families, Community Services and Indigenous Affairs),** *Blueprint for Action in Indigenous Affairs*, Address to the National Institute of Governance – Indigenous Affairs Governance Series, Canberra, available online at http://www.facs.gov.au/internet/minister3.nsf/content/051206.htm, accessed 18 December 2006.

At this stage there is insufficient detail to assess whether homelands and other small communities will be disadvantaged as a result of the Australian Government's funding agreements. It will be through bilateral agreements that the Australian Government will be able to link funds to preconditions as it is doing with housing.

Shire councils to replace Indigenous community councils

Alongside the land tenure reforms is the Australian Government's plan to reform the Indigenous local government system by rationalising the large number of small local community councils and replacing them with larger regional shire councils. The Australian Government has supported the Northern Territory Government's plan to reform its community councils and the Queensland Government is finalising the transition to shire council arrangements.

Currently, across Australia remote communities are governed by local governments or community councils that are based within each community. In the Northern Territory for example, the Government developed a plan to replace its 56 remote Indigenous councils with nine shire councils. The four municipal councils in Darwin, Palmerston, Alice Springs and Katherine will remain unchanged. The Northern Territory Minister for Local Government argued that the shire council model is designed to improve governance and service delivery to remote communities.

> Change will ensure people in the regions have access to the services and experts many of us take for granted in the urban centres…The new local government will create a framework of certainty and better and more reliable services.[71]

Queensland has commenced a four year transition process to transform Aboriginal Councils into full Shire Councils. The stated intention of the transition is to improve governance. The Shire and Island Councils will be responsible to build, operate and maintain a range of infrastructure and to assist in the delivery of services.[72]

The transition to shire councils is an effort to rationalise resources and concentrate high level administrative expertise at the regional level. While this may achieve efficiencies in terms of the cost of local government administration it will also impact on Indigenous employment options in remote communities. The removal of community councils, including community housing associations will remove one of the few sources of remote employment.

As the lack of employment opportunity in remote communities is one of the main impediments to economic development, governments must take care to balance policy approaches. If rationalising housing services reduces employment, then one saving will mean another cost. In order to benefit from any home ownership incentives or policies, Indigenous Australians require employment.

71 **McAdam, E., (Minister for Local Government (NT)), ABC News Online,** *Commonwealth approves changes to NT local govt system*, 30 January 2007, available online at http://www.abc.net.au/news/newsitems/200701/s1836647.htm, accessed 15 February 2007.

72 **Queensland Government Department of Local Government, Planning, Sport and Recreation,** *Website* available online at: http://www.lgp.qld.gov.au/, accessed 25 January 2007.

Housing and home ownership

During 2005 and 2006 the Australian Government announced a number of incentives to increase the rates of Indigenous home ownership and reduce Indigenous dependence on subsidised housing in remote communities. During the publicity that surrounded the initiatives, private home ownership was described as a right for all Australians who can afford this goal. In 2005 the Prime Minister had the following to say:

> I'm a supporter of home ownership for everybody who can afford it, I really am. And I don't think there should be any distinction between Indigenous people and the rest of the community. I think it's patronising. I think it's discriminatory to take the view that somehow or other home ownership is something for the white community but not for the Aboriginal community…Now I'm not trying to undermine the Native Title Act but what I'm saying is that where we can develop methods of private home ownership within Indigenous communities, we should do so.[73]

Just over 7 percent of remote Indigenous Australians own, or have a mortgage over a home. Australia-wide the rates of Indigenous home ownership are higher at 27 percent.[74] Nevertheless, Indigenous Australians fall well behind the 74 percent of non-Indigenous Australians who are either buying or own their home outright.

The Australian Government's remote housing strategy is part of a reform package to encourage Indigenous Australians to embrace a culture of asset accumulation and management with paid employment as its foundation. According to the Government, land tenure reforms on communally owned land have been required in order to make home ownership possible. The Attorney General's Department along with the Department of Families, Community Services and Indigenous Affairs (FaCSIA) and Indigenous Business Australia have collaborated in the home ownership strategy. In fact initiatives for home ownership were released almost simultaneously with the announcement of the proposed amendments to the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) in 2005. The home ownership initiatives included:

- funding for Indigenous Business Australia (IBA) for the *Community Homes* program which will provide low cost houses for purchase at reduced interest rates in remote communities;
- an initial allocation from the *Community Housing and Infrastructure Program* to reward good renters with the opportunity to buy the community house they have been living in at a reduced price;

73 **Howard, J., (Prime Minister), Interview with Pat Morrish, ABC Radio, Cairns, 25 October 2005, available** online at www.pm.gov.au/news/interviews/Interview1651.html accessed 11 January 2007.

74 **Australian Bureau of Statistics,** *National Aboriginal and Torres Strait Islander Social Survey 2002,* ABS series cat. no. 4714.0, Commonwealth of Australia, Canberra, 2004, as quoted by Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *2006 Budget Indigenous Affairs: Strengthening Indigenous Communities*, Media release, 9 May 2006, p13, 2006, available online at http://www.atsia.gov.au/Budget/budget06/Fact_sheets/factsheet09.aspx, accessed 10 December 2006.

- using the *Community Development Employment Projects* (CDEP) program to start building houses, support home maintenance, and to maximise employment and training opportunities.[75]

While the initiatives are described as 'Australia-wide measures' they are exclusively available to states and territories if, or when, they amend their land rights legislations to allow for 99 year leases. To quote the Minister for Families, Community Services and Indigenous Affairs:

> These programs will be available to all States that follow the Australian and Northern Territory government's lead to enable long term individual leases on Aboriginal land... The Australian Government will consult with the States to promote any necessary amendment of State Indigenous land rights regimes to ensure access to the new programs.[76]

The Department of Families, Community Services and Indigenous Affairs has committed over $100 million to increase remote home ownership from 2006 to 2010. However the Northern Territory is the only jurisdiction in a position to access this funding to date. Other states are beginning the process of reviewing their land rights legislations and it is not certain whether they will include provision for 99 year leases.

> From 1 July 2006, the Australian Government is providing $52.9 million plus capital of $54.6 million over four years for initiatives to promote Indigenous home ownership on community title land.
>
> The measure will assist Indigenous families living in communities on Indigenous land to access affordable home loan finance, discounts on purchase prices of houses, and money management training and support.[77]

The Australian Government has targeted its programs and incentives to a select group of communities in the Northern Territory; Galiwinku, Tennant Creek, Katherine and Nguiu.[78] Forty five new houses will be constructed for private purchase across Galiwinku and Nguiu. Discounts of up to 20 percent on house purchase prices will be available in other communities.[79] The discounts will be available to good renters and there is sufficient funding for up to 160 low interest home loans specifically targeted to remote.[80]

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75 **Vanstone, A., (Minister for Immigration, Multiculturalism and Indigenous Affairs),** *Initiatives support home ownership on Indigenous land,* Media Release, 5 October 2005 available online at: http://www.atsia.gov.au/Media/former_minister/media05/v0534.aspx accessed 20 February 2007.

76 **Brough, M., (Minister for Families, Community Services and Indigenous Affairs),** *2006 Budget Summary of Indigenous Measures (Fact Sheet),* available online at: http://www.atsia.gov.au/Budget/budget06/Fact_sheets/factsheet08.aspx accessed 20 February 2007.

77 **Brough, M., (Minister for Families, Community Services and Indigenous Affairs),** *Strengthening Indigenous Communities – expansion of Home Ownership on Indigenous Land Programme,* available online at: http://www.facsia.gov.au/internet/facsinternet.nsf/aboutfacs/budget/budget2006-wnwd-03.htm, accessed 20 February 2007.

78 **Brough, M., (Minister for Families, Community Services and Indigenous Affairs),** *Galiwinku community gets down to MoneyBusiness*, available online at: http://www.atsia.gov.au/media/media06/3906.aspx, accessed 19 February 2007.

79 **Knapp, R., (Group Manager, Housing and Disability Group),** *Hansard,* Senate Community Affairs Legislation Committee, Estimates, Canberra, 30 May 2006, p40.

80 **Indigenous Business Australia:** *IBA Partnerships Announcement*, available online at: www.iba.gov.au/ibapartnerships/newpolicy/communityhomesbudgetannouncements/ accessed 5 February 2007.

FaCSIA will also provide money management training and support to the four Northern Territory communities and two Western Australian communities through a *MoneyBusiness* program. This program is a partnership with the ANZ Bank and is designed 'to develop skills in budgeting, bill paying and saving.'[81]

The incentives and announcements of 2005 and 2006 are likely to be a precursor to broader reforms in Indigenous housing. In June 2006 the Minister for Families, Community Services and Indigenous Affairs announced a comprehensive audit of Australian Government and State and Territory Government funding on public housing.[82] Accompanying the announcement were numerous statements about the cost of Indigenous housing and concerns about whether the states and territories were adequately managing and contributing these programs. In 2006 the Government released a discussion paper to raise potential directions for Indigenous housing: *Community Housing and Infrastructure Program (CHIP) Review Issues Paper. The Best Way Forward: Delivering housing and Infrastructure to Indigenous Australians* (Hereon referred to as the *Issues Paper*).[83]

While the Review has not been released, the topics canvassed in the *Issues Paper* foreshadow the areas of reform. They include the rights and responsibilities of tenants, rent payments and collection, measures to increase home ownership, improved access to mainstream public housing, and strategies to avoid duplication of municipal services and infrastructure.[84]

The remote Indigenous housing profile

The dominant housing tenure for Indigenous people in very remote communities is community rental housing. In 2001, 84 percent of all remote Indigenous households were renters. Approximately seven percent of remote Indigenous householders are home owners.[85]

Community rental housing is built and maintained by governments. Over the past 30 years, somewhere between 500 and 1,000 community rental houses have been built each year in Indigenous communities across Australia. Once built, the houses are vested in Indigenous community organisations for ongoing management and the collection of rental payments. The medium weekly rental payment in very

81 **Brough, M., (Minister for Families, Community Services and Indigenous Affairs),** *Galiwinku community gets down to MoneyBusiness*, available online at: http://www.atsia.gov.au/media/media06/3906.aspx, accessed 19 February 2007.
Note: The $4.4 million MoneyBusiness program includes Galiwinku, Tennant Creek, Katherine and Nguiu (Tiwi Islands) in the Northern Territory, and Geraldton and Kununurra in Western Australia.

82 **Brough, M., (Minister for Families, Community Services and Indigenous Affairs),** *Australian Government to Audit Housing Assistance* Press Release, available online: http://www.atsia.gov.au/media/media06/4006.aspx accessed 19 February 2007.

83 **Brough, M., (Minister for Families, Community Services and Indigenous Affairs),** *Community Housing and Infrastructure Program (CHIP) Review Issues Paper: The Best Way Forward*, Canberra, May 2006, p 3 available online at http://www.facsia.gov.au/internet/facsinternet.nsf/via/indighousing/$file/chip_review_may06.pdf.

84 **Brough, M., (Minister for Families, Community Services and Indigenous Affairs),** *Community Housing and Infrastructure Program (CHIP) Review Issues Paper: The Best Way Forward*, Minister's Forward, Canberra, May 2006, p 13.

85 **Australian Bureau of Statistics,** *National Aboriginal and Torres Strait Islander Social Survey 2002,* ABS series cat. no. 4714.0, Commonwealth of Australia, Canberra, 2004, as quoted by Brough, M., (Minister for Families, Community Services and Indigenous Affairs), *2006 Budget Indigenous Affairs: Strengthening Indigenous Communities*, Media release, 9 May 2006, p13, 2006, available online at http://www.atsia.gov.au/Budget/budget06/Fact_sheets/factsheet09.aspx, accessed 10 December 2006

remote regions is $42 per household.[86] Rents are either set at per person or per household rate and are generally lower than rents in larger townships and cities. Rental payments for community housing covers some of the asset maintenance and other recurrent costs.

The provision of housing in remote communities is failing to meet the demands of the growing Indigenous population. The problems are both with the number and size of houses and the quality of the housing stock. In 2001, 41 percent of remote Indigenous households reported problems with overcrowding. Fifty two percent of the Indigenous remote population reported living in dwellings requiring at least one extra bedroom, compared to 16 percent in non-remote areas.[87] Just over 58 percent of remote Indigenous Australians reported major structural problems of their dwellings at almost double the incidence of non-remote at 32.5 percent. The Australian Bureau of Statistics summarised the problems in remote communities in the following terms: 'overcrowding and lack of adequate facilities such as a clean water supply and sewerage disposal are particularly problematic in remote areas.'[88]

Indigenous housing programs and funding

The responsibility for Indigenous public and community housing is shared between the Commonwealth and the states and territories. However, the Australian Government is the main contributor of funding, providing 73 percent of total funds, while states and territories contribute the remaining 27 percent.[89] The annual contribution of the Australian Government to Indigenous housing is more than $375 million. It is clearly a large commitment and one which accounts for 30 percent of all Australian Government spending on public and community housing.[90] The program through which the funding in administered is the Community Housing and Infrastructure Program (CHIP).

In remote regions CHIP provides housing infrastructure and funding to maintain essential municipal infrastructure and sanitation infrastructure.[91] Six hundred and sixty Indigenous community-controlled housing organisations throughout Australia manage funding for local infrastructure and maintenance as well as collecting rental on Indigenous community houses. These entities provide employment for Indigenous people in remote and regional communities, though

86 **Australian Bureau of Statistics,** *4713.0 – Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2001*, available online at: http://www.abs.gov.au/ausstats/abs@.nsf/b0462a212839e1e5ca256820000fe0de/2b3d3a062ff56bc1ca256dce007fbffa!OpenDocument accessed 25 February 2007.

87 **Australian Bureau of Statistics,** *National Aboriginal and Torres Strait Islander Social Survey* 2002, ABS series cat. 4714.0., Commonwealth of Australia, Canberra, 2002, p39.

88 **Australian Bureau of Statistics,** *National Aboriginal and Torres Strait Islander Social Survey* 2002, ABS series cat. 4714.0., Commonwealth of Australia, Canberra, 2002, p12

89 **Brough, M., (Minister for Families, Community Services and Indigenous Affairs),** *Australian Governments helping Indigenous communities build their future*, available online: http://www.atsia.gov.au/media/media06/4106.aspx accessed 19 February 2007.

90 **Australian Government Department of Foreign Affairs and Trade,** *Indigenous programs: Education, health and housing*, Website material available online at: http://www.dfat.gov.au/facts/indg_education.html, accessed 20 February 2007.

91 **Australian Government Department of Foreign Affairs and Trade,** *Indigenous programs: Education, health and housing*, Website material available online at: http://www.dfat.gov.au/facts/indg_education.html, accessed at 20 February 2007.

it is likely that these organisations will be rationalised into regional entities in the near future.

The Indigenous Business Australia home loans program

In the 2006-07 Budget the Australian Government announced a $107.4 million package over four years to develop home ownership opportunities on Indigenous land. This funding will be used to build houses and to provide loans to Indigenous people on communal lands where individual leases are possible. The Australian Government's remote home ownership program is managed through Indigenous Business Australia's (IBA) *Community Homes* program.

> IBA will expand its home lending program, *Community Homes*… and will manage and deliver incentives to assist in overcoming the barriers of the high cost of housing, low employment and income levels in remote areas.[92]

According to Indigenous Business Australia the additional funds will expand its home lending program, by supporting 460 families or individuals to purchase their own home.[93] *Community Homes* will provide access to home loan finance in all states and territories where land title enables an individual long term interest on a block of land. IBA will work with the Department of Families, Community Services and Indigenous Affairs (FaCSIA) to provide discounts on the purchase price of houses and financial literacy training for eligible participants.[94] Incentives also include purchase price discounts on existing community rental homes of up to 20 percent for Indigenous families with a good rental record. These incentives are part of the *Good Renter Scheme* initiative.

The *Community Homes* scheme will offer loans to low income earners with incomes starting from $15,000. Maximum repayments will vary according to income level, starting at 15 percent of gross income for those on the minimum income level and up to 30 percent of gross income for those on higher incomes. For those on lower incomes, commencing interest rates on loans will start from zero percent per annum incrementing by 0.2 percent each year up to the maximum rate of 6 percent per annum. Grants for co-payments of up to $2,590 each year for the first ten years will assist eligible low income borrowers to repay the loan within a loan term of 30 years. IBA will pay up to $13,000 for loan establishment costs including legal costs, surveys, property valuations, independent legal and financial advice.[95]

92 Indigenous Business Australia, *More Choice for Indigenous Home Ownership,* Media Release, 10 May 2006, available online at http://www.iba.gov.au/files/MediaRelease_Budget01.pdf, accessed 22 February 2007.

93 Indigenous Business Australia, *More Choice for Indigenous Home Ownership,* Media Release, 10 May 2006, available online at http://www.iba.gov.au/files/MediaRelease_Budget01.pdf, accessed 22 February 2007.

94 Indigenous Business Australia, Website information, *Partnerships*, available online at: http://www.iba.gov.au/ibapartnerships/, accessed 22 February 2007.

95 Indigenous Business Australia, *Expansion of Home Ownership on Indigenous Land Program*, Website available online at: http://www.iba.gov.au/ibapartnerships/newpolicy/communityhomesbudgetannouncements/, accessed 24 February 2007.

Home buyers in Australia

Housing affordability is determined by many factors. In attempting to determine whether remote Indigenous Australian will be able to benefit from the *Community Homes* scheme, it is necessary to consider employment opportunities and earning capacity.

A typical Australian home buyer for example, is one who lives in a city and depends on an urban economy to generate work opportunities and an income that will sustain a mortgage over a 30 year period. First home buyers are typically couples aged approximately 35 years. They have a life expectancy up to 78 years for males and 83 years for females.[96] They have above average incomes and in Australia, a growing proportion of first home buyers have two incomes.

The majority of owner-occupier households reported gross weekly incomes in the top two income brackets.[97] This is an average weekly income of $612 to $869 or at the highest bracket $870 or more. The first home buyer relies heavily on debt finance and during 2004 and 2005 the average loan for first home buyers was $210,000. The average weekly housing costs for first home buyers were $330.[98]

> A domestic unit with an income of say $60,000 per annum may buy a dwelling and land package for $240,000, and spend $15,000 per annum over anywhere between the next 20 and 30 years in paying off this capital. In addition, such domestic units undertake to meet the recurrent costs of housing maintenance, so that their asset does not depreciate, as well as paying recurrent government taxes and charges, such as annual land rates and infrastructure service fees. Covering these capital and recurrent housing costs can consume as much as one-third or more of income in these household economies, particularly in the early years after entry to the market or when income falls through developments such as child rearing or unemployment.[99]

The typical remote Indigenous household has an average gross weekly income of $267 per week.[100] The remote Indigenous adult has a 36 percent chance of having a disability or a long term illness which will affect income earning capacity and an average life expectancy 17 years lower than non-Indigenous Australians.[101] The life

96 **Australian Bureau of Statistics,** *3302.0 – Deaths*, Australia, 2005, 30 November 2006, available online at: http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/C67A858BA00CB846CA2568A9001393C6?OpenDocument, accessed 24 February 2007.

97 **Productivity Commission,** *First Home Ownership,* No. 28, Melbourne, 2004, p31.

98 **The Australian Bureau of Statistics, 1301.0 – Year Book Australia, 2007, available online at:** http://www.abs.gov.au/AUSSTATS/abs@.nsf/7d12b0f6763c78caca257061001cc588/591FBA596E76E796CA2572360002721A?opendocument, accessed 22 February 2007.

99 **Sanders, W.,** *Housing Tenure and Indigenous Australians in Remote and Settled Areas*, Discussion Paper No. 275/2005, Australian National University, Canberra, 2005, p7.

100 **Australian Bureau of Statistics,** *4102.0 – Australian Social Trends, 2004 Year Book of Australia,* Commonwealth of Australia, 2004, available online at: http://www.abs.gov.au/ausstats/abs@.nsf/2f762f95845417aeca25706c00834efa/f62e5342be099752ca256e9e0028db17!OpenDocument accessed 24 February 2007. Note: Equivalised gross household income is a standardised income measure which has been adjusted for the different income needs of households of different size and composition. It takes into account the greater needs of larger households and the economies of scale achieved by people living together.

101 **Australian Bureau of Statistics,** *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples,* ABS series cat. No. 4704.0, Commonwealth of Australia, 2005, available online at: http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/B41B1BF36BF3C8EFCA25709900015D71?opendocument accessed 23 February 2007.

expectancy for Indigenous males is 59 years and for Indigenous females, 65 years.[102] These circumstances limit the ability of Indigenous householders to service home loans over a 30 year period.

According to the ABS, Indigenous adults are four times more likely to report financial stress than non-Indigenous households. 'Financial stress' was defined by whether the household could raise $2,000 within a week in a time of crisis. Almost three quarters of remote Indigenous residents reported experiencing financial stress as did half of those Indigenous households in regional areas.[103]

On a $150,000 loan the weekly repayments over 30 years at an interest rate at 3 percent is $145.37 per week. This is 54 percent of the average gross weekly income of a typical remote Indigenous household. Even at an interest rate of 0.2 percent, the weekly repayments are $98.75. This is almost 37 percent of the weekly income of a remote household.

By any measure this level of repayment is not sustainable. Given that Indigenous Business Australia will not lend amounts where the repayments exceed 30 percent of the household income, it is evident that the average remote Indigenous household is in no position to support a home loan, with incentives or otherwise.

In its 1996 *Evaluation of the Home Ownership Program,* the Office of Evaluation and Audit observed that the 'profile of the Indigenous home owner is quite similar to non-Indigenous home owner in Australia.'[104]

> Compared to the non Indigenous home owner, the Indigenous home owner is likely to be older and better educated, to have mainstream employment, higher income, and a non-Indigenous spouse, and to belong to a 'typical' nuclear family in a neighbourhood with relatively lower rates of social dysfunction. [105]

This profile of the Indigenous homeowner has not changed in the ten years since this report. According to more recent ABS data, those who are capable of home ownership exhibit many of the demographic characteristics of their non-Indigenous counterparts including geographic location, employment status and income level.[106]

Remote Indigenous Australians are the most disadvantaged group of any Australian group against every social indicator. The Government strategy to address this situation is to increase the debt burden through a home ownership scheme that will exclude the majority of remote Indigenous householders.

While the Government is offering financial incentives to encourage participation, it is likely that owning a home in remote areas will be a financial liability rather than an asset. The ongoing financial burden for all but a very small minority of

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102 **Australian Bureau of Statistics, 3302.0 –** *Deaths, Australia, 2005*, 30 November 2006, available online at: http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/C67A858BA00CB846CA2568A9001393C6?OpenDocument, accessed 24 February 2007.

103 **Australian Bureau of Statistics,** *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples,* ABS series cat. No. 4704.0, Commonwealth of Australia, 2005, p8.

104 **Office of Evaluation and Audit,** *Evaluation of Home Ownership Program, Final Report,* July 1996, p(i), at http://www.finance.gov.au/docs/homeownershipprogram-july1996.pdf accessed 15 January 2007

105 **Office of Evaluation and Audit,** *Evaluation of Home Ownership Program, Final Report,* July 1996, p(i), at http://www.finance.gov.au/docs/homeownershipprogram-july1996.pdf accessed 15 January 2007.

106 Australian institute of Health and Welfare, *Indigenous housing needs 2005 – a multi-measure needs model* available online at: http://www.aihw.gov.au/publications/hou/ihn05/ihn05-c01.pdf accessed 23 February 2007.

remote Indigenous Australians may exacerbate poverty in remote communities and highlight disparities between the 'haves' and the 'have nots.' Notwithstanding, some Indigenous people in remote communities might be able to afford to purchase a home and governments should extend all support and encouragement to facilitate the home purchase.

Cost, quality and maintenance of Indigenous housing

In 2006, Indigenous Business Australia put out an *Expressions of Interest* paper calling for tenders for an 'Innovative, Affordable Housing Project.' The winning tenders will ultimately provide the materials and design for houses available under the Government's home ownership scheme.

The functional brief for the 'Innovative, Affordable Housing Project' includes three, four and five bedroom house types designed with regard to culturally appropriate living arrangements, security from intrusion and robustness of materials. The *Expression of Interest* paper specified building code compliance with climatic zone categories including tropical, subtropical, humid-arid, dry-arid, warm-temperate, cool-temperate, alpine and cyclone ratings. Notwithstanding these aims, the *Expression of Interest* specified the following:

> The single most important design parameter is cost effectiveness. If solutions are not significantly more affordable than prior models, they will not achieve the objective of the Project.
>
> Skilled onsite labour is hoped to be kept to a minimum so 'this may be achieved by using…pre-fabricated modular building elements and avoiding the use of materials and finishes which require on-site labour such as in-situ concrete, plumbing, electrical work etc. The potential to use local labour to assist with the erection of buildings is anticipated to reduce the end cost of housing and provide much needed Indigenous employment in remote communities.[107]

The quality of the houses will be critical to the longevity of the asset and the cost of maintaining it over time. The Australian Bureau of Statistics outlined the following about Indigenous housing.

> Although there are many factors which contribute to the sustainability of housing, the adequacy of design, construction and maintenance of Indigenous housing plays a crucial role. When houses are not culturally appropriate in their design, are poorly built, or where there is no systematic approach to their repair or maintenance, minor problems can escalate over time and shorten the life expectancy of houses. Given the serious backlog of housing need in rural and remote communities, it is important that resources are well targeted and provide the maximum benefit to Indigenous Australians.[108]

There are indications that the houses proposed for the Government's home ownership scheme will not be of the quality that governments currently provide. The new homes will be 'self built' kit homes that are to be built at less than half of

107 **Indigenous Business Australia,** *Expressions of Interest: Innovative and Affordable Housing Project*, Department of Families, Community Services and Indigenous Affairs, Australian Government, Canberra, 3.2, p6-7, available online at http://www.iba.gov.au/files/Expression_Of_Interest.pdf, accessed 27 February 2007.

108 **Australian Bureau of Statistics,** *1301.0 - Year Book Australia, 2004*, available online at: http://www.abs.gov.au/AUSSTATS/ABS@.NSF/Previousproducts/1301.0Feature%20Article222004? opendocument&tabname=Summary&prodno=1301.0&issue=2004&num=&view= accessed 25 February 2007.

the cost of current Government housing cost in remote. According to the Tiwi Local Government Housing for example, the cost of a government built house on the Tiwi Islands is $320,000.[109] The kit homes earmarked for the home ownership scheme have been costed ex-factory at approximately $150,000 per home.[110] According to the Government they are built to cyclone code.[111]

> [Forty-five] new houses [are] earmarked for home ownership, which [are] to be built on community land… as well as $6 million for innovative housing solutions in remote indigenous communities… it is to look at using self-built type housing construction as a means of more cost-effective housing design and construction in remote communities… it is a reflection of concerns of the high cost of building in very remote communities.[112]

Up to 12 of the proposed 45 houses will be available to residents in Nguiu on the Tiwi Islands through a land reform program package and the remaining homes are earmarked for Galiwinku on Elcho Island.[113] In an exchange in Senate Estimates regarding the quality of the homes, the Associate Secretary of the Department of Families, Community Services and Indigenous Affairs said the following:

> We know of kit homes that are being used… in other parts of Australia - the Torres Strait for example - that are meeting all of the building requirements in that area and are cyclone rated.

The *Rawlinson's Australian Construction Handbook* 2006 is widely used by industry and governments to cost infrastructure. It sets out the cost of building residential housing per square metre in urban and remote regions of Australia. In addition it provides comparative cost analyses of residential housing in major cities compared with regional areas. For example, the cost of building a house in a city such as Adelaide is the benchmark at 100 percent.

However according to Rawlinson, the cost of building the same house in Groote Eylandt is 170 percent due to the freight of materials and the need to bring in tradesmen. In Milikarpiti on the Tiwi Islands the cost is 154 percent. In dollar terms the cost of building a150 sqm house in Adelaide is between $152,200 and $161,200; in Milikarpiti between $226,196 and $239,336; and on Groote Eylandt between $254,750 and $270,050.[114]

Given the inflated costs of remote infrastructure, it is difficult to see how governments will manage to build houses of quality for $150,000. If the houses are of poor quality, the maintenance and structural liability will be transferred to the

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109 **Housing worker, Tiwi Island Local Government Housing,** *Communication with Aboriginal and Torres Strait Islander Social Justice Commissioner*, 27 January 2007.

110 **Bartlett A,** *Hansard*, Senate Select Committee on the Administration of Indigenous Affairs, 30 May 2006, Canberra, p37.

111 **Gibbons, W., (Associate Secretary, Department of Families, Community Services and Indigenous Affairs),** *Hansard,* Senate Community Affairs Legislation Committee, Estimates, Canberra, 30 May 2006, p38.

112 **Knapp, R., (Group Manager, Housing and Disability Group, Department of Families, Community Services** and Indigenous Affairs), *Hansard,* Senate Community Affairs Legislation Committee, Estimates, Canberra, 30 May 2006, p37.

113 **Gibbons, W., (Associate Secretary of the Department of Families, Community Services and Indigenous** Affairs), *Hansard,* Senate Community Affairs Legislation Committee, Estimates, Canberra, 30 May 2006, p38.

114 **Rawlinson's Construction Cost Consultants and Quality Surveyors (eds.),** *Rawlinson's Australian Construction Handbook,* 2006, ed. 24, Rawlhouse Publications, Perth, p26.

homeowner, most of whom have not had the opportunity of independent advice or choice of design or construction materials.

The Australian Government has committed to building quality, healthy houses. In 2005, the Minister for Immigration and Multicultural and Indigenous Affairs introduced the *Healthy Indigenous Housing* policy aimed at improving the viability and sustainability of Indigenous community housing organisations and the quality of Indigenous housing in rural and remote communities.[115] The aim of the initiative is to:

- improve the viability and sustainability of Indigenous community housing organisations and the quality of Indigenous housing;
- reform governance, asset and tenancy management practices; and
- continue a programme of assessing and repairing up to 500 houses in around 15 communities and continue to deliver the Army Aboriginal Community Assistance Program (AACAP) to at least four communities.[116]

Healthhabitat is a non-government organisation with responsibility to improve the health standards of Indigenous housing in Australia.[117] Since 1999 it has inspected over 4,500 houses situated in tropical, rural, remote and urban settings.

One of the three Directors of *Healthhabitat*, Mr Paul Pholeros argues that 'reduced capital cost' housing has a great capacity to pass on infrastructure and maintenance costs to the household through poor construction, inappropriate design and poor materials. For example, a house without roof insulation will be cheaper to build but the costs of cooling the house in a 45°c desert summer, or heating it at night in minus 5°c winter is passed on to the household. These costs increase with remoteness as the cost of electricity increases dramatically. The failure of households to pay the electricity bills can then lead to the power being cut off which in turn makes cooking and food storage exceptionally difficult. Thus, 'reduced capital cost' housing has health implications as well as poor outcomes in terms of the house life-cycle and maintenance costs.[118]

Mr Pholeros is in favour of strategies which seek to alleviate the Indigenous housing crisis. He stresses this problem can not be solved by providing more poor quality housing, merely because it is initially cheaper for governments. New housing must reflect critical minimum standards in key areas such as electrical safety, water supply and good quality taps to avoid leaks and failures, hot water provision, waste

115 **Alfredson, R., (Director of Evaluation and Audit), ,Office of Evaluation and Audit, Indigenous Programs,** *Evaluation and Audit Work Program January- June 2005,* Australian Government, p14, available online at: http://www.finance.gov.au/docs/OEA__IP__Evaluation_and_Audit_Program_2005-_2007.rtf, accessed 15 January 2007.

116 **Australian Government, Indigenous Affairs,** *Indigenous Budget Measure 7: Healthy Indigenous Housing – continuation,* Family and Community Services Portfolio, available online at: http://www.atsia.gov.au/Budget/budget05/c_fact_sheet_7.pdf accessed 26 February 2007.

117 **Pholeros P., (Adjunct Professor in the Faculty of Architecture, Design and Planning, University of** Sydney, Director Healthabitat), *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 26 February 2007.

118 **Pholeros P., (Adjunct Professor in the Faculty of Architecture, Design and Planning, University of** Sydney, Director Healthabitat), *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 26 February 2007.

removal with well installed drainage and treatment of sewage. He cites examples of poor choice of materials in communities reliant upon bore water and other areas with high levels of mineral salts which quickly degrade taps and plumbing which may cost up to $2,000 a visit in remote areas to repair a single fault.[119]

Maintenance of infrastructure in remote areas

Housing maintenance in remote Indigenous communities is expensive and access to maintenance services is intermittent. Small communities often lack relevant trades people, meaning that plumbers, electricians and others need to be flown in to carry out routine maintenance. Given the structural problems with housing stock, and extreme climatic conditions that characterise remote living in desert communities and the tropical north, home maintenance requirements are high. For example, between 2001 and 2002, over 80 percent of Indigenous communities with a population in excess of 50 experienced interruptions to electricity provision. Twenty percent experienced more than 20 interruptions over this period. Sixty three percent of power outages were caused by storms, 59 percent occurred because of equipment breakdown, 42 percent were planned outages for maintenance, and 5 percent were due to system overload. Significantly, vandalism accounted for one percent of all power outages.

Between 2001 and 2002, 48 percent of Indigenous communities experienced sewerage system overflows or leakage. Rather than poor management or vandalism, the predominant causes were blocked drains at 51 percent, equipment failure at 33 percent and design or installation problems at 28 percent.[120]

These statistics affirm the claims of Indigenous people and their advocates who observe that the poor quality and unsustainable design of remote infrastructure is the cause of many of the maintenance problems. These figures refute Australian Government claims that infrastructure is not respected and poorly maintained because the asset is not owned.[121] This view was expressed by the Prime Minister in a speech in October 2005 where he observed:

> [O]ne of the reasons… [that the houses are in] appalling [condition] is that people don't own them. Simple as that… once you own something you value it and you look after it, it's human nature. That's been the experience of all societies… home ownership, private land ownership is a key to family and social stability and Aboriginal people are no different from the rest of us.[122]

119 **Pholeros P., (Adjunct Professor in the Faculty of Architecture, Design and Planning, University of** Sydney, Director Healthabitat), *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 26 February 2007.

120 **Australian Bureau of Statistics,** *Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities 2001,* ABS cat 4710.0., Commonwealth of Australia, Canberra, p22, Graph 3.16b.

121 **Australian Bureau of Statistics,** *Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities 2001,* ABS cat 4710.0., Commonwealth of Australia, Canberra, unpublished additional information request, Department of Families, Community Services and Indigenous Affairs, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner,* Email, 7 February 2007, p1.

122 **Howard, J., (Prime Minister) with Morrish P.,** *Interview ABC Radio*, Cairns, available online at: www.pm.gov.au/news/interviews/Interview1651.html on 11/01/07 12 February 2007.

CDEP home building and maintenance scheme

In a policy announcement in October 2005, the then minister for Indigenous Affairs announced the use of the Community Development Employment Projects (CDEP) program to build houses, support home maintenance, and maximise employment and training opportunities in support of the home ownership scheme.[123] To date there has been no national data to outline the size or impact of this initiative.[124] As the Australian Government has not yet collected or collated CDEP housing maintenance and building data, it is only possible to assess progress by individual project. Programs such as Alpurrurulam in the Northern Territory,[125] and the Torres Strait Infrastructure program,[126] are involving small numbers of CDEP recruits in manual labour and apprenticeship placements. The planned housing construction program in Wadeye has also been designed to involve CDEP participants in the assembly of kit houses.[127] The projects include constructing roads and sewage systems as well as apprenticeship programs geared toward community infrastructure support and maintenance.

Ultimately the quality of the housing construction will impact on the life of the asset and the cost of its maintenance. It will be essential that the highest standards are applied to the development of any asset targeted for the Indigenous home ownership scheme. At this stage the Australian Government is not monitoring the development of the CDEP house building and maintenance scheme and therefore there are some serious concerns about coordination and quality control.[128]

Australian housing markets

While not an immediate issue for the remote housing market, wider trends in property prices in Australia will be relevant in the future. The escalating housing market in Australia provides increasing financial impediments for potential home buyers in many Australian cities and coastal areas. In 2006, Australia's home affordability fell to a level comparable to that reached in 1989 when interest rates

123 **Vanstone, A., (Minister for Immigration, Multiculturalism and Indigenous Affairs),** *Initiatives to support home ownership on Indigenous land,* Media Release, 5 October 2005 available online at http://www.atsia.gov.au/Media/former_minister/media05/v0534.aspx accessed 20 February 2007.

124 **Siewert R., Knapp R., (Group Manager, Housing and Disability Group, Department of Families, Community** Services and Indigenous Affairs), *Hansard*, Community Affairs Legislation Committee, Budget Estimates, 30 May 2006,Canberra p45-46, Senator Siewert: '[H]ow can people comment...on the involvement of Aboriginal communities in construction and maintenance if there is no hard and fast data about which communities have been involved, where it has happened, how many houses have been involved et cetera? Have you done such an evaluation?' Robert Knapp: 'Not that I'm aware of.'

125 **Australian Government,** *Shared Responsibility Agreement, Alpurrurulam, Northern Territory, '*Community Centre and Internet Café', signed 4 May 2005 available online at http://www.indigenous.gov.au/sra/kitold/nt01.pdf accessed 26 February 2007. For details of the Agreement see http://www.indigenous.gov.au/sra/search/srasearch.aspx, accessed 26 February 2007.

126 **Australian Government,** *Indigenous Affairs (Budget) 2003, Fact Sheet*, Canberra, 2003, available online at http://www.atsia.gov.au/facts/old/fs_cameo.pdf, accessed 26 February 2007.

127 **Wayne Gibbons, (Associate Secretary, the Department of Families, Community Services and Indigenous** Affairs), *Hansard*, Senate Standing Committee on Community Affairs, 12 February 2007, p102.

128 **Siewert R. and Knapp, R.** (Group Manager, Housing and Disability Group, Department of Families, Community Services and Indigenous Affairs), *Hansard,* Community Affairs Legislation Committee, Budget Estimates, 30 May 2006,Canberra p45-46.

were at 17 percent.[129] While interest rates are now at 7.55 percent, it is the increase in the cost of houses as well as taxes that have moved property out of the reach of many. In fact, by international standards, Australia has a dismal rating in housing affordability. According to the 2007 *Annual Demographia Survey*, every Australian city is rated as 'seriously' or 'severely' unaffordable in a global study of 159 cities.[130]

> The Demographia survey rates housing 'unaffordable' when the median house price passes three times median household incomes. Housing is 'seriously unaffordable' when it passes four times median household incomes and 'severely unaffordable' when it passes five times median household incomes.[131]

After Western Australia, the Northern Territory property market had the most rapid growth during 2006. Property prices in Darwin increased by 17.6 percent.[132] The median house price in Darwin is now $344,000.[133] Interstate investors have been the main contributors to the rising house prices in Darwin. In recent years, investors have moved their attention from the flattened markets of the eastern states of Melbourne, Sydney and Brisbane to more remote markets like Darwin.

The real concern for prospective Indigenous home buyers is that investors will buy in their remote communities in search of new markets with capital growth. While desert communities are never likely to tempt the investor, remote coastal townships may be attractive given that Australian coastal real estate prices have escalated over past decades. A township like Nguiu in the Tiwi Islands for example, has potential appeal because it is located in an idyllic setting and it offers recreational activities such as fishing in pristine waters.

The property market trends are ominous for low income earners in remote regions. There is a real risk that the Government's home ownership strategy will create property markets that will exclude the very people they have been designed to benefit. Even with incentives and low price houses, the cost of housing and the increases in the market will make home ownership very difficult for the majority of remote Indigenous Australians.

We may see a situation where non-Indigenous investors and sea-changers buy the absolute waterfront blocks of the many coastal townships where 99 year leases are available. Over successive generations, low income Indigenous families may be relegated to the cheaper back blocks. Should some remote property markets move in the same ways as they have across Australia, the Government scheme will be encouraging the most disadvantaged Australians into a property market that is one of the most impenetrable markets in the world.

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129 **Kryger T.,** *Home loan affordability – measurement and trends*, Research Note no. 8 2006–07, Statistics and Mapping Section, Parliamentary Library of Australia, 9 November 2006, available online at http://www.aph.gov.au/Library/pubs/RN/2006-07/07rn08.htm accessed at 21 February 2007.

130 Wendell Cox Consultancy, *The 2007 Demographia Survey*, sourced from The Property Council of Australia website, available online at: http://propertycouncil.gravitymax.com.au/residential/page.asp?622=283194&E_Page=17720, accessed 21 February 2007.

131 **Wendell Cox Consultancy,** *The 2007 Demographia Survey*, sourced from The Property Council of Australia website, available online at: http://propertycouncil.gravitymax.com.au/residential/page.asp?622=283194&E_Page=17720 accessed 21 February 2007.

132 **Australian Bureau of Statistics,** *6416.0 - House Price Indexes: Eight Capital Cities, Dec 2006*. 15 February 2007, available online at: http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/6416.0?OpenDocument accessed 21 February 2007.

133 **Australian Broadcasting Corporation, Stateline,** *Territory Property boom - house prices continue to soar*, Broadcast 17 February 2006, available online at: http://www.abc.net.au/stateline/nt/content/2006/s1572885.htm, accessed 21 February 2007.

There is great potential for non-Indigenous Australians to benefit from the Government's long-lease tenures on communal land. Non-Indigenous investors and home buyers will be able to move into emerging remote markets with relative financial ease. This will add additional pressure to the cost of housing for the Indigenous residents as markets are established and prices become competitive. The most probable consequence of the Government's strategy is that remote Indigenous Australians will be further marginalised in their own communities.

Summary of concerns and challenges regarding remote Indigenous housing

The Australian Government's home ownership policy is poor policy for the following reasons. First, it is not based on an evaluated approach. Rather, the policy is contrary to evaluations of international models which show that similar individual land tenure approaches were seriously flawed and led to a loss of communal lands. Second, the home ownership incentives are poorly targeted and will not be accessible to the vast majority of remote Indigenous Australians for whom the policy is intended. Over time, in some regions housing markets will become increasingly inaccessible and Indigenous people with incomes on the margins will miss out. Third, it is more likely that non-Indigenous people will be the main beneficiaries emerging markets in remote communities.

If these are the consequences of the home ownership policy, then the Government strategy will further entrench Indigenous disadvantage and become another policy failure in the litany of failures that the Secretary of the Department of the Prime Minister and Cabinet so eloquently describes.[134]

The Australian Government and others will continue to argue that remote Indigenous Australians should not be prevented from purchasing their own homes in the same way as the majority of other Australians can purchase a home. In principle, this is correct. However it is not useful to consider home ownership as a right. It is not a right when the vast majority of Indigenous people in remote communities are not in a financial position to achieve this goal. By international human rights standards, adequate housing is a right.[135] It is essential therefore that governments support this right and ensure that adequate funding is maintained in community and public housing programs.

134 **Shergold P., (Secretary of the Department of the Prime Minister and Cabinet),** *Indigenous Economic Opportunity: the Role of the Community and the Individual*, Speech delivered at the First Nations Economic Opportunities Conference, 19 July, 2006: 'I am aware that for some 15 years as a public administrator too much of what I have done on behalf of government for the very best of motives has had the very worst of outcomes. I and hundreds of my well-intentioned colleagues, both black and white have contributed to the current unacceptable state of affairs, at first unwittingly and then, too often, silently and despairingly.'

135 *International Covenant on Economic, Social and Cultural Rights*, Article 11(1): The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the international co-operation based on free consent.

As I argued in last year's *Native Title Report 2005*, if Indigenous Australians and others want to purchase homes on communal lands they can already do so without changes to land tenures.[136] There are existing leasing options to accommodate home ownership that do not require Indigenous land owners to sign their lands over to governments. In addition, some Indigenous councils are aiming to mange their own lease tenures and home ownership programs while maintaining decision-making control over developments on communal lands. The Yarrabah Housing Project case study at Chapter 7 of this Report describes this model.

Governments can best assist Indigenous people to be home owners by investing in their personal and skills development, by developing an ethos of responsible personal finance management, by discussing the virtues of home ownership over an extended period of time and by focusing incentives on responsible renting. Through such initiatives and over time, more Indigenous Australians will be financially able and better placed to make an informed decision to purchase a home.

Indigenous employment

The current labour force participation rates, occupations and locations of Indigenous Australians demonstrate the potential challenges of the remote economic reform agenda. Access to sustainable employment will be essential for remote Indigenous Australians who are keen to participate in the home ownership scheme.

As a proportion of the population, Indigenous Australians are represented at a much higher rate in very remote regions of Australia than in any other region. The remoteness means that Indigenous Australians are dependant on smaller economies for employment, government services and life opportunities. Economies of scale dictate that opportunities in remote areas are not as abundant as those routinely available to urban citizens. Almost 70 percent of Indigenous Australians live outside the major urban centres and almost 18 percent live in very remote regions of Australia. Table 2 shows the proportions of the population by region. In very remote areas, Indigenous people are 45.4 percent of the population, while they are only 1.1 percent of the urban population.[137]

136 **Aboriginal and Torres Strait Islander Social Justice Commissioner,** *Native Title Report 2005*, pp66– 80, available online at: http://www.hreoc.gov.au/Social_Justice/ntreport05/ch2.html#part-ii accessed 27 February 2007.

137 **Taylor J.,** *Population and diversity: Policy Implications of Emerging Indigenous Demographic Trends, Discussion Paper 283/2006*, Centre for Aboriginal Economic Policy Research, 2006, p5.

Table 2: Indigenous and non-Indigenous population distribution by remoteness category, 2001

	Non-Indigenous	Indigenous	Indigenous % of total
Major city	12,732,492	138,494	1.1
Inner regional	3,932,907	92,988	2.3
Outer regional	1,907,688	105,875	5.3
Remote	284,160	40,161	12.4
Very remote	97,473	81,002	45.4
Total	18,954,720	458,520	2.4

Source: Australian Bureau of Statistics (ABS) 2003a.

Across Australia the employment rates for Indigenous people aged 15 years and over are 42.7 percent, and much lower than for non-Indigenous people who are employed at almost 64 percent.[138] The ABS includes in its 'employed' data category, Indigenous people who are participating in the work for the dole scheme; the Community Development Employment Program (CDEP). This means that the real employment rates for Indigenous people are lower than the figures suggest. CDEP employs approximately 28 percent of remote Indigenous people compared with 3.6 percent in non-remote areas, so it is remote regions where Indigenous employment rates are most likely to be inflated. Nevertheless, Table 3 demonstrates that Indigenous people in remote regions are less likely to be employed in full-time work than Indigenous people in non-remote areas. It should also be noted that most government funded projects that generate employment opportunities are funded on an annual basis and are submission based projects.

138 **Australian Bureau of Statistics,** *Summary of Findings, 4714.0 - National Aboriginal and Torres Strait Islander Social Survey, 2002*, Commonwealth of Australia 2004, available online at: http://www.abs.gov.au/Ausstats/abs@.nsf/0/AD174BBF36BA93A2CA256EBB007981BA?Open, accessed at 15 January 2007.

Table 3: Indigenous and non-Indigenous labour market participation as a percentage of the population, 2002

Indigenous				Non-Indigenous	
	Remote	Non-Remote	Total		Total
Full-time Employed	18.9*	25.3*	23.6*	Full-time Employed	45.2
Part-time employed	28.8*	15.4*	19*	Part-time employed	18.3
Total Employed	47.9*	40.8*	42.7*	Total Employed	63.5
Unemployed	4.4	11.3	9.4	Unemployed	3.7
Not in labour force	47.8	47.9	47.9	Not in labour force	32.8

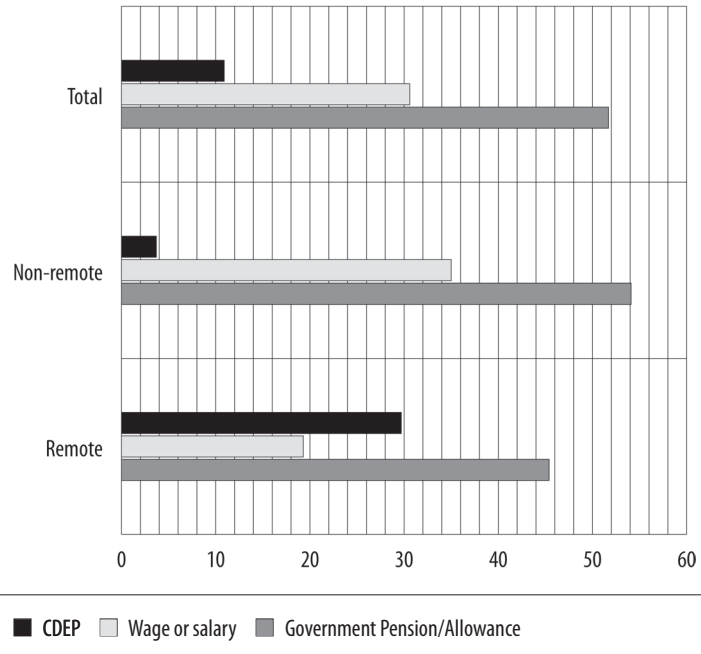
Source: Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey, 2002*.
*This data includes people employed through CDEP.

An important factor contributing to low employment rates is the lack of employment opportunity in regional and remote regions where 70 percent of Indigenous Australians are located.[139] The Government's 2006 policy to put a 12 month limit on CDEP participation in regional and urban areas is likely to inflate unemployment rates in the future.[140] Graph 1 identifies the sources of income for Indigenous people by their location. Indigenous people in remote and non-remote locations are most likely to source their income from a government pension or allowance. Indigenous people in remote areas were less likely to be in waged employment than people in regional and urban areas. Participation rates in CDEP were highest in remote locations.

139 According to the ABS, lower rates of education attainment may also contribute to lower Indigenous employment rates. Australian Bureau of Statistics, *Summary of Findings, 4714.0 – National Aboriginal and Torres Strait Islander Social Survey, 2002*, Commonwealth of Australia 2004, available online at: http://www.abs.gov.au/Ausstats/abs@.nsf/0/AD174BBF36BA93A2CA256EBB007981BA?Open, accessed at 15 January 2007.

140 Andrews K., (Minister for Employment and Workplace Relations), *CDEP Guidelines For 2006*, Speech, 26 March 2006, available online at http://mediacentre.dewr.gov.au/mediacentre/AllReleases/2006/March/CDEPGuidelinesFor2006.htm accessed 24 February 2007.

Graph 1: Source of income for Indigenous people aged over 15 years by remoteness as a percentage of the Indigenous population 2002



Source: Australian Bureau of Statistics, 4714.0, *National Aboriginal and Torres Strait Islander Social Survey, 2002.*

Occupation

In 2001 the most common occupation for Indigenous people Australia-wide was labouring work. Rates of Indigenous labourers increased with remoteness.

> The main occupation group for employed Indigenous persons was Labourers and Related Workers (24%) while the main occupation group for non-Indigenous persons was Professionals (18%). A relatively high proportion of both Indigenous and non-Indigenous persons were employed as Intermediate Clerical, Sales and Service Workers (18% and 16%, respectively).
>
> The proportion of employed Indigenous persons working as Labourers and Related Workers rose markedly with increasing geographic remoteness from about one in ten (11%) in major cities to about one in two (47%) in very remote areas.[141]

141 **Australian Bureau of Statistics,** *4713.0 – Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2001,* available online at http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/2B3D3A062FF56BC1CA256DCE007FBFFA?OpenDocument, accessed 8 December 2006.

In 2001 the private sector was the employer of 55 percent of all employed Indigenous Australians. In comparison, the private sector was the employer of 82 percent of non-Indigenous people.[142] This finding is significant in the light of the Government's argument that a private sector market economy will provide real employment to Indigenous people. To date, the private sector has not been a strong employer of Indigenous people. If these employment trends are replicated on Indigenous land, it is unlikely that Indigenous Australians will be major beneficiaries of a remote market economy.

Collectively, the labour market data demonstrates poorer outcomes for Indigenous Australians against all indicators. If remote Indigenous Australians are put in a position where they have to compete with non-Indigenous people for employment, it is almost inevitable that there will be an increase in levels of Indigenous employment disadvantage.

In recognition of this disadvantage, the Minerals Council of Australia (hereon referred to as the MCA) is working with the mining industry sector to ensure employment quotas for Indigenous Australians through Indigenous Land Use Agreements under the native title regime. The case studies of the MCA Memorandum of Understanding and the Argyle Agreement at Chapters 3 and 5 of this Report outline industry-based Indigenous employment initiatives in more detail. Similar interventions are required in remote communities without mines. Without these interventions, Indigenous people will fall further behind non-Indigenous Australians. Unfortunately, under the Government's intended reforms, such interventions are unlikely. Interventions such as these would be contrary to the Government's intention to create market economies to replace the interventions of welfare economies and CDEP.

Programs supporting Indigenous enterprise and economic development

In order to support and stimulate economic development on Indigenous land, the Australian Government has developed a range of programs that provide funding and resources to Indigenous organisations and individuals. The programs are based on a self-access model requiring applicants to undertake tasks such as developing business plans and applying for start up funds. Program funding is available through Australian government departments and statutory authorities including the Indigenous Land Corporation and Indigenous Business Australia. The programs cover a wide range of areas including home ownership schemes, business development schemes, employment programs, governance training, finance programs, financial management programs, loan schemes, and joint venture projects.

In order to assess the take-up rates and expenditure on national Indigenous economic development programs, I surveyed government agencies and statutory authorities with responsibility to administer national programs during the 2005 –

142 **Australian Bureau of Statistics,** *4713.0 – Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2001*, available online at http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/2B3D3A062FF56BC1CA256DCE007FBFFA?OpenDocument, accessed 8 December 2006.

2006 financial year. Nine entities provided data on 33 national programs. Funding entities provided information about the following:[143]

- the aims of the program;
- the number and type of indigenous entities applying for funding;
- the number of successful applicants;
- the reasons for unsuccessful applications;
- the category of applicant by organisation type;
- total budget allocation for program; and
- total expenditure for the program.

Survey findings

The survey responses from Australian Government Departments and statutory authorities demonstrate that there are a good range of economic development programs available to Indigenous Australians. The programs fall under the following categories:

- industry and business development;
- land management, heritage protection and the environment;
- employment;
- land acquisition;
- community infrastructure; and
- capacity building.

The aims and targets of the programs demonstrate good strategic alignment with the objectives of the Australian Government's *Indigenous Economic Development Strategy*. According to the survey data, during 2005 – 2006 the total annual expenditure across all programs was in excess of $246,503,887. Detailed survey responses for each program are provided at Appendix 2 of this Report.

Industry and business development

Four government departments and one statutory authority provided funding towards ten programs for *Industry and Business Development* during 2005 – 2006. Providers of program funding include:

- the Department of Employment and Workplace Relations (DEWR);
- the Department of Agriculture, Fisheries and Forestry (DAFF);
- the Department of Industry, Tourism and Resources (DITR);
- the Department of Communication, Information Technology and the Arts (DCITA); and
- Indigenous Business Australia (IBA).

143 **Department of Employment and Workplace Relations; Department of Families, Community Services and** Indigenous Affairs; Department of the Environment and Heritage; Department of Agriculture, Fisheries and Forestry; Department of Transport and Regional Services; Department of Industry, Tourism and Resources; Department of Communication, Information Technology and the Arts; Indigenous Business Australia; and the Indigenous Land Corporation.

The ten programs provided funding and support for Indigenous business development, Indigenous business support, development projects on Indigenous land, advice and training on ways to improve returns from trusts and investments, and programs to support home ownership.[144] It is not possible to provide an accurate total expenditure under the category of *Industry and Business Development* because DEWR could not disaggregate funding data across their various programs.[145] DAFF were unable to provide any funding data for programs relevant to this category. Aggregated expenditure under *Industry and Business Development* which includes DCITA, DITR and Indigenous Business Australia in the 2005-2006 financial year was $78,999,570.

Land management, heritage protection and the environment

Three government departments provide funding towards five programs specifically related to *Land Management, Heritage Protection and the Environment*. They include the Department of the Environment and Heritage; the Department of Agriculture, Fisheries and Forestry; and the Indigenous Land Corporation. The programs are all directed to improved heritage and conservation outcomes and improved land management. In the 2005-2006 financial year a total expenditure in excess of $17,894,248 was allocated to Indigenous program applicants.[146]

Employment

The Department of Employment and Workplace Relations administers all six programs related to Indigenous employment. All programs aim to address the particular disadvantage of Indigenous Australians in the labour market, and stimulate Indigenous economic activity through employment opportunities.[147] Individual program expenditure was not provided by DEWR for employment programs.

Land acquisition

The Indigenous Land Corporation administers the funding related to land acquisition. The programs include the Environment Acquisition Program, the Cultural Acquisition Program, the Social Acquisition Program, and Economic Acquisition Program. In the 2005-2006 financial year a total of $7,934,024 was expended on land acquisitions.

144 **Australian Government,** *Achieving Indigenous Economic Development: Indigenous Economic Development Strategy, targeting jobs, business and assets,* pp14-18.

145 **Department of Employment and Workplace Relations,** *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 200,* 26 February 2007.
Note: DEWR reported a total expenditure of 77, 710 000 across 9 programs across two categories, Industry and Business Development and Employment.

146 **Note: Funding data was not provided for all of the programs related to the** *Land Management, Heritage Protection and the Environment* category.

147 **Department of Employment and Workplace Relations,** *Annual Report 2005-2006,* p65, available online at www.dewr.gov.au, accessed 23 February 2007.

Community infrastructure

The Department of Families, Community Services and Indigenous Affairs, and the Department of Communications, Information Technology and the Arts provide funding for five programs specifically related to access to, and improvement of community infrastructure. In the 2005-2006 financial year in excess of $31,483,097 was allocated to Indigenous program applicants.[148]

Capacity building

The Department of Transport and Regional Services, and the Department of the Environment and Heritage provide funding towards six programs specifically related to capacity building.[149] These programs contribute to the development of self-reliant communities through partnerships with other governments, communities and the private sector. In the 2005-2006 financial year a total of $32,482,948 was allocated to Indigenous program applicants.

Applications for program funds

In excess of 1,544 funding applications were submitted for the 33 economic development programs and 1,109 were successful. While this is a 72 percent success rate, 414 of these applications were not successful.

Five of the nine entities were able to provide data specifying which categories of Indigenous organisation were successful in their funding applications.[150] The following is collated data by Indigenous group type:

- Aboriginal Shire/Community Councils were successful in 529 of their 752 applications across seven programs;
- Community Corporations were successful in 227 of their 334 applications across nine programs;
- Native Title Representative Bodies were successful in 20 applications across six programs. Data regarding success rates was inconclusive;[151]
- Land Councils were successful in 78 of their 98 applications across eight programs;
- Prescribed Bodies Corporate were successful in 77 applications across four programs. Data regarding success rates was inconclusive; and[152]

148 Note: Funding data was not provided for all of the programs related to the *Community Infrastructure* category.

149 Note: This includes the two home ownership programs provided by Indigenous Business Australia.

150 Note: Departments were asked to disaggregate applicant data by group type under the following categories: Native Title Representative Bodies, Land Councils, Prescribed Bodies Corporate, Aboriginal Shire/Community Councils, Individual Traditional Owner Groups and Community Development Organisations. Five entities provided funding breakdowns by applicant type.

151 Note: Data on number of unsuccessful applicants was not provided.

152 Note: Data on number of unsuccessful applicants was not provided.

- individual traditional owner groups submitted 38 applications across five programs. Data regarding success rates is inconclusive.[153]

Given that only five entities could identify their funding recipients by organisation type, I was unable to make any overarching assessment of the relative capacity of Indigenous organisational types. It would be beneficial for the Australian Government to conduct an audit of all 33 national programs and collate the data to determine which Indigenous organisational types are accessing programs. This information will determine whether there is equitable distribution of economic development funding and support across the Australian Government economic development strategy. Given that the programs provide targeted funding to redress disadvantage, it is important to be able to assess the overall efficiency and effectiveness of the strategy to see whether it is achieving its intended objectives.

Without data provided across all departments it is difficult to:

- assess the priority areas for funding;
- determine which organisations are applying for categories of funding;
- determine which organisations require more intensive assistance with the preparation of funding applications; and
- determine whether there are regional variations in funding applications.

The nine entities were asked to specify the most common reasons for unsuccessful funding applications. Almost without exception across the 33 programs, the reason for unsuccessful applications included:

- failure to adequately address selection criteria; and
- incomplete applications.

To ensure that all Indigenous organisations can be competitive in the application process, targeted assistance in the form of workshops, plain English guides, application templates and training in the preparation of applications is required.

While ultimately the availability of program funding provides equality of opportunity, it may not lead to equality of outcomes. Governments need to be sure that communities with the greatest need for resources have the appropriate support to access available program funding. Reliable data will permit governments to assess the barriers that exclude some Indigenous groups from obtaining program funding.

Agreements and economic development

The Indigenous Land Use Agreements of the native title regime and the Australian Government's Shared Responsibility Agreements both provide opportunity for Indigenous Australians to leverage or enhance economic activity on Indigenous land.

153 Note: Data on number of unsuccessful applicants was not provided.

Indigenous Land Use Agreements

Indigenous Land Use Agreements (hereon referred to as ILUAs) provide one of the only ways in which the native title regime provides opportunity for economic development outcomes for traditional owners. An ILUA is an agreement through which native title holders negotiate and agree to terms and conditions that may include economic and employment opportunities. ILUAs can be negotiated under the following subject categories:

- access;
- co-management;
- community living area;
- consultation protocol;
- development;
- extinguishment;
- government;
- infrastructure;
- mining;
- petroleum/gas; and
- pipeline.

When registered, Indigenous Land Use Agreements bind all parties including the native title claimants or holders to the terms of the agreement. Some of the economic development provisions contained in ILUAs include provision for education and training, scholarship positions, compensation payments to Indigenous trusts, employment opportunities and quotas, and freehold land in exchange for extinguishment of native title rights. Each ILUA contains different provisions depending on the nature of the agreements and the resources, interests and capacity of the signatory parties.

During the 2005 – 2006 financial year, a total of 68 ILUAs were registered in Australia. This represents a significant escalation in the overall number of ILUAs. By June 2006 there were a grand total of 250 registered ILUAs since they were first introduced in 1998.[154]

ILUAs are usually initiated when governments, industry or other interests require access to the land or use of the land to progress economic and development plans. This means that the land either holds precious subsurface resources or it is located in an area where governments or industry plan to develop infrastructure such as gas pipelines. In many areas of Australia, particularly the desert regions, there are limited opportunities for traditional owners to leverage economic outcomes through ILUAs. Where there are no mineral riches and no plans for future development there are very limited opportunities for ILUA agreements.

In addition, not all ILUAs are lucrative or beneficial for traditional owners. Recent research by Griffith University has found that although about a quarter of Indigenous Land Use Agreements are delivering substantial outcomes to Aboriginal people in Australia's major resource regions, half have little by way of substantial benefit, and

154 National Native Title Tribunal, Annual Report 2005-2006, Commonwealth of Australia 2006, p72, available online at: http://www.nntt.gov.au/publications/data/files/AnnualReport20052006.pdf accessed 27 February 2007.

a quarter should never have been signed. Professor O'faircheallaigh from Griffith University recommended that better negotiated outcomes could be obtained for Indigenous groups through organised approaches that identify traditional owner aspirations.[155]

Detailed discussion regarding economic development possibilities and challenges of ILUAs is contained in the case studies of this Report, specifically the Argyle Participation Agreement and the South Australian State-wide ILUA framework.

Shared Responsibility Agreements

Shared Responsibility Agreements (hereon referred to as SRAs), are agreements between governments and Indigenous communities for services and resources in regional and remote Australia. They are based on the principle of mutual obligation. The Australian Government provides a service or a resource in exchange for input or mutual obligation from the community. This might include the commitment of community funds, or the achievement of certain targets in improved education, employment or health outcomes. SRAs are increasingly being used to address service and infrastructure requirements in communities. According to the Office of Indigenous Policy Coordination, SRAs mean that:

> Communities… take responsibility for determining their own priorities for change and to work out what they can contribute to making things better. This contribution could involve using community assets, such as a community centre, upgraded sports facility or tourism business; or it could be a commitment to invest time and energy towards outcomes.[156]

SRAs can be coordinated in a way that enhances or creates the preconditions for enterprise and economic development on Indigenous land. For example, SRAs can be used to specify capital improvements or targeted training that supports economic activity. An SRA can be a small or a large agreement and it can be initiated by traditional owners or community members. SRAs can also be linked to other agreements such as ILUAs. It is the view of the President of the National Native Title Tribunal, that although there are legislative rules about the criteria for registration and the purpose of an ILUA, there is scope for SRAs and Regional Partnership Agreements to support mutual outcomes.[157]

> Land is a significant issue for Indigenous communities, and the Tribunal strongly supports Indigenous communities making best use of available agreement-making options, and better integrating agreements about native title and other forms of Indigenous agreements. The Tribunal can see no reason why negotiations relating to native title can not be run in parallel with negotiations of other forms of Indigenous agreements, and would encourage a situation where all relevant

155 **Corbett T., O'faircheallaigh C.,** *Unmasking the Politics of Native Title: The National Native Title Tribunal's Application of the NTA's, Arbitration Provisions*, Department of Politics and Public Policy, Griffith University, Brisbane, 2006.

156 **Office of Indigenous Policy Coordination,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Social Justice Report 2005*, p2.

157 **National Native Title Tribunal,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2006,* 22 February 2007, p2.

> stakeholders are brought to one table to address issues relevant to the community in a coordinated approach.[158]

Currently there is only one SRA that directly complements an Indigenous Land Use Agreement.[159] Traditional owners of the East Kimberley area have entered a Shared Responsibility Agreement with the Australian Government to develop an education and training fund. The traditional owners dedicate funds obtained from the ILUA and the government has matched the funds through an SRA agreement. This is a good example of the use of one agreement to leverage another for strategic community development.

For more detailed analysis of the Shared Responsibility Agreements please see Chapter 3 of my *Social Justice Report 2006*.[160]

Assessment of the self-access model for Indigenous economic development

While the self-access model provides for equality of opportunity, it will not necessarily lead to equality of outcomes where there are glaring disparities between the capacity and contexts of Indigenous communities. The current Australian Government strategy of 99 year leases and home ownership will not assist remote, desert communities where there has been limited history of development. Businesses and residents are unlikely to move into these areas. In places where the land is marginal and there is no mining activity and no history of enterprise development, targeted government assistance will be necessary to support models of Indigenous governance and the development of entities with business expertise.

> The remote regions we represent essentially have no economic development whatsoever. Most people accept that economic development and security is essential for a sustainable future.[161]

Governance structures and business experience are essential components of any business venture. Creating a successful business in the Australian marketplace is difficult by any measure. The Australian Productivity Commission identified that between 7 and 8 percent of all small businesses in Australia fail within their first year of operation.[162]

In resource rich regions like Eastern Arnhem Land, the Pilbara and parts of the Queensland Cape York region, mining activity has involved Indigenous leaders in business planning, negotiation and enterprise opportunities. The resultant agreements with mining companies have created governance models and in

158 **National Native Title Tribunal,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2006,* 22 February 2007, p4.

159 **Agreements, Treaties and Negotiated Settlements Project,** *Gelganyem Education and Training Shared Responsibility Agreement, 2005,* available online at: http://www.atns.net.au/biogs/A002885b.htm accessed 5 March 2007.

160 **See generally, Aboriginal and Torres Strait Islander Social Justice Commissioner,** *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission, Sydney, 2007.

161 **Ngaanyatjarra Council Aboriginal Corporation, Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2*006.

162 **Bickerdyke I, Lattimore R and Madge A,** *Business Failures and Change: An Australian Perspective*, Productivity Commission Staff Research Paper, AusInfo, Canberra, 2000, p184.

some instances, increased financial and business literacy amongst the Indigenous community. As a result, entities have been developed with a specific mandate to increase economic development activity on behalf of the Indigenous people of the region.

> The Gurang Land Council (Aboriginal Corporation) GLC(AC) region is a resource rich area and is seen as a prime area that will be targeted for opportunities by mining and exploration companies for years to come… Currently, within the GLC(AC) region, there are approximately 8 more ILUAs in the negotiation or registration stage. These agreements concern mining, state government tenure resolution, infrastructure, access and a pipeline.[163]

Across remote Australia, there are few established entities with any capacity or mandate to engage with the Australian Government's self access model of economic development. The Australian Government *Indigenous Coordination Centres* (hereon referred to as ICCs) have a role to coordinate government services and negotiate Shared Responsibility Agreements in the 30 Australian regions where they are located. ICCs accommodate 'Solution Brokers' who are personnel with responsibility to implement 'employment, participation, training and enterprise opportunities for Indigenous Australians in their ICC region.'[164]

With such a broad ambit of responsibility over large regions, economic development outcomes are likely to be some way off, if they are to be possible at all. Governance and representative structures will be a precondition for ICCs to support economic development on behalf of the Indigenous people within each region. To this end, the Australian Government has announced that it is currently consulting with Indigenous people to decide on local representative networks.

> The networks will be different in each area. They may be set up at a number of levels—regions, communities, groups of organisations, clans or families. It depends on what is suitable in any one area, and what local people want.[165]

Native title entities are unable to proactively support or initiate economic development. A lack of funding and prescriptive guidelines limit the capacity of Prescribed Bodies Corporate and Native Title Representative Bodies respectively. Neither group is in a position to initiate or support economic development because both entities are limited by funding linked to functions of the *Native Title Act 1993* (Cth). The Office of Indigenous Policy Coordination (hereon the OIPC) outlined the following parameters for funding.

> Funding to Native Title Representative Bodies (NTRBs) under the Native Title Program (NTP) is not formula driven. Within the constraints of the funding available within the NTP ($55.1M in 2006-07 financial year), funding to individual NTRBs is determined on the basis of Operational Plans developed by NTRBs that identify and cost prioritised native title activities to be progressed in the funding year. Funding is also provided to meet the operational overheads associated with

163 **The Gurang Land Council (Aboriginal Corporation), Survey Comment,** *HREOC National Survey on Land, Sea and Economic Development 2*006.

164 **Australian Government,** *Office of Indigenous Policy Coordination, Secretaries' Group Annual Report 2005*, Website, available online at: http://oipc.gov.au/performance_reporting/sec_group/ar2005/section1_1.asp accessed 28 February 2007.

165 **Australian Government,** *Office of Indigenous Policy Coordination*, Indigenous Coordination Centres, Website, available online at: http://www.indigenous.gov.au/icc/sra.html#anchor2, accessed at 28 February 2007.

> implementing and delivering the funded Operational Plans. It is open to NTRBs to seek additional funding to meet unforseen native title matters during the course of the funding year and to seek variations to Operation Plans to meet emerging and changed priorities.[166]

The Operational Plans of NTRBs are based on activity prescribed under Division 3 s203B of the *Native Title Act 1993* (Cth). These activities include facilitation and assistance, certification, notification, agreement making and internal review functions.[167] NTRBs have reported in numerous forums and submissions that they are under funded to perform their statutory obligations. This precludes these bodies from providing support for economic development that is not strictly within agreements and processes associated with native title.[168]

It is difficult to assess the capacity of land councils to engage in economic development activity. The land council respondents to the 2006 national survey of traditional owners provided mixed responses about their relative capacities.[169] In the Northern Territory it is likely that land councils will have limited capacity since the amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in 2006. The new provisions under s64 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) provide a revised funding formula that will dramatically limit discretionary funds for activity such as enterprise and economic development.

Ultimately, the capacity for Indigenous Australians to engage in economic development should not be left to chance. Remote Indigenous communities require good governance and business expertise to access program funding and to develop economic development agreements. For communities without independent sources of capital, the development of representative entities will not be possible without bilateral assistance from governments. Significant efforts and interventions will be required to establish governance and economic development capacity in remote communities.

Conclusion

Good policy is based on trialed and evaluated approaches that provide assessments of the relative advantages and disadvantages of policy impacts and outcomes. Good policy benefits the greatest number of the target group for whom it is intended. The Australian Government reform agenda is not based on an evaluated approach or from trials within Australia or overseas. In fact the international experience of individualising land title the United States, New Zealand and Africa in past decades has led to poor outcomes for Indigenous people including the loss of land and few economic benefits if any. These countries are reversing land reform approaches that individualise title.

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166 **Office of Indigenous Policy Coordination,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2006*, Email, 3 July 2006.

167 *Native Title Act 1993* (Cth), Division 3, s203B.

168 **Note: Chapter 1 of this Report provides further evidence of the relative capacity of NTRBs to engage in** economic and develop activity beyond the requirements of the *Native Title Act 1993* (Cth).

169 **Human Rights and Equal Opportunity Commission,** *National Survey of Traditional Land Owners Australia*, 2006, See Chapter 1 of this Report.

The Government's reforms radically recast the meaning and intention of land rights and the implementation of the reforms during 2005 and 2006 have individually and collectively reduced the capacity of Indigenous Australians to have decision-making control over land and administrative affairs. Some of the reforms will have far reaching implications that will last beyond any political term and any lifetime of the politicians and the people on whom it will impact. It is therefore imperative that the Australian Government ensure the highest threshold of Indigenous participation and consent for any initiative that will remove the authority of traditional owners to make decisions over traditional lands and seas.

In accordance with Article 1 of the *Declaration on the Right to Development*, Indigenous peoples (like every other person, and all peoples) are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development. It is imperative that those most affected by policy are included as active participants in the process of negotiating and deciding upon the economic and social policies that will impact on their communities. Indigenous stakeholders require control of the development goals and agendas for economic development especially because the ultimate success of these goals is dependent on our active participation. Crucial to the successful implementation of the right to development for Indigenous people is the Government's obligation to ensure that its policies, legislations and practices make provision for the following:

- the right to self-determination;
- the right to protection of culture;
- economic, social and cultural rights;
- free, prior and informed consent; and
- equality.

Findings

2.1 The Australian Government has begun a process of implementing reforms to Indigenous communal lands that have the potential to radically change the nature of Indigenous communities on these lands.

2.2 The Australian Government's economic reform agenda on Indigenous land will be evaluated by successive COAG reports.

2.3 The marginal nature of the majority of Indigenous land and the legislative restrictions on the resources and the rights of Indigenous tenures, severely limit capacity for economic development.

2.4 The majority of Indigenous communities are located in desert areas where there is limited or no development potential. A minority of Indigenous communities are located in resource-rich areas with well-developed governance structures, experience in negotiating agreements, and capacity to leverage economic opportunities. This means that Indigenous communities have vastly different contexts and capacities and therefore require different forms of support.

2.5 The Australian Government has rejected proposals by Indigenous communities who have put up alternative models to the Government's 99 year headlease model.

2.6 International evidence demonstrates that individualising lease tenures on communal lands such as those proposed under section 19 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) [99 year headleases] leads to a loss of communal lands, and few, if any, economic benefits.

2.7 The Australian Government has signaled an intention to reduce services to homeland communities.

2.8 The home ownership scheme administered by Indigenous Business Australia and central to the Australian Government's economic development strategy is outside the financial reach of the majority of remote Indigenous households.

2.9 The Australian Government has emphasised 'cost effectiveness' as the most important criteria for the provision of homes for purchase under the home ownership scheme.

2.10 Indigenous houses in remote locations have high maintenance requirements due to construction problems, poor choice of building materials and extreme weather conditions.

2.11 Australian housing markets are escalating and investors are increasingly looking to remote markets for capital growth.

2.12 The private sector is not a reliable, proven employer of Indigenous Australians.

2.13 There are a wide range of economic development programs that are targeted to Indigenous people, but there is differential capacity for Indigenous Australians to obtain any benefit from a self access model.

2.14 The capacity of Indigenous people to leverage opportunities from ILUA and SRA agreements is largely dependent on the existence of strong local governance and entities with capacity to progress economic outcomes.

Recommendations

The following recommendations outline approaches to economic development on Indigenous land that:

- emphasise Indigenous participation in the development of policy;
- provide high thresholds for obtaining Indigenous consent to economic development strategies, initiatives and agreements; and
- emphasise policy approaches that are supported by reliable research, trial processes and on-going evaluation.

Recommendation 2.1

That the Australian Government support a range of land leasing options on communal land including options where leases are held by traditional owners through their elected entities for varying periods of time. That the *Community Homes* program be extended to communities with alternative lease schemes where the lease period is commensurate with the maximum loan repayment period.

Recommendation 2.2

That all land leasing options on communal land be rigorously and progressively monitored and evaluated and that evaluative research be utilised to inform existing and future lease options.

Recommendation 2.3

That the Australian Government provide evidence (domestically and internationally) of models where individual tenure rights have led to improved economic outcomes for indigenous peoples living on communal lands.

Recommendation 2.4

Governments legislate to ensure that consent and authorisation processes for 99 year leases are consistent with those required by sections 203BE(5) and 251(A) of the *Native Title Act 1993* for authorising Indigenous Land Use Agreements.

Recommendation 2.5

That the Australian Government remove section 64(4A) from the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

Recommendation 2.6

That governments ensure employment contingencies or re-deployment training for Indigenous employees who become unemployed as a result of the transition from community administration to a shire council model.

Recommendation 2.7

In recognition of the continuing disadvantage of remote Indigenous Australians, that governments commit to providing subsidised, quality community housing and public housing according to need, and that no funds from existing rental housing schemes be redistributed to home ownership schemes.

Recommendation 2.8

That houses constructed under the home ownership scheme be of the highest quality and that regulations be developed to government guarantee liability and indemnify home owners for agreed periods against structural flaws in the house and the associated infrastructure.

Recommendation 2.9

That the Australian Government develop a planned, supervised and strategic approach to train CDEP employees working on the house building and maintenance program to ensure adherence to the highest industry construction standards. That the Government maintain national data on the program and that CDEP employees be provided with award wage employment once they have completed the training.

Recommendation 2.10

That the Australian Government direct ICCs to work with Indigenous land entities (including representative bodies) to strategically link Shared Responsibility Agreements to land agreements in ways that will increase economic development projects and opportunities.

Recommendation 2.11

That governments provide bilateral support to fund and develop regional Indigenous governance structures that are attached to entities capable of the following:

- developing and sustaining an economic development strategy for the region;
- applying for funds from governments and other sources; and
- coordinating appropriate training and development to support regional economic development.

Introduction to the case studies

Some interesting economic development activities are occurring in Indigenous communities across Australia. There are numerous examples of communities working intensely to develop employment, enterprise and housing options for local people. There are also instances where Indigenous and non-Indigenous people are working collaboratively to improve land agreements so that they provide sustainable outcomes for Indigenous Australians.

The following case studies are an extension of the recommendations in this Report and the recommendations of my Native Title Report 2005. They provide examples of economic and social development that emphasise Indigenous involvement and management of all aspects of agreement-making and enterprise development. They demonstrate that when provided with the opportunity and support from government and non government stakeholders, Indigenous Australians can exercise responsible self determination and self management for the benefit of our people.

The case studies provide only a small sample of good practice in agreement making an enterprise development in Australia. Two of the case studies describe system-wide approaches to land agreements and enterprise development, based on government and industry collaboration. Three case studies describe regional approaches to land and enterprise development.

The case study at Chapter 3 describes a collaborative approach between the Australian Government and the minerals industry to support Indigenous economic development in eight trial sites across Australia. Chapter 4 provides another system-wide approach, outlining South Australia's State-wide approach to Indigenous Land Use Agreements. Chapter 5 describes a regional agreement; the Argyle Indigenous Land Use Agreement in the Kimberley, Western Australia. Chapter 6 describes the development of an Indigenous owned and managed enterprise in the Pilbara. Chapter 7 provides an example of a township lease agreement and a home ownership scheme that has some similarities and some marked differences with the leasing and home ownership approaches of the Australian Government.

Case Studies

Chapter 3:	The Memorandum of Understanding between the Minerals Council of Australia and the Australian Government and the East Kimberley Regional Partnership Agreement
Chapter 4:	South Australia's State-wide Indigenous Land Use Agreement Framework
Chapter 5:	The Argyle Participation Agreement
Chapter 6:	Ngarda Civil and Mining
Chapter 7:	The Yarrabah Housing Project

Chapter 3

The Memorandum of Understanding between the Australian Government and the Minerals Council of Australia and the East Kimberley Regional Partnership Agreement

Introduction

Throughout Australia's history the relationship between the mining industry and Indigenous peoples has been less than harmonious. The drive for resources has seen the rights and interests of Indigenous peoples sacrificed in favour of economic growth. While many problems still remain today, there is evidence of a recent shift in the attitude of mining interests towards neighbouring Indigenous communities. Leading resource corporations such as Rio Tinto and Newmont have demonstrated willingness to formally recognise obligations towards traditional land owners and local Indigenous communities. To this end, there is evidence that the mining industry is increasingly acting upon its social responsibility to include Indigenous people in opportunities created by their mining activities.[1]

Over 60 percent of the Australian mining industry's operations are located adjacent to Indigenous communities. It therefore follows that both industry and Indigenous communities stand to benefit from the development of reciprocal and sustainable relationships.[2] For Indigenous communities, mining operations present opportunities in terms of employment, infrastructure and services. For mining companies, local communities provide a potentially stable workforce. Given the current industry boom, the need for constructive relationships between mining interests and Indigenous people is all the more significant.

Evidence to date demonstrates that Indigenous people are not realising economic opportunities presented by current industry expansion. Even in regions like the Pilbara, abundant in natural resources, Indigenous unemployment rates remain as high as 41 percent.[3]

1 **Argyle Diamond Mine,** *Aboriginal Partnerships*, available online at http://www.argylediamonds.com.au/comm_aboriginal_text.html, accessed 9 January 2007; Newmont, *Australian Indigenous Peoples Statement of Commitment*, available online at http://www.newmont.com/en/operations/australianz/social/community/statement/index.asp accessed 9 January 2007.

2 **Minerals Council of Australia,** *Indigenous Relations Strategic Framework*, available online at http://www.minerals.org.au/environment/indigenous_engagement, accessed 15 December 2006.

3 *Regional Partnership Agreement on Indigenous Employment in Port Hedland*, 7 November 2006, available online at http://www.indigenous.gov.au/rpa/wa/porthedland.pdf, accessed 1 February 2006.

The reasons for such disproportionately high unemployment rates in the Indigenous population are complex. In part they are related to a paucity of job opportunities in remote communities, but largely they are influenced by the immense set of obstacles created by dispossession and intergenerational disadvantage. According to the *National Aboriginal and Torres Strait Islander Social Survey* of 2002, 90.5 percent of unemployed Indigenous persons aged 15 years or over had difficulties in finding work; the primary difficulties being insufficient education, training or skills, transport problems and distance, and a lack of jobs in their local area or line of work.[4] These data demonstrate that in order to address unemployment in Indigenous communities, it is necessary to do more than create additional jobs. Communities require tools to enable them to overcome the wide range of employment obstacles that stand between opportunity and employment.

Minerals Council of Australia Memorandum of Understanding

In recognition of the need to take a comprehensive approach to address Indigenous economic disadvantage, in June 2005 the Australian Government and the Minerals Council of Australia (MCA) signed a Memorandum of Understanding (MoU) which documents a commitment to work with Indigenous people to build sustainable, prosperous communities in which individuals can create and take up social, employment and business opportunities.[5] When launching the MoU's joint commitments, The Hon Ian MacFarlane, MP explained:

> The MoU is about building partnerships between the mining sector and Indigenous communities. The objective is to improve the flow of mutual benefits between regional employers, their Indigenous workers and the wider Indigenous community.[6]

According to the consultant employed to coordinate the MoU negotiations, the MoU was developed in response to the need for mining companies to fulfil commitments made through Indigenous Land Use Agreements (ILUAs).[7] Whilst individual companies were pursuing a large number of initiatives in this area, the MCA identified potential benefit from a coordinated whole of industry and whole of government response.[8] For example, one of the features of the MoU is that it promotes collaboration across mining companies in the areas of human resources and Indigenous relations. Mining companies, previously in competition, are now in negotiations to pool and coordinate resources, increasing their capacity to provide employment and training services.

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4 **Australian Bureau of Statistics,** *National Aboriginal and Torres Strait Islander Social Survey*, ABS series cat no. 4714.0., Commonwealth of Australia, 2002, p43, Table 16.

5 **Australian Government,** *Memorandum of Understanding between the Commonwealth of Australia and the Minerals Council of Australia*, 1 June 2005, available online at http://www.minerals.org.au/__data/assets/pdf_file/11514/MCA_Commonwealth_MOU.pdf, accessed 1 February 2007.

6 **MacFarlane, I., (Minister for Industry Tourism and Resources),** *Minerals Council of Australia*, address to the Minerals Council of Australia, 3 June 2005, available online at http://minister.industry.gov.au/index.cfm?event=object.showContent&objectID=3F717786-65BF-4956-BBF2D594C905A7FA, accessed 15 December 2006.

7 **Gawler J., Principal,** *Cooperative Change Pty Ltd*, Project Coordinator of the National Steering Committee of the Australian Government and Minerals Council of Australia MoU.

8 **Minerals Council of Australia Secretariat,** *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of the Native Title Report 2006*, 21 December 2006.

In terms of Indigenous involvement, the MoU negotiation process involved local Indigenous leaders through the *Indigenous Leaders Dialogue*.[9] The *Indigenous Leaders Dialogue* is a forum through which local Indigenous leaders advise the MCA about Indigenous aspirations and anticipated outcomes from the MoU.[10] The MoU establishes broad principles to guide regional engagement with Indigenous communities. They are:

- collaboration and partnership between the parties based on mutual respect;
- collaboration and partnership between the parties and Indigenous communities based on shared responsibilities and respect for culture, customs and values;
- integration of sustainable development considerations within the MoU partnership decision-making process; and
- joint commitment to social, economic and institutional development of the communities with which the parties engage.[11]

Regional Partnership Agreements

Parties to the MoU decided on eight regional locations to focus the coordinated activity of the MoU during its five year timeframe. At each site, a Regional Participation Agreement (RPA) will be developed between local mining companies, government bodies and community organisations. These RPAs are intended to do the following:

- Operate as regional frameworks to coordinate strategies to increase the employment opportunities and the employment skills of Indigenous people;
- Foster Indigenous business enterprises; and
- Build prosperous communities, families and individuals that endure beyond the life of the mine.

Currently two of the eight pilot sites have completed an RPA. In November 2006 agreements were signed in the East Kimberly and Port Hedland regions. Both completed agreements are similar in their content and outcomes. Table 1 outlines the status of each RPA in the 8 trial sites.

9 Note: The Indigenous Leaders Dialogue is 'a dialogue between Indigenous leaders and the MCA Board members that occurs twice a year and facilitates engagement between industry and Indigenous leadership, to build common understanding and discuss capacity building initiatives of mutual interest and benefit;' Minerals Council of Australia, *Indigenous Relations Strategic Framework*, available online at http://www.minerals.org.au/environment/indigenous_engagement, accessed 1 February 2007

10 Minerals Council of Australia Secretariat, *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of the Native Title Report 2006*, 21 December 2006.

11 Australian Government, *Memorandum of Understanding between the Commonwealth of Australia and the Minerals Council of Australia*, 1 June 2005, available online at http://www.minerals.org.au/__data/assets/pdf_file/11514/MCA_Commonwealth_MOU.pdf, accessed 1 February 2007.

Table 1: Status of Regional Partnership Agreements linked to the MoU, 2006

Pilot site	Industry parties	Project plans	Status of negotiations
East Kimberley (WA)	Argyle, Roche, Voyages El Questro	*300 club;* work readiness; business development; child care; building accommodation for trainees	**RPA completed** and signed; communications ongoing.
Port Headland (WA)	BHP Billiton, Ngarda, Fortescue, Newcrest	Coordination, motivation and mentoring initiatives; drivers license program; child care provision; drug and alcohol support; housing support; Youth Pathways; Indigenous business development; Indigenous education and training for employment.	**RPA completed** and signed; communications ongoing.
Newman (WA)	BHP Billiton, Newcrest, Ngarda	No activity for the period.	No activity for the period.
Karratha/ Roebourne (WA)	Rio Tinto Iron Ore, Woodside Energy, Chevron Australia, BHP Billiton Petroleum	Improve the work readiness of Indigenous people in the region through targeted education and training for employment, drivers licences, drug and alcohol support, support for youth at risk. Sustainability through child care, housing and the development of sustainable business opportunities.	Project planning under discussion.
Wiluna (WA)	Newmont Asia Pacific, Nickel West	Initially will focus on training, employment and business development.	Steering committee established. Still in discussion phase about content of the RPA.
Boddington (WA)	Newmont Asia Pacific	Initially will focus on training, employment and business enterprise	Steering committee agreed and Traditional Owners have selected representatives.

Tanami (NT)	Newmont Asia Pacific	Initial focus on training employment and business enterprise, Also a focus on school retention and community well being.	Steering committee established and meet on a regular basis. Draft RPA currently circulating. First projects identified under RPA are currently being scoped out e.g. Rehabilitation business.
Western Cape York (Qld)	Comalco	Working groups formed for Western Cape Baseline Study, Indigenous business analysis, youth engagement, housing, regional transport and work readiness training.	Project framework drafted; draft RPA planned for end January 2007.

Source: Gawler J., Principal, Co-operative Change Pty Ltd, December 2006; McMartin S., Senior Regional Manager, External Affairs, Newmont Asia Pacific, 8 February 2007.

East Kimberley Regional Partnership Agreement

This case study profiles one of the eight agreements, the East Kimberley Regional Participation Agreement (RPA); the most progressed of the 8 trial sites. As the agreement is in an early stage, this case study describes the structure, the objectives and some of the early outcomes of the East Kimberley RPA.

Background

The East Kimberley is located in the North-East of Western Australia. The East Kimberley RPA covers the regions of Kununurra, Halls Creek, Wyndham and Warmun communities and outstations.[12] Approximately 38 percent of the East Kimberley inhabitants are Indigenous.[13] The Indigenous population is overwhelmingly young, with approximately 40 percent of people under the age of 15, and growing rapidly.[14] Economic development in the region is primarily sustained by agriculture, mining and tourism. In 1985, the Argyle Diamond Mine was established and it has since become the largest supplier of diamonds in the world. Pastoral and irrigated agricultural operations are also operating in the region.[15]

12 **Australian Government and WA Government**, *Regional Partnership Agreement on Indigenous Employment in the East Kimberley*, 7 November 2006, available online at http://www.indigenous.gov.au/rpa/wa/eastkimberley.pdf, accessed 1 February 2006.

13 **Australian Bureau of Statistics,** *2001 Census of Population and Housing*, Wyndham-East Kimberley, ABS series cat no 2002.0, Commonwealth of Australia, 2002.

14 **Taylor J.,** *Aboriginal Population Profiles for Development Planning in the Northern East Kimberley*, CAEPR Monograph 23, 2003.

15 **Kimberley Development Commission,** *Economic Activity in the Kimberley An Overview*, available online at http://www.kdc.wa.gov.au/index.cfm?menu=250&page=ff_econ accessed 21 December 2006.

While there is a prosperous regional economy, the Indigenous people of the East Kimberley remain severely disadvantaged. The labour market indicators of the Indigenous population show high unemployment rates, falling participation rates in the mainstream employment and poor literacy and numeracy. Table 2 shows carious labour market and associated statistics for the East Kimberley region.

Table 2: Comparison of selected indicators for Indigenous and non-Indigenous people in the Wyndham-East-Kimberley region, 2001 Census data

	Indigenous	Non-Indigenous
Median Weekly Individual Income 15+	$160-$199	$500-$599
% of people 15+ unemployed or on CDEP	64.6%	3.6%
Participation in mainstream labour market	16.2%	81.3%
Participation in CDEP scheme	29.5%	1.4%
% of households owned or being purchased	5.7%	40.6%
% of persons aged 15+ who have completed Year 12	6.7%	39.3%
% students attained Yr7 benchmarks for reading	22.1%	82.6%
% Internet usage	5.4%	32.8%
Life expectancy	47 years	78 years

Sources: Taylor, J., *Aboriginal Population Profiles for Development Planning in the Northern East Kimberley,* Research Monograph 23/2003, CAEPR, ANU, Canberra; Australian Bureau of Statistics, *2001 Census of Population and Housing,* Wyndham-East Kimberley, ABS series cat no 2002.0, Commonwealth of Australia, 2002.

Content of the Agreement

The aim of the MoU and the RPA agreements is to directly address the poor education, economic and employment outcomes for Indigenous people. The East Kimberley RPA aims to place at least 300 additional Indigenous people in jobs each year for the next 5 years. Based on current levels of Indigenous unemployment in the region, it is hoped this will reduce unemployment by 50 percent by 2011 and equalise Indigenous and non-Indigenous employment rates within 10 years. These are ambitious targets. In order to achieve them the East Kimberley RPA incorporates five projects with further projects expected to be developed during the course of the agreement. Table 3 describes the current projects.

Table 3: East Kimberley Regional Partnership Agreement projects 2006

Project	Objective	Action
300 Club	• To increase Indigenous employment in the region. The project hopes be a driver for attitudinal change within the corporate community by linking local employers with one another and with Government and working with the RPA partners to achieve their targets.	• The *300 Club,* or the East Kimberley Corporate Leaders Group, will be established to engage local employers, support local business involvement, share labour market information, promote job matching and work experience opportunities.
Work readiness (Coordination, Motivation and Mentoring)	• To improve links between employers, service providers and Indigenous people in the region in order to assist them to overcome barriers to employment such as poor literacy, numeracy and life skills.	• Place case managers in certain communities to support Indigenous people to enter and remain in the workforce; • Motivation and mentoring between employers and employees; • Education and training options to enhance job readiness.
Business development	• To support business development in order to create jobs, enhance the entrepreneurial climate in the community, retain businesses, accelerate local industry growth and diversify local economies.	• Using a business incubation program, this project. will work with both Traditional Owner and non-Traditional Owner groups to support business development opportunities.
Child care	• To overcome the barrier to employment posed by lack of child care.	• Create additional childcare places and more flexible childcare services in the region; • Develop and implement a child care course at TAFE specifically designed for Indigenous women.
Building accommodation for trainees	• To address the lack of suitable accommodation in Kununurra which makes it difficult for young Indigenous people to take up training and employment opportunities.	• Engage Indigenous apprentices and trainees to work alongside other tradespeople to build accommodation units that will later be utilised to provide accommodation for Indigenous trainees.

Negotiation process

The East Kimberley RPA was a product of 18 months of discussion regarding employment and job pathways strategies. Talks initially focussed on employment in the mining industry in the Kununurra region but later expanded to take in other communities and industries. They were coordinated by Janina Gawler[16] of *Cooperative Change* in conjunction with the *Kununurra Indigenous Coordination Centre* (ICC). Other parties to negotiations included local industry members and interested businesses as well as Traditional Owners and Indigenous community organisations. The signing of the MCA MoU in July 2005 added greater impetus to discussions.

In the end, not all parties involved in negotiations became signatories to the agreement. Unfortunately, the initial negotiation process was viewed by many parties as one of the major weaknesses of the agreement. However, as membership is not closed, organisations and groups are able to participate in communications and meetings relating to the RPA even though they are not formal signatories.[17] This allows them to stay informed of activities and opportunities that may arise. One such example is the Gelganyem Trust Traditional Owner group who are not a party to the RPA but are active participants in discussions in view of involvement at a later stage. Given the central role that continuing communications and negotiations in the implementation of the East Kimberley RPA, it will be important to encourage broad participation in the agreement as this is an excellent capacity building opportunity.

There are currently 15 parties to the East Kimberley RPA as identified at Table 4. RPA membership is flexible and may change over time as projects progress and activities expand.

Table 4: Partners to the East Kimberley Regional Partnership Agreement 2006

Sector	Parties	Area of Responsibility
Government	• Shire of Wyndham East Kimberley • WA State Government (East Kimberley DIA) • Australian Government (Kununurra ICC)	• To coordinate service delivery and development of project plans and actions with communities

16 **Gawler J., Principal,** *Cooperative Change Pty Ltd*, Project Coordinator of the National Steering Committee of the Australian Government and Minerals Council of Australia MoU.

17 **Sherwin, A. (Manager, Kununurra Indigenous Coordination Centre),** *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of the Native Title Report 2006,* 19 December 2006.

Industry	• Argyle Diamond Mine • Voyages El Questro • Roche	• To participate in local leadership group of East Kimberley businesses to support actions and other local businesses that are committed to increasing employment of Indigenous people
Employment and training providers	• Work Base • Kimberley Group Training • East Kimberley Job Pathways • Kimberley TAFE • East Kimberley CDEP	
Indigenous organisations	• Wunan Foundation • Ngoonjuwah Council Aboriginal Corporation • Kununurra Waringarri Aboriginal Corporation • Warmun Community (Turkey Creek) Incorporated	• To coordinate and promote local efforts, informing and encouraging individuals to participate

A number of parties to the RPA reported that negotiation process leading up to the RPA was impaired by two factors: the poor strategic coordination and communication; and a lack of Indigenous engagement. With respect to the first factor, the RPA negotiation process was very lengthy, inefficient and ambitious in what it was able to achieve in the development phase. In addition there was a lack of transparency and 'it was very unclear for all parties involved, including government. No one had a clear strategic plan for development.'[18] In addition, a lack of bipartisanship between the State Government and the Australian Government was a major impediment to early negotiations.[19]

The initial lack of direction and coordination, together with the ad hoc nature of communications meant that translating the commitment of all parties into an RPA agreement was 'incredibly frustrating.'[20] Problems with communication generated widespread confusion about the agreement to the point that some parties are still uncertain as to their exact role under the agreement, even after its execution.

The second problem affecting negotiations was a lack of community engagement. This has been described as a major and continuing concern by the majority of parties to the RPA. From the outset, parties to the RPA saw it as an initiative of the Australian Government. 'The project is not currently community and industry-

18 Anonymous, Representative from an Indigenous organisation party to East Kimberley RPA, 2006.

19 Anonymous, Representative from an Indigenous organisation party to East Kimberley RPA, 2006.

20 McLeish, K. (General Manager, Argyle Diamond Mine), *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of the Native Title Report 2006*, 2 February 2007.

driven, it is government driven.'[21] There is evidence that the negotiation processes were run according to the Government's own agenda and plans were hastily developed in a rush to meet fixed deadlines leaving other parties feeling pressured to follow for fear of being left behind.

> The Government seems to be making policy on the run and addressing this issue on a 'take it or leave it' basis. Communities are being forced to agree to things, knowing that otherwise they will be left behind when it comes to funding and services.[22]

According to the architects of the RPA, one of the key features of the agreement is that is driven by local communities:

> The design of the RPA is developed in direct response to local Indigenous community needs which makes it radically different in its approach to Indigenous employment and business enterprise.[23]

As part of the RPA development process, the Wunan Foundation, one of the signatory Indigenous organisations, was allocated resources to conduct consultations with Indigenous communities. These consultations are considered to have been relatively extensive. However, notwithstanding the Wunan Foundation negotiations, the level of community engagement is regarded as greatly inadequate.

As a result of the lack of engagement with Indigenous people, there is a critical lack of understanding within the community about the RPA, and what it aims to deliver.[24] For example, there was reported confusion between the RPA and other changes to regional governance arrangements including changes to the Community Development Employment Project. This kind of confusion has the potential to skew commitment and expectations of the RPA, and may lead to dissatisfaction with outcomes. In addition, as long as communities are uncertain about the nature of the RPA, they will be unable to take advantage of the opportunities it creates.

Concerns have also been raised regarding inequality between negotiating parties. According to several of the community organisations involved, negotiations have been weighted in favour of resource-rich industry and government parties whose interests control the agenda. Some organisations have not become signatories because they fear they will lose control over their programs and initiatives by joining the RPA process.

> Involvement of the local corporate partners is a good thing; but they should not be allowed to fully shape the process. The process has to be conducted with all parties on an equal footing.[25]

21 Anonymous, Representative from an Indigenous organisation party to East Kimberley RPA, 2006.

22 Anonymous, Representative from an Indigenous organisation party to East Kimberley RPA, 2006.

23 Gawler, J., Co-operative Change Pty Ltd, December 2006, *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of the Native Title Report 2006*, 23 January 2007.

24 Anonymous, Representative from an Indigenous organisation party to East Kimberley RPA, 2006.

25 Anonymous, Representative from an Indigenous organisation party to East Kimberley RPA, 2006.

Status of the RPA

Given that the RPA was signed late 2006, it is not yet possible to measure tangible outcomes for Indigenous stakeholders. Nevertheless, outcomes will need to be measured, monitored and assessed over time against targets such as those set out in the employment projects.

At this stage it is only possible to assess the appropriateness of the strategies that have been developed for improved Indigenous participation in the workforce and the local economy. The projects of the RPA demonstrate that the potential of the Agreement is that it seeks to do more than simply create jobs through Indigenous employment quotas. By implementing programs to address education and training, motivation and mentoring, business development and childcare, the RPA has been designed to enable Indigenous people to overcome barriers which prevent participation in employment.

According to the projects of the RPA, the Indigenous community can expect to see more places for education, training and apprenticeships, as well as programs to develop long-term skills that are applicable to the community in general, not just specific to industry. Training in areas such as engineering, building and maintenance will be targeted to enable individuals to service current mining operations and later contribute to other aspects of community infrastructure.

Along with business development, it is hoped that these strategies will build the capacity of individuals and the community as a whole, contributing to the sustainable economic development of the region.

Changing policy to improve access to employment

The RPA has provided impetus for the WA Government to modify policies in some areas that affect Indigenous employment opportunities. One disincentive to Indigenous people entering the workforce was the sudden loss of eligibility for housing and welfare subsidies. Due to chronic housing shortages in many regional and remote towns. Indigenous families are unlikely to take up employment if it means they have to move towns and schools and struggle with elevated rental costs.[26]

Following the signing of the East Kimberley and Port Hedland RPAs, the WA Minister for Indigenous Affairs, introduced a public housing initiative to allow Indigenous employees some transition time as they move from welfare to employment.[27] Under this initiative, public housing tenants will be allowed to remain in public housing for up to 2 years while they find private rental accommodation or build or purchase their own home. In addition, the Department of Housing and Works will provide advice and education on home ownership and budgeting.

26 **Calma, T., (Aboriginal and Torres Strait Social Justice Commissioner),** *A Level Mining Field: The Path to Achieving Outcomes for Indigenous and Non-Indigenous Stakeholders in Mining*, Sustainable Development Conference, Sheraton Perth Hotel, WA, 26 October 2006.

27 **Roberts, M., (Minister for Housing and Works, Heritage, Indigenous Affairs and Land Information), media** statement, 14 December 2006, available online at http://www.mediastatements.wa.gov.au/media/media.nsf/d3ea7ba6c70aeaae48256a7300318397/c39259385f76bdde48257244002a8c17?OpenDocument, accessed 23 January 2007.

The need for consideration of housing policy demonstrates that overcoming the barriers to employment will require more than a focus on education and training. Cooperation and change will need to occur across a range of government departments encompassing a number of policy areas. For example, one aspect of Indigenous employment not currently addressed by the RPA is the accommodation of Indigenous cultural rights. According to the *NATSIS Survey* of 2002 more than 20 percent of employed Indigenous persons felt they were unable to meet cultural responsibilities due to their work.[28] The accommodation of cultural rights, like the accommodation of housing interests may be required as a special measure to overcome Indigenous disadvantage.[29]

> While Indigenous employees should not be exempt from means testing on government subsidies, policy should be responsive and flexible. Governments should be working closely with industry to ensure that they are not operating at cross purposes.[30]

According to the Committee on the Elimination of Racial Discrimination (CERD), when applying International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) state parties are required to provide Indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics.[31]

Cultural responsibilities at certain times of the year that do not coincide with Christian holiday periods such as Christmas, may be a factor which limits Indigenous people in being able to meet work obligations. The RPA provides a forum for discussion of matters such as cultural rights. Ultimately all matters that potentially impede employment must be canvassed in the interests of assisting the Indigenous people of the East Kimberley to develop their full potential and lead productive, creative lives in accordance with their needs and interests.[32]

Collaboration amongst community organisations

A key outcome of the East Kimberley RPA has been collaboration and networking between local community groups. Since completion of the RPA, negotiations have continued through meetings and communications involving interested

28 **Australian Bureau of Statistics,** *National Aboriginal and Torres Strait Islander Social Survey*, ABS series cat no. 4714.0., Commonwealth of Australia, 2002, p.42, table 15.

29 **Human Rights and Equal Opportunity Commission,** *What are 'special measures' and why do we have them?* Website, available online at: http://www.hreoc.gov.au/faqs/general.html#5 accessed 7 March 2007. Note: Special measures are policies or actions by organisations or governments which recognise that the past or present disadvantage suffered by certain groups based on their race, gender or disability has affected their access to equality of opportunity and basic human rights. In order to ensure that such groups or individuals enjoy equality of opportunity and protection of their basic human rights, special measures permit 'positive discrimination' in favour of these groups. Special measures are an exception to the general rule that discrimination on the basis of race, gender or disability is unlawful.

30 **Calma T., (Aboriginal and Torres Strait Social Justice Commissioner),** *A Level Mining Field: The Path to Achieving Outcomes for Indigenous and Non-Indigenous Stakeholders in Mining*, Sustainable Development Conference, Sheraton Perth Hotel, WA, 26 October 2006.

31 **Human Rights and Equal Opportunity Commission,** *Human Rights Based Approach to Mining on Indigenous Land*, available online at http://www.humanrights.gov.au/social_justice/corporateresponsibility/hr_approach.html, accessed 1 February 2007.

32 **Human Rights and Equal Opportunity Commission,** *Human Rights Based Approach to Mining on Indigenous Land*, available online at http://www.humanrights.gov.au/social_justice/corporateresponsibility/hr_approach.html, accessed 1 February 2007.

organisations and employer groups. The regular meetings provide opportunity for collaborative action across a range of regional actors including industry, government, and Indigenous groups.

> The RPA has the potential to see all parties working on the same issues in an environment of cooperation and coordination.[33]

A number of community organisations reported that the current level of funding is insufficient for them to fully participate in ongoing negotiations. The availability of funding was a primary motivation for community organisations joining the agreement.

Community organisations claiming to be already under resourced fear they are likely to struggle with the increased demands placed on them by the RPA such as increased administrative workloads and reporting requirements.[34]

> There is a bombardment of information but no resources provided to assist communities in understanding it all.[35]

So far the Australian Government has made an initial commitment of $1.5 million to the East Kimberley RPA with the potential for further funding as additional projects are developed.[36] In order to create equality between all negotiating parties, an assessment of resource allocations is required so that community organisations can participate fully and effectively to achieve the objectives of the RPA.

Conclusion

Regional Partnership Agreements have the potential to become a valuable mechanism for the coordination of community development strategies between multiple levels of government, industry and communities. By bringing existing and future projects under regional facilitation, RPAs aim to identify gaps and overlaps in policy and initiatives that facilitate Indigenous participation in the local economy. The RPA provides an overarching framework for their coordination.

> Even though there are many problems with the negotiations process and the dynamics of the various groups involved, this is a good direction from government and has the potential to achieve big changes.[37]

The keys to the success of the East Kimberly RPA at this point are greater engagement with local Indigenous stakeholders and the development of processes to maintain momentum in the projects. The RPA is currently at a turning point, requiring the coordinators to establish mechanisms to drive action, to improve and maintain communication, to increase the number of Indigenous partners, and to develop procedures for formal evaluation of projects and the RPA.

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33 **Clear C., (CEO, Warmun Community Incorporated),** *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of the Native Title Report 2006*, 12 December 2006,

34 **Anonymous, Representative from an Indigenous organisation party to East Kimberley RPA, 2006.**

35 **Anonymous, Representative from an Indigenous organisation party to East Kimberley RPA, 2006.**

36 **Brough, M., (Minister for Families, Community Services and Indigenous Affairs),** *1,500 Indigenous people to get jobs in the East Kimberley*, Media Release, 7 November 2006.

37 **Anonymous, Representative from an Indigenous organisation party to East Kimberley RPA, 2006.**

Chapter 4

South Australia's State-wide Indigenous Land Use Agreement (ILUA) framework

Introduction

In most states and territories of Australia, Indigenous Land Use Agreements (ILUAs) are negotiated on a case by case basis between the relevant parties, usually traditional owners, governments and industry groups. South Australia however, has taken a more comprehensive approach to these agreements. The South Australian Government, Indigenous traditional land owners and industry stakeholders have developed a state-wide framework that streamlines ILUA processes and reduces the resources that are required for successive negotiations.

ILUAs have the potential to deliver economic and other outcomes in the absence of native title determinations. The South Australian State-wide ILUA approach offers a strategic use of resources to deliver native title outcomes for all stakeholders. While ILUAs do not replace determinations, they realise one of the SA Government's targets to 'reduce the gap between the outcomes for South Australia's Aboriginal population and those of the non-Indigenous population.'[1] The registration of ILUAs provides certainty for Indigenous land owners, industry and government interests.

It is not unusual for a single native title determination to cost tens of millions of dollars and take many years. For example, the De Rose Hill native title claim in SA went through court processes over a period of more than ten years at an estimated cost of $15 million. These costs and commitments have made native title moribund in some states. In instances where the resources of state governments and representative bodies are expended in single litigations, other native title activity suffers. This can lead to an inequitable situation for claimant groups and others who are waiting for their native title interests to be progressed.

The agreement to develop a State-wide ILUA framework was the result of a year of discussions between the South Australian Government and Aboriginal Legal Rights Movement (ALRM). In 1999, the South Australian government initiated the State-wide ILUA process, and in 2000 the native title claimant groups agreed to engage

1 Haines, Dr. T., (Deputy Principal Negotiator, Indigenous Land Use Agreement Negotiation Team South Australian Government), *Aboriginal Employment through constructive partnership in government*, Address to the Indigenous Employment in SA: Resources Industry Forum, Adelaide, May 22nd, 2006, p2.

in the negotiations.[2] In effect, the State-wide framework sought to establish ILUA templates to guide negotiations across industry and interest areas.

> We have a State-wide approach to the ILUA negotiations which enables a greater degree of coordination and utilisation of resources which we believe will lead to far superior outcomes than a piecemeal approach. We believe that this will result in much reduced costs in resolving native title versus litigation.[3]

In the seven years of operation of the State-wide ILUA negotiations, from 1999 to June 2006, nine agreements have been registered.

Indigenous Land Use Agreements

The ILUA is the agreement through which the terms and conditions for access and development on traditional Indigenous lands is negotiated. ILUAs can include provisions for the following:

- compensation for the use of land, (the focus in the South Australian negotiations has been on 'benefits');
- extinguishment of native title rights to land;
- access rights;
- native title holders agreeing to a future development; and
- a resolution of the coexistent rights of native title holder and other parties.

When registered, ILUAs bind all parties, including the native title claimants and holders, to the terms of the agreement. An ILUA has the effect of a contract even if it does not satisfy the common law requirements of such, and can through agreement have the effect of surrendering native title.

> The objective is to resolve native title claims through lasting and enforceable agreements about the parties' respective rights and responsibilities over land and waters that are subject to those claims (and consent determinations of native title where appropriate), resulting in certainty in use of South Australia's land and water resources and economic, cultural and social benefits for the State.[4]

The South Australian State-wide ILUA

The parties to the State-wide ILUA include the Aboriginal Legal Rights Movement (ALRM), the South Australian Farmers Federation (SAFF), the South Australian Chamber of Mines and Energy (SACOME), the Seafood Council (SA Ltd.), the South Australian Fishing Industry Council (SAFIC), the Local Government Association (LGA) and the South Australian Government.[5] The ALRM supports the 23 claimant

2 **Agius, P., Davies, J., Howitt, R., and Johns, L.,** *Negotiating Comprehensive Settlement of Native Title Issues: Building a New Scale of Justice in South Australia,* Land, Rights, Laws: Issues of Native Title, AIATSIS, Vol. 2, Issues Paper No. 20, December 2002, p4.

3 **AIATSIS Native Title Conference,** *Implementing the SA ILUA State-wide Negotiations,* Dixon, I., Agius, P., and Hall, P., Coffs Harbour, New South Wales, June 2005.

4 **State of South Australia Indigenous Land Use Agreement Negotiating Team,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2006,* 23 January 2007.

5 **South Australian Government,** *South Australian Indigenous Land Use Agreement State-wide Negotiations, Who is involved?* available online at www.iluasa.com.

groups who are represented through the Congress of Native Title Management Committees.

The objectives of the State-wide ILUA are outlined in the *South Australian Indigenous Land Use Agreement State-wide Negotiations Strategic Plan 2006 -2009*. They are:

- recognition of native title interests;
- certainty for all interest holders;
- recognition and better protection of Aboriginal heritage;
- Aboriginal cultural sustainability;
- better economic outcomes for Aboriginal people; and
- a framework for sharing responsibility in caring for land, protecting the fishing environment, and managing land and water.[6]

The State-wide ILUA process is jointly funded by the South Australian Government and the Australian Government. The policy commitment of the SA Government to Indigenous families and communities includes the promotion of 'economic opportunities and independence' and 'capacity-building initiatives in the mining, pastoral, fishing, aquaculture, tourism and arts industry sectors'.[7] The State-wide ILUA negotiations have been integral to realising this policy objective.

> It has been necessary since 1999, when the ILUA negotiation initiative started in South Australia, progressively to engage with major industries in order both to consider their interests in Aboriginal land claims and to negotiate benefits for the claimant groups. The industries involved in negotiation could potentially offer employment for Aboriginal people both as an incentive to settlement and as a real pathway to sustainable development. This three-way partnership – between Government, industry and the Aboriginal community – has grown increasingly stronger, with each partner in the discussion benefiting from the inputs and the outputs of the others.[8]

The State-wide negotiating process

The negotiations for the State-wide ILUA framework are independently chaired and project managed by an external consultant.[9] Since the commencement of negotiations in 2000, each party has come to the negotiation table as an equal partner. The negotiations are governed by a meeting protocol which sets out clear instructions for the form, scope and conduct of discussions. The *SA ILUA State-wide Negotiations Meeting Protocol* has been operating since 2001 and has been updated three times to reflect additions and changes to processes.[10] There are *Guidelines for Organising Workshops* for ILUA Negotiations and a *Glossary of Key Terms* used to

6 **South Australian Government,** *South Australian Indigenous Land Use Agreement State-wide Negotiations Strategic Plan 2006 – 2009,* available online at: www.iluasa.com.

7 **The South Australian Government***, Doing it right, the South Australian Government's commitment to Aboriginal families and communities in South Australia*, Key Principle 7.

8 **Haines, Dr. T., (Deputy Principal Negotiator, Indigenous Land Use Agreement Negotiation Team South** Australian Government), *Aboriginal Employment through constructive partnership in government*, Address to the Indigenous Employment in SA: Resources Industry Forum, Adelaide, May 22nd, 2006.

9 **State-wide negotiations are chaired and project managed by Ian Dixon of Dixon Partnerships** Solutions.

10 **State-wide ILUA Negotiating Parties,** *South Australian Indigenous Land Use Agreement State-wide Negotiations Meeting Protocol*, June 2006.

guide negotiations.[11] Discussions occur at a number of levels in recognition of the fact that parties understand that:

- there are a number of issues relating to native title that were common to many or all native title claims;
- their constituents needed to be directly involved in decision making;
- their constituents differed widely in their level of understanding of native title issues and of the technicalities involved in resolving them; and
- some sensitive issues could only be discussed or decided on by land users and others at the local level, not by people outside the area.[12]

The State-wide negotiating framework comprises a Main Table for discussion between representatives of the key stakeholders on major issues and process. The Main Table is responsible for monitoring progress, confirming agreed outcomes and providing direction. Side Tables were established for each of the industry groups and for the local government sector. An additional three tables include: a Relationship to Land and Water Table; a Heritage Table; and a Parks Table.[13] Discussions from Side Tables are canvassed at the State-wide level with the native title claimants.

Indigenous engagement in the SA State-wide ILUA process

Crucial to the process has been the full participation of traditional owners. As a result of discussions amongst the 23 claimant groups, the traditional owners decided that they needed to constitute their own negotiating group to participate in the State-wide negotiations. The ALRM clarified its role with respect to the negotiations. It stressed from the outset that its role was not to negotiate on behalf of the claimants, but rather to provide advice and support in the form of funding for meetings, travel costs, sitting fees, training and information to claimants. The Congress of South Australian Native Title Management Committees (the Congress) was specifically established and recognised as the peak negotiating body for the 23 claimant groups. The Congress is constituted by delegated representatives of the 23 Native Title Management Committees (NTMCs) of the claimant groups.

> Some aspirations and needs require coordinated responses at the broader regional or State-wide scale. One of the most important aspects of the State-wide process that enables such scales to be approached is the establishment of the Congress of Native Title Management Committees.[14]

11 **AIATSIS Native Title Conference,** *Implementing the SA ILUA State-wide Negotiations,* Dixon, I., Agius, P., and Hall, P., Coffs Harbour, New South Wales, June 2005, pp6-11.

12 **State-wide ILUA Negotiating Parties,** *South Australian Indigenous Land Use Agreement State-wide Negotiations Meeting Protocol*, June 2006, p5, available online at: www.iluasa.com.

13 **For more information about the roles and responsibilities of the Main Table and the Side Tables, see the** *South Australian Indigenous Land Use Agreement State-wide Negotiations Strategic Plan 2006 – 2009* and also AIATSIS Native Title Conference, *Implementing the SA ILUA State-wide Negotiations,* Dixon, I., Agius, P., and Hall, P., Coffs Harbour, New South Wales, June 2005, p3.

14 **ALRM Native Title Unit,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2006,* Email, 2 March 2007.

In the early phases of the negotiation process, traditional owner groups had concerns that entering an ILUA would result in the extinguishment of native title.[15] Some believed that ILUAs were separate from native title and would make their claims redundant.

> It was clear that the claimants did not trust ILUAs… they said that they are different to native title, that they water down Aboriginal people's rights and that they mean the extinguishment of native title. Aboriginal people stated… they would not enter into any talks if extinguishment was going to be a condition of the agreements.[16]

In consultations with the Congress and its constituent Native Title Management Committees, the ALRM decided that it would be best not to use the term ILUA when discussing the State-wide framework. At a meeting in 2000, the Native Title Management Committees decided that they would work towards a process that they would refer to as the 'State-wide Native Title Settlement Agreement'.[17] Changing the terminology in the early stages of the negotiations gave the claimant groups some certainty that they would not be disadvantaged by the State-wide framework. As negotiations continued and claimant groups gained greater understanding of the relationship of ILUAs to native title, they were able to engage with the concepts and the terminology of Indigenous Land Use Agreements.

All State-wide meetings involved the Congress, which meant 'that Aboriginal people who live in vastly different landscapes, from sand hills to mountain ranges to the coast' would be represented.[18] Discussions had to be based on a foundation of mutual respect for each others' cultural differences. The Congress decided that there was a need for internal meeting protocols to ensure that traditional law was not breached in matters including who has authority to speak for country. Translators and interpreters were used in negotiations so that Indigenous stakeholders were able to speak to government and industry in their own languages.[19] Diagrams, drawings and models were also useful in presenting complex issues and explaining structures for decision making.

> One of the NTMC members, Mr Dean AhChee produced his own diagram of what the negotiation process would look like 'Anangu way.' Later he painted it and it has been endorsed by the NTMCs as a logo for the Congress.[20]

The complexity of bringing together large groups of different traditional owner interest groups is exemplified by an early challenge for the Congress. During 2000, when the proposal for State-wide negotiations was first presented, the Congress representatives had to resolve the question as to whether they had authority to

15 **Davies, J.,** *Submission No. 11,* Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Operation of the Native Title Act,* Inquiry into Indigenous Land Use Agreements, p3.

16 **Agius, P., Davies, J., Howitt, R., and Johns, L.,** *Negotiating Comprehensive Settlement of Native Title Issues: Building a New Scale of Justice in South Australia,* Land, Rights, Laws: Issues of Native Title, AIATSIS, Vol. 2, Issues Paper No. 20, December 2002, p7.

17 **Davies, J.,** *Submission No. 11,* Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Operation of the Native Title Act,* Inquiry into Indigenous Land Use Agreements, p4.

18 **Agius, P., Davies, J., Howitt, R., and Johns, L.,** *Negotiating Comprehensive Settlement of Native Title Issues: Building a New Scale of Justice in South Australia,* Land, Rights, Laws: Issues of Native Title, AIATSIS, Vol. 2, Issues Paper No. 20, December 2002, p7.

19 **The meetings were translated into Yankunytjatjara-Antakirinya, a Western desert language.**

20 **Agius, P., Davies, J., Howitt, R., and Johns, L.,** *Negotiating Comprehensive Settlement of Native Title Issues: Building a New Scale of Justice in South Australia,* Land, Rights, Laws: Issues of Native Title, AIATSIS, Vol. 2, Issues Paper No. 20, December 2002, p8.

negotiate matters on behalf of their native title claim groups. The Congress adopted an 'opt-in' system whereby each separate NTMC is given an opportunity to debate issues and consider its local position in separate workshops. Each NTMC is then able to present its decision and reasoning to the full Congress representative group. The separate NTMC workshops are a powerful mechanism for decision making, allowing groups to work through the State-wide issues in the context of their own local issues and concerns. One of the NTMC members described this approach as 'not leading us like sheep, but forcing us to make *our* decision'.[21]

Differences in communication and governance between Indigenous and non-Indigenous parties have been an ongoing challenge. Indigenous and non-Indigenous parties have committed to learning about each others' cultures and traditions through activities such as role reversals. This has helped to promote *cooperative negotiation.* The focus on communication and governance has helped industry parties understand that the Congress is the authority and it drives the negotiations (not the ALRM). In turn the Congress and their constituent NTMCs are learning about the opportunities and challenges in the different industry sectors.

The development consent and information provisions were an important component in the success of the State-wide negotiations. At a meeting of the Congress, attended by the State Attorney General in 2000, the delegates resolved that 'any proposal to sign-off an agreement with the South Australian Government will require specific authorisation following the giving of informed consent by relevant claimants or their delegated representatives'.[22] This process gave the traditional owner groups certainty about processes for agreement-making in the initial stages of negotiations.

The State-wide templates

One of the fundamental outcomes of the State-wide ILUA process has been the development of ILUA templates in the following areas: pastoral, minerals exploration, petroleum conjunctive agreements, fishing and aquaculture, local government, outback areas and parks. The templates are designed 'as useful practical guides to the parties in their attempts to resolve native title.'[23] For example, the Outback Areas ILUA template provides a heritage survey formula that engages traditional owner consultants for the purposes of heritage clearance.

The Local Government ILUA template is similar in concept and content to that of the Outback Areas ILUA. The Local Government ILUA template outlines a process whereby exchange for 'benefits' provides certainty of the validity of acts done that may have been invalid, the removal of the right to negotiate, acknowledgement of the finality of compensation, heritage provisions, and agreement to the degrees

21 **Agius, P., Davies, J., Howitt, R., and Johns, L.,** *Negotiating Comprehensive Settlement of Native Title Issues: Building a New Scale of Justice in South Australia,* Land, Rights, Laws: Issues of Native Title, AIATSIS, Vol. 2, Issues Paper No. 20, December 2002, p9. Emphasis added.

22 **Native Title Conference,** *Different Visions, Different Ways: Lessons and challenges from the native title negotiations in South Australia*, Agius, P., Jarvis, S., Howitt, R., Alice Springs, Northern Territory, 3-5 June 2003, p10.

23 **Local Government Association of South Australia,** *Agreeing on Native Title, Indigenous Land Use Agreements – A Local Government Template*, June 2006, available online at http://www.lga.sa.gov.au/webdata/resources/files/ILUA_Local_Government_Template_and_Explanatory_Documentation.pdf, accessed 15 March 2007.

of extinguishment of native title. Both the Outback Areas and Local Government ILUAs have provided land and infrastructure assets as well as associated business and commercial opportunities. Of the two, only the Local Government agreement provides employment quotas.[24]

Pastoral ILUAs are agreements with the South Australian Farmers Federation. These agreements standardise conditions of traditional owner access to pastoral properties by for activities such as hunting, gathering, performing ceremonies and maintaining cultural sites. In economic terms, access to traditional lands is important for traditional owners in order to harvest the fauna and flora that forms part of the customary economy. Due to various factors such as drought, fuel and labour costs, and an increasingly competitive international market, the pastoral industry is becoming less viable as profits cannot be guaranteed from year to year. As a result, pastoral templates do not offer employment quotas, though they do provide opportunities for training, employment and tourism ventures.

The mineral sector

There are preliminary signs that the minerals industry will provide tangible outcomes for Indigenous South Australians, though at this stage mineral activity has been limited to exploration. South Australia has developed a Minerals Exploration template and a Conjunctive Petroleum template. While no mining ILUAs have been registered to date, there has been considerable State-wide activity. The South Australian Chamber of Mines and Energy (SACOME), the Primary Resources and Industries South Australia (PRISA), the Gawler Ranges Native Title Group and the Antakirinja and Arabunna peoples are parties to four ILUA's, which pertain to mineral exploration. These agreements were negotiated using the Minerals Exploration ILUA template as a guide. The agreements contain provision for:

> long-term benefits to the traditional owners, including the preservation of Aboriginal heritage, access payments and a commitment to use all possible endeavours to develop work, training and educational opportunities around the resources industry.[25]

Minimal economic benefit for Indigenous people is derived at the exploration stage, though some income can be derived from fees for exploration agreements and the employment of traditional owners in heritage clearance. In anticipation of future mining activity, the minerals industry is enthusiastic about training an Indigenous work force. To this end, the minerals industry has recently become a principal partner in the study centre located at Port Augusta which will provide relevant training for people who are interested in employment in the mining and minerals sector. The minerals industry is also supporting after-school educational support projects for SA Indigenous students who have the capacity, interest and potential to complete their secondary education.[26]

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24 **ALRM Native Title Unit,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2006,* Email, 2 March 2007.

25 **Government of South Australia,** *Indigenous Agreement for Mineral Exploration in Gawler Ranges*, 20 November 2005, available online at: http://www.iluasa.com/dl/Gawler_Ranges_Minerala_Exploration_Signing_of_Agreement.pdf.News Release.

26 **More information on the Port Augusta Education Partnership can be found online at: www.pff.com.au.**

In 2005 a Memorandum of Understanding between the Australian Government and the Minerals Council of Australia (MCA) was signed 'to work together with Indigenous people to build sustainable, prosperous communities in which individuals can create and take up social, employment, and business opportunities in mining regions'.[27] The MoU sets a national target to engage 3,000 Indigenous people in the minerals industry by 2020; South Australian parties are working towards a South Australian specific Memorandum of Understanding to support this aim. The State Government has committed $8.9 million to establish a Heavy Engineering and Minerals Resources Skills Centre to commence in 2007; an Indigenous training component will be incorporated within the Centre.

In order to ensure that the approaches to Indigenous engagement in the minerals industry are appropriate and effective, an Indigenous Engagement Taskforce (the Taskforce) has been established. The Taskforce was established under the auspices of the Minerals and Energy Division of Primary Resources and Industries South Australia (PRISA). It has a role to address issues as they arise for both the industry and for Indigenous people with regard to:

- ensuring the integration of strategies and coordinated pathways to achieving Indigenous employment goals;
- engaging directly with industry, governments and community, gathering and sharing information, planning, setting up pilot sites, identifying best practice in Indigenous employment and promoting effective programs to overcome identified barriers; and
- reporting on performance to government, Indigenous groups and industry and recommending additional measures to meet targets.[28]

No mining ILUAs have yet been registered in South Australia. This is due in part to the existence of s 9B of the *South Australian Mining Act 1971* which provides that the function of mediation and arbitration be carried out by the South Australian Environment Resource and Development Court rather than the National Native Title Tribunal.[29] It is the aim of the State-wide ILUA stakeholders to resolve this issue.

Progress in registering ILUAs in South Australia

While initial progress in registering ILUAs in South Australia has been slow, the pace is now beginning to accelerate. The ILUA templates have assisted in streamlining negotiations with relevant parties as well as checking off relevant ILUA provisions. In December 2003 there was one registered ILUA in South Australia, by 2006 a further eight ILUAs have been registered. There are an additional 14 to be submitted

27 *Memorandum of Understanding between the Minerals Council of Australia and the Commonwealth Government (1 June 2005 - 2010)*, Canberra, 1 June 2005, available online at: http://www.minerals.org.au/__data/assets/pdf_file/11514/MCA_Commonwealth_MOU.pdf.

28 **Co-operative Change, consultant on behalf of the SA ILUA State-wide Negotiating Parties,** *Report of the Indigenous Employment in South Australia Resources Industry Forum*, Adelaide, South Australia, 22 May 2006.

29 *Mining Act 1971 (SA) Part 9B.*

for registration in the near future and some 51 ILUAs are currently contemplated by the parties. The *South Australian Strategic Plan* outlines a target of resolving 75 percent of all native title claims by 2014.[30]

Table 1: Total number of registered South Australia ILUAs, 2006

Claim Name	Subject Matter	Registration Status
Adnyamathanha #1	Parks ILUA (Vulkathunha Gammon Ranges ILUA)	ILUA registered
Antakirinja	Mineral Exploration ILUA#1	ILUA registered
Antakirinja	Mineral Exploration ILUA#2	ILUA registered
Arabunna	Mineral Exploration ILUA	ILUA registered
Gawler Ranges	Mineral Exploration ILUA	ILUA registered
Ngadjuri (Claim not registered)	Ngadjuri pastoral ILUA	ILUA registered
Narungga (Claim not registered)	Local government ILUA	ILUA registered
Yankunytjatjara/ Antakirinja	Todmorden pastoral ILUA	ILUA registered
Narungga (Claim not registered)	Port Vincent Marina	ILUA registered

Legislative change

The State-wide ILUA process has also become a catalyst for State-wide policy and legislative change. Amendments to the *National Parks and Wildlife Act* 1972 make provision for co-management of national parks and conservation areas by the State Government and Indigenous groups. Some states have struggled to come to agreement on similar matters. For example, traditional owner groups in Queensland have been lobbying the Queensland Government for national park

30 Principal Negotiator, ILUA Negotiation Team SA Attorney-General's Department, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2006,* Email, 27 February 2007.

joint management provisions without success. The Queensland *Aboriginal Land Act,* 1991 (Qld) is currently under review and joint management provisions are not included in this review, despite it being a major aspiration of traditional owner groups.[31] In light of Queensland's experience, it would appear that one of the main advantages of a State-wide process is that all parties can negotiate their land aspirations in a forum that has authority to achieve agreed legislative and policy outcomes.

Consent determination policy

Discussions between the ALRM and the South Australian government, under the auspices of the SA State-wide ILUA process, have resulted in the development of a Consent Determination Policy.[32] This policy provides details about the State Government requirements for connection materials in applications for determinations of native title under the Native Title Act 1993. The Main Table parties adopted this policy in October 2004. There are several advantages to this policy, namely, it provides a degree of certainty about the nature of the connection requirements including regulations to ensure confidentiality of sensitive materials.

The Consent Determination Policy emphasises an interrelated approach to native title. 'The intention being to progressively develop ILUAs for specific claim areas that address all sectoral interests represented by the peak bodies hence enabling resolution of the claim by withdrawal, ILUA and consent determination processes'.[33]

> …a negotiation program is scheduled and carried out on a case by case basis. At this commencement stage for each set of negotiations, the issue of the claim group's 'connection' is not crucial. However, as the negotiations progress, a process of preparation of connection materials by the claim group takes place so that, preferably before the negotiations conclude, the State is in a position to decide whether or not it will support a consent determination. If so, consent determination proceedings before the Court are instituted; if not, the State discusses with the claim group whether it is willing to withdraw its claim. Either way, the negotiated outcomes stand; the main point is that the claim is resolved by withdrawal or consent determination.[34]

The Consent Determination Policy provides a starting point for ILUA discussions that do not require connection reports. A consent determination may be the ultimate outcome of ILUA negotiations, but connections materials are not the required in the initial negotiation phase.

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31 **Chuulangun Aboriginal Corporation (on behalf of Kaanju People and Kaanju Homelands),** *Submission to Review of the Aboriginal Land Act (Queensland) 1991,* December 2004, pp 3-4.

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

33 **AIATSIS Native Title Conference,** *Implementing the SA ILUA State-wide Negotiations,* Dixon, I., Agius, P., and Hall, P., Coffs Harbour, New South Wales, June 2005, p11.

34 **Principal Negotiator ILUA Negotiation Team, SA Attorney-General's Department,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2006,* Email, 27 February 2007.

> A critical factor in the development of the SA State-wide negotiation process is that the SA government has accepted the authority and governance structure established through the NTMCs. It is not requiring native title claimant groups in SA to prove their connection to country through assembling anthropological evidence in a connection report.[35]

Conclusion

A perennial criticism of the native title process, and of agreement making between native title applicants and respondents, is the length of time that it takes to achieve resolution. The South Australian situation is no different. However it is hoped that the initial investment of time and resources will make future agreements possible in a timeline that suits all parties. Equally important will be future efforts to ensure that the State-wide ILUA process is sustainable, and that the people involved pass their knowledge to new generations of negotiators. For Indigenous native title claim groups, NTMC's and the Congress succession planning is extremely important due to the oral transmission of Indigenous knowledge. As is widely acknowledged in all areas of native title, negotiations are outliving elders who hold knowledge and have the authority to speak for country.

> Agreement-building needs to proceed hand-in-hand with the process of building the capacity for institutions of Aboriginal self-government from the bottom-up. Aboriginal people themselves are the principals in such agreements not their lawyers and other representatives. In making such agreements, there are political decisions to be considered. These are properly within Aboriginal domains at the scale at which people exercise self-governance.[36]

Other organisations, principally the NNTT and the Federal Court have a statutory duty to be satisfied that negotiations are fruitful and progressing over time. The ongoing credibility of the process is dependant on agreements that provide tangible outcomes to all parties.

> Aboriginal people see ILUAs as a way of building partnerships for the future with two broad sets of objectives… to provide opportunities for Aboriginal people in South Australia with employment, education, training and business opportunities over the next 15 years… and to offer to business and industry: certainty; access; support rather opposition of local communities; and ready access to trained and skilled labour – people who are locals, who know the country and the conditions and have as much pride and reasons to help you develop resources.
>
> … Aboriginal people are just as keen as you to see resources developed on their land… but not unreasonably. They expect to be recognised, respected and given fair value and equity in return.[37]

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35 **Inaugural Pacific Regional Meeting, International Association for the Study of Common Property,** *Traditional CPRs, new institutions: Native Title Management Committees and the State-wide Native Congress in South Australia*, Davies J., Brisbane, 2-4 September 2001.

36 **Native Title Conference,** *Different Visions, Different Ways: Lessons and challenges from the native title negotiations in South Australia*, Agius, P., Jarvis, S., Howitt, R., Alice Springs, Northern Territory, 3-5 June 2003, p4.

37 **Indigenous Employment in SA: Resources Industry Forum**, Speech by Agius, P., Executive Officer Aboriginal Legal Rights Movement South Australia – Native Title Unit, Adelaide, 22 May 2006, pp2-3.

Chapter 5

The Argyle Participation Agreement

Introduction

> The Indigenous Land Use Agreement (ILUA) and Argyle Management Plan Agreement (AMPA) together are arguably the most comprehensive arrangements ever made between a resource company and traditional owners negotiated in Australia. They are the result of one of the most comprehensive agreement processes undertaken with traditional owners. The unique structure of the agreements reflects the aspirations of both Argyle Diamond Mine and the traditional owners that the agreements provide a firm base for an enduring partnership and sustainable prosperity for traditional owners during the life of the Argyle mine and once mining is completed.[1]

The Argyle Diamond Mine Participation Agreement (the Argyle Agreement) is a registered Indigenous Land Use Agreement (ILUA) between Traditional Owners of the East Kimberley region of Western Australia, the Kimberley Land Council and Argyle Diamond Mine (Argyle Diamonds).[2] The ILUA area covers 797.5 square kilometres and is located 100 kilometres south west of Kununurra. It is situated in the Shire of Wyndham-East Kimberley and the Wunan Regional Council.[3] The Indigenous communities affected by the mining include those at Warmun; Doon Doon; Glen Hill; Bow River; and Crocodile Hole. The ILUA area contains a special lease for grazing purposes as well as the mining tenements.

The ILUA was registered with the National Native Title Tribunal on 8 April 2005. It was the result of 3 years of negotiation and replaced a 'Good Neighbour Agreement' that had existed since the 1980s. The ILUA will be relevant until the closure of the Argyle Diamond Mine in approximately 2018.

An ILUA is a voluntary agreement entered in good faith by all parties. ILUAs are the product of agreements between traditional owners and governments or commercial operators or both simultaneously. Participating parties have particular interests in an area of land and a desire to work together outside of the courts to achieve practical certainty about rights and future acts on land.[4]

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1 **Gelganyem Trust and Kilkayi Trust,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner,* Email, 17 November 2006, p3.

2 **The Argyle Diamond Mine is owned by the Rio Tinto Group.**

3 **ATNS Argyle Agreements Database; available online at www.atns.net.au.**

4 **National Native Title Tribunal,** *What is an Indigenous Land Use Agreement (ILUA)?,* Fact Sheet, September 2006.

This case study documents the commitment of the participants in the Argyle Agreement to understand differing cultures and systems of law. Ultimately, the Argyle Agreement achieved the required technical outcomes, but according to both Indigenous and non-Indigenous parties, it achieved more. It is a tangible embodiment of practical reconciliation between Indigenous land owners and non-Indigenous industry representatives. The Argyle Agreement provides a mechanism for recognising, accepting and incorporating two worlds.

Background

The Argyle Diamond Mine covers two significant story places for the traditional owners of this region; Barramundi Gap and Devil Devil Springs. The traditional owners have a responsibility to protect and maintain these sites of significance and ceremony. It is the responsibility of the Miriuwung and Gidja people, particularly the women, to protect their ancestor the Barramundi, who will in turn take care of them. The Ngarranggarni (sometimes referred to as the Dreaming) is a living belief system that establishes continuity between past, present and future. It continues to inform the day to day activity of the Miriuwung and Gidja peoples and their relationships to country.[5] These are their Dreaming stories.

We grew them diamonds up[6]

Jaliwang Ngarranggarni

Barramundi Dreaming Story (Miriuwung)

A barramundi lives in the river at Tharram (Bandicoot Bar). One day a crane fishing for food sees the barramundi and spears it with her beak, but is unable to catch it as the barramundi swims quickly away.

The barramundi travels up the Dunham River, past where the Worrworrum community is today, and on to Glen Hill where she scrapes off some of her scales as she passes through. Today, these scales can be seen near the Glen Hill community's first gate as white rock on the hillside, most clearly visible in the late afternoon.

Here the barramundi is spotted by some women who try to catch her using nets made of rolled Spinifex grass (a traditional Miriuwung fishing method known as Gelganyem). But the barramundi flicks her tail and jumps over the trap. She escapes between the two hills of Barramundi Gap and heads down to Bow River, where she comes to rest as a white rock. This rock, which can still be seen today, is quite different from all the others at Bow River.

Daiwul Ngarranggarni

Barramundi Dreaming Story (Gidja)

A barramundi is being chased by a group of old women and swims into a cave near the area now known as Barramundi Gap. As she enters the cave the women prepare to catch her with nets made from rolled Spinifex grass (a traditional fishing method known as Kilkayi).

The barramundi realises she is trapped in the shallow, muddy water of the cave entrance and tries to escape by swimming to the other end, toward Nunbung

5 Argyle Diamonds, *The Argyle Participation Agreement: Breaking New Ground,* Information Brochure, p7.

6 Peggy Patrick, as cited by Nish, S., *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 19 October 2006.

(Wesley Spring). But she cannot find a way out and returns to the entrance of the cave, where the old women are waiting with their nets. She swims towards the women and jumps over them, shedding her scales as she jumps and leaving them behind in the shallow water. The scales become the diamonds of all colours that are found there today.

The barramundi then jumps through a gap in the rocks, landing in the deep, clean water of Kowinji, or Cattle Creek. As the barramundi dives she turns into a white stone. Three of the old women who have chased the fish to Cattle Creek peer into the water to look for her and they too turn into stone, forever becoming part of the landscape. Today there are three stone formations overlooking the creek.

According to Gidja people, barramundi are not found in the area today because of the presence of the Ngarranggarni barramundi in this place.

Strategic preparations for negotiations

Argyle Diamonds have been mining in the East Kimberley region of Western Australia for the past 20 years. The Argyle lease occupies the traditional country of the Mirriuwung and Gidja peoples as well the Malgnin and Woolah peoples. Ethnographic studies confirm that those with particular rights and interests in the area are people with connections to areas known as Mandangala, Tiltuwam, Yunurr, Neminuwarlin, Balabur, Bilbidjing, and Dundun.[7] There is a history of engagement between the traditional owners and the mining company. According to the anthropologist contracted by Argyle Diamonds, the history is as follows:

> Aboriginal people had been involved in a process of negotiation with the mining company in ways that were mostly informal, mostly unrecognised, unarticulated negotiations and engagements.[8]

In 2001, Argyle Diamonds and the traditional owners came to the table to renegotiate and renew the relationship between the traditional owners and the mining company. Neighbouring traditional owner groups were included in negotiations for the first time. This process provided an opportunity for a new agreement, beyond the limits of the first 'good neighbour' arrangements.

The preparations for negotiation included a process for recognition and co-operation between two systems of law, Western law and Indigenous law. The mediation and negotiation processes guided by the *Native Title Act 1983* (Cth) and Indigenous Land Use Agreement regulations met the requirements of Western law, while the conduct of particular ceremonies at the mine site met the responsibilities of Indigenous traditional law.

In the early meetings the traditional owners made the point: 'we are not moving on with your system until you hear our grief, pain, distress and hurt from the past'. According to meeting participants, many of the early meetings had no formal

7 **Groups of Indigenous people with very particular connections to the country of the Argyle lease area,** through tradition, kin, and descent. Members of these groups belong to Gidja, Mirriuwung, Malgnin, and Woolah peoples. Argyle Diamonds, *The Argyle Participation Agreement: Breaking New Ground,* Information Brochure, p15.

8 **Doohan, K.,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 17 October 2006.

agenda and Argyle Diamonds personnel made a point of listening to the traditional owners and apologising for the past.[9]

The parties to negotiations recognised that there were implicit power imbalances between the mining interests and the traditional owner interests. Argyle Diamonds endeavoured to redress the imbalance by ensuring that communication was tailored to the needs of the traditional owners. Traditional owners were taken on tours of the mine, including the underground mine. Different visual strategies were developed to assist with explanations of the impact of the mining activity on their country. Translators were used throughout to ensure that everyone could follow and participate in the negotiations. All key documents were prepared in a format that included plain English interpretations.

The traditional owners also recognised that representatives of Argyle Diamonds required interpretations of the traditional processes of agreement making and traditional law of the region. In a reciprocal process the traditional owners provide the mining company representatives with information about their laws and customs. They also performed ceremonies to ensure that the mining operation could be conducted free from danger and interruption by the local Dreaming beings and spirits of the 'old people.'[10]

Building relationships with the community

The first step towards developing the Argyle Agreement was to rebuild relationships and right the wrongs of the past 20 years. Initially there was a Memorandum of Understanding (MoU) that formalised the relationship between Argyle Diamonds and the Kimberley Land Council on behalf of the traditional owners. The MoU provided the foundation for the negotiation process and a significant component was about the development of trust with traditional owners. The MoU set out the substantive issues to be negotiated; a structure and timetable for the negotiation; principles and objectives; resources and funding; and the legal representation arrangements for a new formal and binding agreement with traditional owners.[11]

The second step was a formal apology from Argyle Diamonds to the traditional owners for past wrongs. Soon after, in May 2003 the traditional owners gave their approval to the underground mine. At this point a Framework Agreement was developed. The Framework Agreement was an extension of the MoU. It outlined the agreement principles and traditional owner processes for decision making.[12]

Negotiating with the right people

The previous Good Neighbour Agreement was primarily with one family group and this effectively disenfranchised other traditional owners who had responsibilities over the mining region. Argyle Diamonds had no real relationship with the Kimberley Land Council and although they had a relationship with some of the

9 **Nish, S.,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 19 October 2006.

10 Doohan, K., *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 17 October 2006.

11 **Argyle Diamonds,** *The Argyle Participation Agreement: Breaking New Ground,* Information Brochure, p17.

12 **Freehills,** *Argyle Diamond Mine Indigenous Land Use Agreement registered,* Article, 10 June 2005.

traditional owners through the Good Neighbour Agreement.[13] The negotiation of the new agreement became a process of restoring these relationships, not only between the mining company and the original Good Neighbour signatories but with all traditional owners.

During the first 18 months of the negotiations, anthropological research was commenced for the preparation of a native title Connection Report. Comprehensive ethnographic and genealogical studies were conducted by two anthropologists commissioned by the Kimberley Land Council. The anthropologists recognised and worked within traditional Indigenous authority structures. The process defined traditional ownership in accordance with Indigenous law and culture, rather than proximity to the mine or prior involvement in claims.[14]

During the first eight months of fieldwork a number of cultural groups were identified. These groups were structured into *inside groups*, representing those who would be most affected by the mining operations, and *outside groups* representing less affected groups but those who still had a responsibility to the land within the boundary of the mine lease area.

Negotiation committees

The ILUA negotiations were conducted by two committees, that of the traditional owners and of Argyle Diamonds. The traditional owner Negotiation Committee was structured to include the various cultural groupings. It comprised 22 representatives from all family groups with traditional rights and interests as defined by the ethnographic studies. The Negotiating Committee attended meetings on behalf of the traditional owner groups and other senior men came to the meetings and observed.

> My personal view is that this is a governance practice that you just can't buy in any other way…that group on traditional lines came together, exercised traditional decision-making power …. They demonstrated the power of traditional decision-making and they constructed that group so it was a blend of men and women, old people, young people, the right composition of family. It held, the composition held, everybody came to every meeting, everybody worked hard at every meeting, it was just phenomenal. The old people were just sagging in their seats, they were so exhausted, but none of them left.[15]

Securing adequate resources

Resources for negotiations were provided by Argyle Diamonds and the Australian Government through the National Native Title Tribunal (NNTT) and Aboriginal and Torres Strait Islander Services (ATSIS). The total cost of the Argyle Agreement was more than $9M. The Kimberley Land Council received approximately $3M from Argyle Diamonds, Aboriginal and Torres Strait Islander Services and the National Native Title Tribunal to represent the traditional owners. It cost Argyle Diamonds

13 **Nish, S.,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 19 October 2006.

14 **Argyle Diamonds,** *The Argyle Participation Agreement: Breaking New Ground*, Information Brochure, p15.

15 Nish, S., *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 19 October 2006.

more than $6M to run their negotiations.[16] The general observation from both Argyle Diamonds and the Kimberley Land Council was that it was a very expensive process.

Economic and legal advice

A number of consultants were contracted to assist both parties on the Argyle Agreement negotiations. These included:

- interpreters;
- people with experience in the development of other Native Title Agreements;
- legal and financial experts who gave advice on technical aspects of the agreement and negotiated outcomes on behalf of the traditional owners;
- anthropologists;
- experts in business development; and
- those who could advise on the economic and social impacts of the Argyle Diamond mine on Aboriginal communities.

According to the CEO of the Kimberley Land Council, the interpreters and those advising on legal and financial matters played a major role in negotiations. 'The financial advisors provided advice on specific issues including whether or not this agreement was reasonable and reviewed and advised on what is happening in other areas.'[17]

The Argyle Agreement

The Argyle Diamond Mine Participation Agreement consists of two parts.

The first part is the Indigenous Land Use Agreement (ILUA). The ILUA is legally binding on the parties. It outlines and formalises the financial and other benefits that traditional owners receive. It specifies how the benefits are to be administered. It contains a process which ensures that the traditional owner's native title rights and interests are recognised to their fullest potential.

The second part is the Argyle Management Plan Agreement (AMPA).[18] The AMPA contains eight Management Plans. They are:

1. Aboriginal site protection
2. Training and employment
3. Cross-cultural training
4. Land Access
5. Land Management
6. Decommissioning

16 **Nish, S.,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 19 October 2006, and Bergmann, W., *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 6 October 2006.

17 **Bergmann, W.,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 6 October 2006.

18 **The Kimberley Land Council is a party to the ILUA but is not a party to the Argyle Management Plan** Agreement.

7. Business development and contracting
8. Devil Devil Springs

The AMPA confirms the way in which Argyle Diamonds and traditional owners agree to work together to achieve numerous objectives. Some of these include preservation of the environment, the recruitment and retention of Indigenous mining employees and the development of Indigenous businesses that will be sustainable after the mine.[19] Each aspect of the management plan is described here.

Aboriginal site protection

The Site Protection Management Plan aims to provide the strongest protection possible to the more than 50 identified Aboriginal heritage sites listed on the Argyle lease. The provisions under this plan protect the traditional owners' rights to make decisions about activity on their land that may affect cultural heritage. The Site Protection Management Plan provides a protocol for site management including:

- Protocol for ensuring traditional owner approval that site clearances have been conducted for past and current operations;
- Protocol for submitting work program plans to traditional owners before conducting any future ground disturbing activity; and
- Protocol to ensure that any work proposed by Argyle does not interfere with Aboriginal sites.[20]

The Site Protection Management Plan is underpinned by a 'no means no' principle.

Training and employment

A significant focus of the Argyle Agreement is to achieve training and employment outcomes for local Aboriginal people. Argyle Diamonds has made a commitment to give support and preference to local Aboriginal people for jobs and training at the mine. The Training and Employment Management Plan includes business and employment principles that aim to achieve and maintain a 40 percent local Aboriginal employment quota on commencement of the underground mine in 2008, continuing until the mine closes.

Argyle Diamonds supports a number of education support programs to address impediments to Aboriginal people gaining employment. The Yachad Accelerated Learning Program, the Follow the Dream Program, and mentoring and various leadership camps are aimed to provide pre-employment entry points. Argyle also provides flexible apprenticeships, traineeships, career planning and alternative employment programs.

19 **Freehills (consultant),** *Argyle Diamond Participation Agreement: Argyle Management Plan Agreement,* AMPA between Argyle Diamonds Limited and Argyle Diamond Mines Pty Limited and Traditional Owners.

20 **Freehills (consultant),** *Argyle Diamond Participation Agreement: Argyle Management Plan Agreement,* AMPA between Argyle Diamonds Limited and Argyle Diamond Mines Pty Limited and Traditional Owners.

Cross-cultural training

The traditional owners were invited by Argyle Diamonds to develop a cross cultural program. This training will include traditional ceremony such as Manthe,[21] the traditional welcome to country. Argyle has agreed to incorporate Manthe into their site safety induction procedures.[22]

Argyle Diamonds has committed to ensuring that all employees and contractors who have worked with Argyle for more than 6 months will be given cross cultural training. The Argyle executives and management receive extra training that includes an 'on country' component with the traditional owners. Cross cultural training will be conducted for all staff as a refresher every 3 years. The content of the training is by agreement between Argyle Diamonds and the traditional owners.

Argyle Diamonds has made a commitment to employ and train 20 traditional owners to deliver Indigenous modules of the cross cultural training. This will fulfil an aspiration of the traditional owners to develop their own enterprise. This project is still underway.

Land access, land management, decommissioning and Devil Devil Springs

The Argyle Agreement recognises the traditional owners as landlords of the Argyle mining lease and acknowledges the traditional native title rights in the mining lease area. The traditional owners have agreed under the ILUA that the rights of the mining company prevail for the term of the mining operation.[23] This means that the traditional owners will not lodge a Native Title application over the lands and waters until after the mine is closed. Upon closure of the mine, Argyle Diamonds has made a commitment to support the traditional owners in an application for a consent determination of native title over the mine area.[24]

The Management Plan defines rules regarding access to country and security clearance provisions. It also contains land management protocols. For example, Devil Devil Springs is a site of significance. It is a freshwater spring which is being impacted as a result of the mining operations. The Management Plan outlines Argyle Diamond's responsibilities regarding Devil Devil Springs and defines procedures for informing traditional owners about activities affecting the Springs.[25] A separate management plan deals specifically with the management of Devil Devil Springs.

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21 **A ceremonial Manthe of smoke and water is done to welcome people to Aboriginal country. Manthe is a** traditional ritual of welcome where newcomers walk through the smoke of fires or are brushed with wet gum leaves. Argyle Diamonds, *The Argyle Participation Agreement: Breaking New Ground,* Information Brochure, p3.

22 **Freehills (consultant),** *Argyle Diamond Participation Agreement: Argyle Management Plan Agreement,* AMPA between Argyle Diamonds Limited and Argyle Diamond Mines Pty Limited and Traditional Owners, p117.

23 **Argyle Diamonds ,** *Communities and Environment: Indigenous Land Use Argyle Agreement,* website of Argyle Diamonds , available online at www.argylediamonds.com.au , accessed 5 September 2006.

24 **Freehills (consultant),** *Argyle Diamond Mine Participation Agreement,* ILUA between Argyle Diamonds Limited and Argyle Diamond Mines Pty Ltd, Traditional Owners and Kimberley Land Council Aboriginal Corporation, p16.

25 **Freehills (consultant),** *Argyle Diamond Participation Agreement: Argyle Management Plan Agreement,* AMPA between Argyle Diamonds Limited and Argyle Diamond Mines Pty Limited and Traditional Owners, pp131-140.

The Management Plan also contains provisions for the decommissioning of the mine and the rehabilitation of the land. Argyle Diamonds has committed to provide training on land management and rehabilitation. The mine site includes significant infrastructure, including the airstrip and the Argyle Village. Traditional owners will have an opportunity to submit a business plan to maintain and utilise the infrastructure after the closure of the mine. The Argyle Diamond Mine currently has a life of approximately 20 years.

Business development and contracting

The Business Development Taskforce is (a sub-committee of the Relationship Committee) made up of five Argyle Diamonds representatives and five traditional owner representatives. The role of the Committee is to scope viable business opportunities for traditional owner businesses and to advise the traditional owners about business development. For the first three years the Taskforce will be supported by a Business Development Facilitator with responsibility to assist in developing business plans and business skills. The Facilitator also has a role to assist in the development of appropriate corporate governance measures. Current projects include earthmoving, transport, manufacturing, horticulture and tourism ventures. These projects are designed so that traditional owner businesses can compete for site-based contracts.[26]

Argyle Diamonds has recently developed an 'inside-out' approach to traditional owner business development and contracting services. This approach is to assist Aboriginal mine employees to utilise their existing mining skills to develop commercial opportunities through private businesses. For example, Aboriginal people working as grader operators could start earthmoving businesses, and those working in waste management could start waste management businesses.[27]

Argyle Diamonds has agreed to give preference to traditional owners and traditional owner businesses for contract work relating to the provision of services at the mine site worth more than $250,000. If Argyle Diamonds thinks the traditional owner businesses can provide the services as well as any non-Indigenous contractor, they will win the tender. If they are unsuccessful, Argyle Diamonds has committed to provide feedback to the traditional owner enterprise. Argyle Diamonds has also agreed to give preference to non-traditional owner businesses that provide the greatest benefits to traditional owners.

> Argyle will ensure that the Business Development Taskforce is informed of the measures that each tenderer is prepared to take to involve traditional owner businesses and promote employment, training and/or benefits to traditional owners.[28]

26 Argyle Diamonds , *Communities and Environment: Aboriginal Partnerships,* website of Argyle Diamonds , available online at www.argylediamonds.com.au, accessed 5 September 2006.

27 Argyle Diamonds , *Communities and Environment: Aboriginal Partnerships,* website of Argyle Diamonds , available online at www.argylediamonds.com.au, accessed 5 September 2006.

28 Freehills (consultant), *Argyle Diamond Participation Agreement: Argyle Management Plan Agreement,* AMPA between Argyle Diamonds Limited and Argyle Diamond Mines Pty Limited and Traditional Owners, pp145-152.

Executing the Argyle Agreement

The Relationship Committee is a key component in the implementation of the Argyle Agreement. This committee comprises 26 traditional owners (including senior traditional owners, younger people, men and women) and a small group of Argyle Diamonds representatives. The Relationship Committee has a role to meet every 3 months for the life of the Argyle Agreement to monitor its implementation. The Committee is closely linked to the Trusts which were also established under the Argyle Participation Agreement.[29]

The ILUA established two trusts; the Gelganyem Trust and the Kilkayi Trust.[30] The names of the trusts are derived from the Mirriuwung and Gidja peoples words that describe traditional fishing methods and are used by the women for stories associated with Barramundi Gap.

The **Gelganyem Trust** is made up of eleven trustees, nine representing the seven traditional owner estate groups that are party to the ILUA and two independent trustees. Training was provided to the trustees prior to assuming their roles and responsibilities.

The Gelganyem trust administers the Sustainability Fund, the Law and Culture Fund, and Education and Training Fund, and the Miriuwung and Gija Partnership Fund. For the first four years of operation, financial contributions will be split between the Sustainability Fund and the Partnership funds. After that time all funds will be paid into the Sustainability Fund. The Miriuwung and Gija Partnership Fund provides funds for community projects and community development. The Sustainability Fund provides future generations of Miriuwung and Gija people with a significant capital base which includes money for future generations, a law and culture fund, and an education and training fund.[31] The Law and Culture Fund provides annual support for both men and women law and culture activities. This is an important way for the agreement outcomes to support the exercise and development of customary law and governance.

The **Kilkayi Trust** has only two independent trustees. This trust has two roles:

1. To administer the annual payments from Argyle to the individual families party to the ILUA and;
2. To assist each family to develop an annual expenditure plan outlining specific community projects and initiatives.

The independent trustees are appointed by agreement of the ILUA parties and bring high level management, financial and community development skills to the trusts.[32] Traditional owners agreed that they not be representatives on trusts that manage other families business.[33]

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29 **Nish, S.,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 19 October 2006, pp13-14.

30 **Information used in this section is provided by the Gelganyem Trust and the Kilkayi Trusts.**

31 **Gelganyem Trust and Kilkayi Trust,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner,* Email, 17 November 2006, p2.

32 **Gelganyem Trust and Kilkayi Trust,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner,* Email, 17 November 2006, p3.

33 **Nish, S.,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 19 October 2006.

The Gelganyem Trust has developed a number of projects. These include:

- Indigenous business development facility
- Renal health
- Law and Culture grounds infrastructure upgrade
- Holiday programs for youth at risk
- Adult literacy
- Cultural Curriculum
- Scholarship Fund
- Parents as Learners (PAL)[34]

The Trust is able to use the royalty payments to leverage funding from federal, state and private funding partners to support these projects. The Gelganyem *Education and Training Shared Responsibility Agreement* is an example of this when in August 2005 the Australian Government committed $300,000 to match funds committed by the Trust. to expand education and training opportunities through tertiary education scholarships for Indigenous people in the communities.[35]

Conclusion

The legacy of the Argyle Agreement is that it has provided the traditional owners with a range of social, economic and development opportunities. These opportunities are managed and decided by the traditional owners on their own terms.

> When they (traditional owners) were engaging with the mine they did so on their own terms. By performing ceremonies and reinforcing their relationships to the land and the Dreaming in the land, they were actually using very critical ways of engaging with the mining company that reinforced their difference, that ensured that they were not lost in a blended amorphous relationship. They really wanted the mining company to know that we are different from you, we have a very different way of being in the world, but we can be in this world with you. What I think is so exciting about Argyle is that those Aboriginal people who were engaging at that level, within their own cultural framework were never compromised in their relationship with the mine.[36]

Research conducted by the Harvard Project on American Indian Economic Development indicates that although royalty payments, employment, training, and education scholarships are all important outcomes, the key to sustainable communities and economic development is due to other factors.[37] They are:

- Indigenous self-government;
- capable governing institutions capable of meeting all of the corporate and legislative requirements; and
- governing institutions that are generated by Indigenous people

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34 **Gelganyem Trust and Kilkayi Trust,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner,* Email, 17 November 2006, p4.

35 **Vanstone, A., (Senator),** *Vanstone to Sign Shared Responsibility Agreements with Kimberley Indigenous Communities,* Media Release, 3 August 2005, p1.

36 **Doohan, K.,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 17 October 2006.

37 **Cornell, S.,** *Starting and Sustaining Strong Indigenous Governance,* Presentation at the 'Building Effective Indigenous Governance Conference, Jabiru, Northern Territory, 5 November 2003.

> and have legitimacy with the people they govern, reflecting Indigenous conceptions of how authority should be organised and exercised.[38]

The experience of negotiating the Argyle Participation Agreement reinforces the importance of Indigenous models of governance. Indigenous governance is not *consultation*, it is *jurisdiction*, and includes genuine decision making power.

> Good governance means having good rules for deciding how people work together to do the things they need to get done, how decisions are made, who has the authority to act for the group, how are disputes resolved and how to get community business done.[39]

Ted Hall, the Chairperson of the Gelganyem Trust sums up the legacy of this agreement for the traditional owners:

> It's been empowering, it has empowered us to make decisions on our own terms. We determine what happens in our area. We set the terms and goals and we are achieving them also. As an Aboriginal man I can finally walk around with my head held high. This process has bought unity between the elders and the young. The young bring the education and the elders bring the knowledge. People like RPM, ADM and the independent trustees give us direction.[40]

38 **Cornell, S.,** *Starting and Sustaining Strong Indigenous Governance,* Presentation at the 'Building Effective Indigenous Governance Conference, Jabiru, Northern Territory, 5 November 2003, pp2-3.

39 **Cornell, S.,** *Starting and Sustaining Strong Indigenous Governance,* Presentation at the 'Building Effective Indigenous Governance Conference, Jabiru, Northern Territory, 5 November 2003, p.3.

40 **Hall, T.,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 20 December 2006.

Chapter 6

Ngarda Civil and Mining

Ngarda Civil and Mining (Ngarda) began its operation five years ago with six staff and six whipper-snippers. It is now a multi-million dollar Indigenous owned and operated business that provides contracting services to the mining and construction industries in four regions of the Pilbara.

> Ngarda has experienced consistent growth in terms of business turnover and job creation during its four year life. The company won over $70 million of work since 2001, and currently achieves an annual turnover of $27 million….the company employs 170 [people], of which 140 are Indigenous – an incredible employment achievement within the mining industry. [1]

This case study describes the development of Ngarda and its indirect relationship to native title Indigenous employment quotas.

Introduction

A number of mining and exploration ventures in Australian are located on land that is subject to native title or native title claim. This means that mining companies are required to negotiate with traditional land owners regarding land use and potential compensation for the short or long-term loss of Indigenous rights and interests to land.

The resultant native title Indigenous Land Use Agreements (ILUAs) contain various provisions which may include services and financial arrangements with traditional owners. These can include remunerations to trust companies, employment quotas for local Indigenous people in mining operations, education and training opportunities and community infrastructure.

Employment and training are almost standard provisions in ILUAs with mining companies. Employment and training provides opportunities for Indigenous people to share in the wealth created by the mining enterprise. However, the mining industry has made no secret of its difficulty in recruiting and retaining Indigenous employees.[2] The CEO of the Mining and Minerals Council of Australia has described a failure of mining companies to harness the vast and untapped

1 **Ngarda Ngarli Yarndu Foundation** *Correspondence to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, 31 October 2006, p3.

2 **Hooke, M., (Chief Executive, Minerals Council Australia), Address to the 2006 Garma Festival, Gove,** Nhulunbuy, Northern Territory, August 2006.

Indigenous workforces that are co-located with mining operations in Australia.[3] In a speech in August to commemorate the Wave Hill Walk Off, the MCA Chief Executive Mitch Hooke stated:

> …More than 60 percent of our operations have neighbouring Indigenous communities. We are currently experiencing skills shortages and we face profound people shortage requiring some 70,000 more people, or a 50 percent increase on current direct employment in the next decade.[4]

The continuing disadvantage of Indigenous people in the Western Pilbara region is characteristic of many Indigenous communities in Australia that are co-located with mining operations. Despite significant opportunities for employment and economic advancement, particularly with the current resources boom in Western Australia, Indigenous people have not been able to participate in these opportunities. The Western Pilbara is a clear example of a dual economy where a thriving resource sector is situated alongside an Indigenous population overcome by high levels of unemployment and poverty.

Where mining companies have had difficulties in engaging Indigenous recruits, there is potential for Indigenous owned and run corporations like Ngarda to provide a link between an under-utilised local Indigenous workforce and the mining company employer. But Ngarda is more than an employment service to the mining industry in the Pilbara; it is a civil engineering and mining company in its own right, with a skilled Indigenous workforce to provide contract services to the mining industry.

Indigenous owned and operated corporations are in a unique position to become service provider satellites to mining operations. If the governing bodies and management personnel of the corporations are themselves local Indigenous people, they are able to make direct connections into local Indigenous communities. They are able to create workplace environments that attract Indigenous employees. They are able to develop and deliver training and pathways to employment that are relevant and culturally appropriate.

The development of Ngarda Civil and Mining

Ngarda Civil and Mining is a subsidiary company of the Ngarda Ngarli Yarndu Foundation Inc (the Foundation).[5] The Foundation was initially developed by the Aboriginal and Torres Strait Islander Commission (ATSIC) through the Ngarda Ngarli Yarndu Regional Council (NNYRC).

> The Economic Portfolio of the Ngarda Ngarli Yarndu ATSIC Regional Council… saw an opportunity … for the development of a regional strategic approach to economic development. The [Regional Council] sub-committee consulted with a number of Indigenous organisations throughout Australia with similar features to

3 **Hooke, M., (Chief Executive, Minerals Council Australia), Address to the 2006 Garma Festival, Gove,** Nhulunbuy, Northern Territory, August 2006.

4 **Hooke, M., (Chief Executive, Minerals Council Australia), Address to the 2006 Garma Festival, Gove,** Nhulunbuy, Northern Territory, August 2006.

5 **The name Ngarda Ngarli Yarndu, means 'belong to us' in the local Yindjibarndi language. Provided by** Ngarda Ngarli Yarndu Foundation in *Correspondence to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, 31 October 2006, pp1-2.

> the Pilbara region in order to develop a successful strategic approach and plan to development in the Western Pilbara region.[6]

The Foundation was established and incorporated in 2001 and it quickly identified education and training as prerequisites for improved employment and economic outcomes for Indigenous people.

> Foundation partners believed that there was a perception by the mining and construction industries that Indigenous people were generally lacking in the skills and training necessary to meet the industry's needs, and this perception needed challenging.[7]

In response to this situation, the Foundation decided to develop an independent body with a mandate to seek and nurture commercial opportunities for Indigenous people. This was the genesis of Ngarda Civil and Mining. In 2001, the Foundation went into partnership with Indigenous Business Australia and Henry Walker Eltin[8] to establish Ngarda Civil and Mining (Ngarda). The Foundation continues to be integral to Ngarda Civil and Mining. It provides the governance structure and the strategic direction for the subsidiary company.

The primary aim of the Foundation is to alleviate poverty among Indigenous people in the Western Pilbara region. The Foundation aims to achieve this goal by:

- Providing wealth creation for the Aboriginal people of the Western Pilbara region via dividends to the Foundation;
- Raising funds directly by making commercial investments which deliver long-term returns;
- Creating employment opportunities for the local community; and
- Directing funds back into the community through social services including:
  a) Health facilities and services;
  b) Education and training facilities and services;
  c) Employment opportunities;
  d) Economic opportunities;
  e) Preservation of culture; and
  f) Any other initiatives that contribute to the alleviation of poverty for the Indigenous people in the Western Pilbara region.[9]

The Foundation services the Western Pilbara region which includes eighteen different traditional owner claimant groups, all with different goals, objectives, and governance structures. The traditional owners and the communities located

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6 **Ngarda Ngarli Yarndu Foundation** *Correspondence to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, 31 October 2006, p8.

7 **Ngarda Ngarli Yarndu Foundation** *Correspondence to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, 31 October 2006, p3.

8 **Leighton Contractors acquired the shares of Henry Walker Eltin in March 2006. Ngarda Ngarli Yarndu** Foundation, *Correspondence to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, 31 October 2006, p3.

9 **Ngarda Ngarli Yarndu Foundation** *Correspondence to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, 31 October 2006, pp4-5.

in the Western Pilbara region support the initiatives of the Foundation and receive opportunities and benefits that flow from the Foundation's projects. The Foundation prides itself on its capacity to provide opportunities for all Indigenous people in the region, not only the traditional owners.

> The Foundation represents everyone – whether you are Noongar from Perth living in the Pilbara, or a traditional owner from the area. The Board membership predominantly comes out of the ATSIC Regional Council but we are changing that now. We are asking for expressions of interest. Anyone can apply to sit on the Board. Like I said, that template is based on good governance which is a big downfall in Aboriginal communities around Australia, when you have family groups and traditional owners, internal conflicts, nepotism. What I am saying to our mob is I don't care if only one traditional owner sits on this Board as long as we have people who are going to give us good sound advice, good governance structure to make us more successful.[10]

The selection of members to the Board of Management is done by nomination. The Board is currently made up of six Indigenous representatives and two special advisors. The two external appointments to the Board provide advice and business management training. The Board of Management assesses all business opportunities and determines investments by considering their commercial viability and their potential to have a beneficial impact for Indigenous people.

> The most important consideration for the Foundation is that proposed business opportunities must demonstrate Indigenous employment outcomes, with Indigenous participation in meaningful roles in management and decision-making processes.[11]

As the overarching governing body of Ngarda, the Board of Management of the Foundation provides strong leadership and brings together appropriate skills and capacity to:

- manage the interests of the Foundation;
- possess interest and knowledge that is relevant to the region. This could include a demonstrated involvement in economic development of the region, ie. business, the resource industry, employment and tourism;
- have a decision-making capacity that meets the needs required at an executive level; and
- the ability to work cooperatively to achieve agreed goals across a wide range of economic issues.[12]

10 **Taylor, B., communication with the author, 18 October 2006, p7.**

11 **Ngarda Ngarli Yarndu Foundation** *Correspondence to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, 31 October 2006, p11.

12 **Ngarda Ngarli Yarndu Foundation** *Correspondence to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, 31 October 2006, p14.

Securing adequate resources

A significant feature of the Foundation is that it does not receive any form of government funding, nor is it supported by native title revenue. The only funding that the Foundation has received was one-off start up grant of $150,000 from ATSIC to establish Ngarda in 2000.

> The funding at the time was inadequate as it provided funding for 12 months, supporting one salary, a motor vehicle and administration costs.[13]

The Foundation's resources have increased over time due to commercial investments such as Ngarda which has delivered long-term returns in the payment of dividends and interest on loans.

Since 2000, Ngarda Civil and Mining has received further loans from its shareholders; the Foundation, IBA, and Henry Walker Eltin to the value of $4 million divided according to shareholder proportions. These loans are currently being serviced and are provided as working capital.[14]

Achievements and success factors

Ngarda currently has in excess of $200 million in contracts with various companies. The Indigenous workforce employed by Ngarda receives approximately $10 million in wages per annum.[15] The preference to recruit from local communities means that a portion of those wages go back into the local economy of the region, in turn creating social and economic opportunities for other members of the community.

The commercial success of Ngarda has allowed the company to support a range of independent enterprises and community based projects.[16] For example, Ngarda provides management and technical skills for the Port Hedland Community Development Employment Project (CDEP) program. The CDEP provides gardening and maintenance services to BHP Billiton. Ngarda has also provided management support to the Gumala Aboriginal Corporation and the Indigenous Mining Services; two Pilbara based Aboriginal commercial ventures providing contract services to the mining industry.[17]

Ngarda attributes its business success to 6 critical factors. They are:

- *Partnerships*. The partnerships that Ngarda Civil and Mining have with the Foundation, Leighton Contractors Pty Ltd and Indigenous Business Australia all share common interests in developing the economic prosperity of the Western Pilbara region and the inclusion of Indigenous people in those opportunities. The partners also increase the capacity of the company by providing a broad skills base.

13 **Ngarda Ngarli Yarndu Foundation** *Correspondence to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, 31 October 2006, p9.

14 Hughey, B., communication with the author, 30 January 2007.

15 **Ngarda Ngarli Yarndu Foundation** *Correspondence to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, 31 October 2006, p12.

16 **Ngarda Civil and Mining, Company brochure**, pp2-3.

17 **Ngarda Ngarli Yarndu Foundation** *Correspondence to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, 31 October 2006, pp4-7.

- *Quality Systems*. The company maintains a strong commitment to ensure its systems meet industry benchmarks and safety requirements.
- *Client Benefits*. Ngarda's clients are offered the unique combination of local knowledge, local people and on the ground experience, leading to a shared interest in the project success. The company has also developed a personal rapport with their clients and community.
- *Employment Policy*. The company is guided by its Indigenous Employment Policy which stipulates a minimum company workforce of 85% Indigenous personnel, preferably from the surrounding local communities.
- *Corporate Governance*. Ngarda Civil and Mining prides itself on its effective system of corporate governance and its capacity to deliver economic outcomes in a corporate environment. The leadership of the company, through its established and focused Board of Directors, believe that a functional and flexible system of governance is essential to the company and its outcomes and strongly support the continual development of effective corporate governance systems.
- *Economic Mandate*. The company has a mandate for economic development that leads to community development and stability into the future from its 6 Indigenous Board Directors, each of whom are members of their communities and the traditional owner groups of the region.[18]

Training for employment

A level of numeracy and literacy are important pre-requisites for employment in the mining industry. The legacy of long standing neglect of education in remote communities means that many potential employees are not work ready. As Barry Taylor, Managing Director of the Foundation observed:

> Trying to get an Aboriginal person on to a mine is onerous. You have to pass courses and have certificates; given safety is a big issue. But a lot of our people are semi-literate, and if you can't read signs and you have an ore loader coming the other way you're in trouble. [19]

The Foundation recognised that Indigenous people were lacking in the skills and training necessary to meet the mining and construction industry needs. Ngarda responded to this by providing training opportunities that were specific to the local employment requirements.

At present, Ngarda is finalising the development of a training program aimed at providing a bridge between the needs of the mining industry and skills of the Indigenous members of the community. This program will meet the dual objectives of employing Indigenous people and meeting industry requirements. It will cover topics such as: responsible drinking; hydration; safe driving; fatigue recognition; fire fighting; safety on elevated platforms and training in the operation of equipment.

18 Ngarda Civil and Mining, Company brochure, pp2-3.

19 Mr Barry Taylor, Managing Director of Ngarda, from "Aboriginal workers cash in on mining boom" Andrew Trounson, The Australian, 24 July 2006.

As the program is being developed, Ngarda enriches the program materials by involving local Indigenous people in their design. This process ensures the relevance of the training program, a feature that is often lacking when non-Indigenous training programs are taken and 'Aboriginalised' without consideration for local needs. Ngarda works with local Indigenous people in identifying the relevance of the content, in honing the application of the message, and in obtaining advice about how the material can be presented. Ngarda expects to have both male and female Indigenous trainers and mentors involved in the delivery of the training.[20]

According to the Ngarda Managing Director, involving local Indigenous people in the development of training creates a culture of commitment, and is an important step to ensuring that Indigenous training participants fulfil their responsibility to attend and engage in courses that are tailored for their needs.

Delivering culturally appropriate training both in formal education settings and in the workplace serves a number of purposes. If culturally appropriate training is developed with the involvement of local Indigenous people it gives both training participants and Indigenous employees' ownership of their workplace skills and knowledge.

Many employees who have been developed and trained through Ngarda's program have become marketable and competitive employees. In some circumstances Ngarda has found it difficult to offer their employee's packages that meet the salaries of mining companies as the Managing Director explained:

> We offered one Aboriginal engineer who worked for Main Roads for about $80,000 per year a Regional Manager's position on an annual salary package of $250,000 per year. Rio Tinto came and offered him a package of $350,000. How do you compete with that? We lose a lot of workers to mining companies but it creates more opportunities for others and it's a backhanded compliment to us. If BHP or Pilbara Iron can pick up our employee's they get better pay.[21]

The creation of employment opportunities in the Western Pilbara region has enabled the Indigenous people of the region to develop and utilise their skills, receive remuneration accordingly, provide for their families, and lead their community with pride.

Challenges, pressures and impediments

Approximately 35 percent of the population of the West Pilbara is under the age of 18. This has proved to be a constraint for the company as it limits the potential of continuous availability of an Indigenous workforce. The Ngarda Civil and Mining Business Plan aims to achieve an Indigenous workforce of approximately 500 people between 2006 and 2008. This will require the recruitment of approximately 250-270 people to ensure there are no disruptions to operations and employment quotas are reached.

According to Ngarda, social impediments such as substance abuse and anti-social behaviour have had an impact on the potential employment opportunities in the

20 Ngarda Civil and Mining, *Correspondence with Aboriginal and Torres Strait Islander Commissioner,* Email, 5 October 2006, p1.

21 Taylor, B., communication with the author, 18 October 2006, p8.

region, particularly amongst school leavers. Ngarda has a zero tolerance alcohol and drugs policy and conducts regular testing of employees.[22]

Another disincentive to employment is the cost of living in mining regions, and policies which make it difficult for Indigenous people to make the transition between welfare and employment. Despite employment opportunities and attractive salaries of up to $90,000 per annum, employment data suggests that this is not incentive for Indigenous people to take up positions. One reason for this is that at a certain level of salary, employees lose eligibility for subsidised public housing. The Managing Director of the Foundation noted:

> They may earn good money, but it may not be enough to cover the rents which are $500-600 per week for a house. Also who is going to rent to blackfellas with the housing and land shortage? They would rather rent to someone where they can get $800-900 per week. The market is dictating the rentals.[23]

The Foundation is considering buying houses for Ngarda employee's to alleviate this problem.[24]

The Foundation is continually considering new and different commercial opportunities. This will put pressure on the Board of Directors to make the right decisions. One of the challenges that may arise from this is the limited access to capital to invest in such opportunities and to fund growth.[25]

Conclusion

The success of Ngarda Ngarli Yarndu Foundation through the vision of the previous Ngarda Ngarli Yarndu ATSIC Regional Council, and its subsidiary company Ngarda Civil and Mining, provides a model for governance and a system for enterprise that balances the dual objectives of profit and community development.

While the Ngarda experience may not be directly transferable to other regions and other entities, aspects of its business can be emulated elsewhere. To this end, the Ngarda Ngarli Yarndu Foundation have been working with other Indigenous groups in Australia, particularly groups in South Australia to promote best practice and to provide a business model that contains principles that can be duplicated and implemented. The business model adopted by the Foundation is applicable to both traditional owner groups negotiating agreements with industry, and other Indigenous business entrepreneurs independent of the native title process.

According to the Minerals Council of Australia (MCA), at best we can say that in 2006 Indigenous people represent about five percent of the minerals industry workforce. The MCA report that more and more operations are adopting Indigenous employment targets to ensure that the composition of their workforce reflects the proportion of Indigenous people in the region. For example, the Pilbara operations of Rio Tinto and BHP Billiton now have a target of 12 to 15 percent Indigenous workers, and the East Kimberley operation of Rio Tinto has a target of approximately

22 Taylor, B., communication with the author, 18 October 2006, p5.

23 Taylor, B., communication with the author, 18 October 2006, p4.

24 Taylor, B., communication with the author, 18 October 2006, p4.

25 Ngarda Ngarli Yarndu Foundation *Correspondence to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, 31 October 2006, pp6-13.

40 percent.[26] The majority of these targets are negotiated through native title and related agreements.

There have been many attempts over the years to implement Indigenous recruitment programs in the Pilbara. These projects have targeted all business sectors, and the majority have not been successful. Job readiness and cultural issues have been identified as factors contributing to failure.[27] Mineral companies such as Rio Tinto, have been developing relationships with Indigenous people over the past decade and are finding that recruiting from local communities cuts back on the enormous cost of flying city-based employees in and out of sites. In addition, there is a social capital benefit in employing locally, as local employment contributes to the communities that are directly affected by mining operations.[28]

Mining companies are finding that Indigenous people potentially provide a stable workforce because they are more than likely to be long term residents of the area. Indigenous people are more than likely to raise their children in the area and to be descended from long lines of traditional owners of the area. They know the land, they know the heritage of the area and they are a part of the continuous history of the area.

26 Minerals Council Australia and Chamber of Minerals and Energy Report: Staffing *the Supercycle: Labour Force Outlook in the Minerals Sector, 2005 to 2015.*

27 Smith, F., Indigenous recruits ease staff shortages (29 August 2006), *Australian Financial Review,* 59, p1.

28 Smith, F., Indigenous recruits ease staff shortages (29 August 2006), *Australian Financial Review,* 59, p1.

Chapter 7

The Yarrabah Housing Project

Underpinning the Government's partnerships approach to Indigenous policy is the belief that economic development is the key to sustainable improvement in the quality of life of residents of Indigenous communities.[1]

Introduction

The Yarrabah Housing Project has some distinct parallels with the Australian Government's initiative to individualise tenures on Indigenous communal lands and encourage home ownership. However, while there are similarities in the intention of the Government and Yarrabah initiatives, there are also marked differences in the management and governance structures. This case study provides an alternative to the Australian Government model, demonstrating an example of a community determined to locally manage the development of the township while stimulating local economic growth.

The Yarrabah Aboriginal Shire Council (the Council) is proposing to hold a 99 year headlease over the Yarrabah township in trust for the Indigenous land owners, while managing 99 year subleases for Yarrabah residents and businesses. The Council will also manage a housing construction project in Yarrabah through its own construction company Y-Build. Y-Build will employ, train and develop a local Indigenous workforce with the skills to build and maintain residential housing in Yarrabah.

The Yarrabah Aboriginal Shire Council is approaching all aspects of the project in close collaboration with the community. All decisions about the nature of tenure resolution, enterprise and the residential development are made with the informed participation of Yarrabah residents. In contrast, the Australian Government's lease scheme is at arms length from Indigenous people within a community. Once a 99 year lease is signed under the Australian Government model, local people will have no on-going role in managing, planning or building the housing and infrastructure developments in their township.

1 Department of Aboriginal and Torres Strait Islander Policy, *Meeting the Challenges of Community Governance, A White Paper on New Laws for Aboriginal Community Governance,* October 2003, p6, available online at http://www.mcmc.qld.gov.au/resources/documents/CG_White_Paper.pdf, accessed 13 December 2006.

The Yarrabah Housing Project is still in the very early stages of planning and negotiation. Mediations for an Indigenous Land Use Agreement are in progress and confidentiality obligations preclude a detailed analysis of some aspects of the project to be recorded. However, a good deal of information is already public, and this information provides a clear picture of the direction and parameters of the project. Some of the matters which are integral to the project include; resolving native title, developing a collaborative working relationship with the State Government, building community governance capacity, and amending land rights and local government legislations and regulations. This case study documents the requirements, successes, challenges and pressures of the Yarrabah Housing Project.

Background

Yarrabah is an Indigenous township in Far North Queensland, approximately 40kms east of Cairns. It was initially set up as an Anglican mission in 1892. The community is made up of families of traditional owner groups as well as families of those forcibly removed to the area under the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* which came into operation on 1 January 1898. There are approximately 40 different language groups in the Yarrabah region.[2]

The housing stock in Yarrabah is in poor repair and there are insufficient houses to meet the current requirements. Approximately 43 houses, a significant proportion of the Yarrabah housing stock, has been identified for demolition or replacement over the next 5-7 years. The Aboriginal and Torres Strait Islander Housing (ATSIH) needs study identified a target occupancy rate of 5.5 persons per dwelling. In Yarrabah's 335 houses the occupancy rates are up to 11 persons per dwelling.[3] The ATSIH Division of the Department of Pubic Works and Housing identified the following new housing requirements for Yarrabah at Table 1.[4]

Table 1: Housing requirements in Yarrabah Township 2001-2010

Period	Number of Houses Required	Number of Houses Funded
2001-2002	51	15
2002-2003	52	18
2003-2004	53	19
2004-2005	50	15

2 **Gurriny Yealamuka Health Service Report, 2000, As cited by Leon Yeatman,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview 22 September 2006.

3 **Unpublished,** *Five Year Development Plan 2003-2007*, Yarrabah Aboriginal Council, July 2003, p43, *Information provided by Yarrabah Aboriginal Council to the Aboriginal and Torres Strait Islander Social Justice Commissioner.*

4 **Source: ATSIH Housing 5 Yr. Program 1999-2004, as cited in the unpublished,** *Five Year Development Plan 2003-2007*, Yarrabah Aboriginal Council, July 2003, p43, *Information provided by Yarrabah Aboriginal Council to the Aboriginal and Torres Strait Islander Social Justice Commissioner*.

2005-2006	45	*
2006-2010	88	*
Total	**339**	**67**

Source: *The Aboriginal and Torres Strait Islander Housing needs study.*

*Outside current funding period

Current and future housing requirements are estimated to be at 300 houses to be provided between 2000-2010. Yarrabah Aboriginal Shire Council and the community are working in partnership with the Queensland Government to develop a plan to address this situation. While the affordability of home ownership is declining for mainstream Australia, the Yarrabah Aboriginal Shire Council and the community believe that home ownership is the best way to provide an economic future for community residents and to reduce the community's dependence on Government funds for housing in the long term.[5] In pursuit of these goals, the Yarrabah Aboriginal Shire Council is developing a lease proposal, a town plan, a house building project and an Indigenous employment enterprise, all aimed at building houses and establishing conditions for individual home ownership.

Land tenure resolution

Yarrabah is located on Deed of Grant in Trust (DOGIT) land under the *Aboriginal Land Act 1991* (Qld). Trustees appointed by the Queensland State Minister for Natural Resources and Water, hold the freehold title for the traditional owners. The land cannot be sold or mortgaged. Decisions to grant leases must be made in accordance with Aboriginal tradition[6] and residential leases require Ministerial consent.[7] There is also an active native title claim over the Yarrabah region; the combined Gunggandji Native Title Claim. The claim was lodged in 2001 and has been notified though it is not yet registered. The area covered by this claim includes the Yarrabah DOGIT and surrounding lots.

The native title and DOGIT land tenures over Yarrabah provide some complex challenges. The native title traditional owners have a recognised common law right to their traditional lands, and the Indigenous residents have rights to the land under the DOGIT regime. Those with rights under DOGIT are all Indigenous residents, including those Indigenous people who were removed from their traditional lands to reserves or missions under various Acts of Parliament. Further complicating this situation is the fact that DOGIT lands have not yet been transferred back to Indigenous community control. In fact, the Queensland Government has faced criticism regarding the amount of time it is taking to transfer lands under the *Aboriginal Land Act 1991* (Qld). The Government argues a number of impediments to

5 Unpublished, Yarrabah Aboriginal Shire Council, *Beyond the Reserve – Improving our Housing: Yarrabah's proposals for improved housing in the community,* prepared for the Housing Negotiation Table Meeting, Yarrabah, 29-30 May 2006, *Information provided by Yarrabah Aboriginal Council to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, p9.

6 *Aboriginal Land Regulation 1991*,(Qld) Reg. 45 (1), (2).

7 *Aboriginal Land Act 1991*,(Qld) s 131.

speedy transferral including, the need for extensive consultation, the requirement for surveys of easements, the requirement for surveys of existing tenures on the land, and the implementation of appropriate corporate governance arrangements for land trusts.[8] The Council expects that an outcome of the review of the *Aboriginal Land Act 1991* will enable them to issue 99 year leases to residents of the Yarrabah community.[9]

In accordance with the *Native Title Act 1993* (Cth), all developments in Yarrabah are future acts and traditional owners must be consulted.[10] It is through an Indigenous Land Use Agreement to which the traditional owners and the Council are parties that native title tenure resolution will be resolved. For example, native title negotiations are occurring to resolve the status of leases in Yarrabah which were issued under the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985*. While the ILUA negotiations are underway, the traditional owners have given permission for the project to proceed on designated residential areas within the township. This means that the housing project can go ahead before the ILUA is registered.

In all likelihood, the tenure plan for Yarrabah will give the Council responsibility to manage and administer 99 year leases over areas within the township. The lease areas located outside the town area will be managed by a land trust or a Prescribed Body Corporate on behalf of the traditional owners. The traditional owners will be able to develop the leases outside of the town area as an economic development initiative. Both the Council and the traditional owner groups will be in a position to provide home ownership opportunities to the community.

However, it is not 100 percent certain that the Council will be the land trustee once the DOGIT is transferred. This is an issue that will potentially effect the management and governance of the housing project.

> Whoever the Trustee party is, they will be the ones charged with the responsibility of actually issuing leases and it may not be the Council…
>
> It is intended that once the *Aboriginal Land Act* transfer process is finalised the trusteeship of the trust area may rest with another body other than the Council. One likely outcome will be the creation of a town area, and the creation of a trust area. There will be different land use governing structures, and it is envisaged that there will only be inalienable freehold, restricting the transferability of the land between Indigenous peoples only.[11]

While it is yet to be confirmed, the *Review of the Aboriginal Land Act 1991* (Qld) (the Review) suggests that the Aboriginal Shire Council will retain ownership of the township area.[12] The Review recommends that Aboriginal Shire Councils consider

8 **Department of Natural Resources and Mines, Queensland Government,** *Summary of the Discussion Paper, Review of the Aboriginal Land Act 1991* (Qld), April 2005, p3.

9 **Unpublished, Yarrabah Aboriginal Shire Council,** *Beyond the Reserve – Improving our Housing: Yarrabah's proposals for improved housing in the community,* prepared for the Housing Negotiation Table Meeting, Yarrabah, 29-30 May 2006, information provided by Yarrabah Aboriginal Council to the Aboriginal and Torres Strait Islander Social Justice Commissioner, p9.

10 **A future act is not a past act and refers to acts in relation to land or waters resulting in the making,** amendment or repeal of legislation on or after 1 July 1993; or any other act that takes place on or after 1 January 1994. For more information refer to s233 of the *Native Title Act 1993* (Cth).

11 **Yarrabah Aboriginal Shire Council,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 22 September 2006.

12 **Department of Natural Resources and Mines, Queensland Government,** *Summary of the Discussion Paper, Review of the Aboriginal Land Act 1991* (Qld), April 2005.

converting blocks of land in townships to normal freehold and selling them on an open or restricted market.[13]

Indigenous land tenure is a complex issue in Queensland due to the number of interests and the various pieces of legislations that govern these interests. The review of the *Aboriginal Land Act* considers the following actions in community areas essential for communities to encourage economic development and home ownership:

- define township areas;
- address native title issues through an ILUA;
- introduce clearer leasing provisions;
- resolve tenure issues that arose out of the *Aborigines and Torres Strait Islander (Land Holding) Act 1985* (Qld); and
- survey land interests properly.[14]

A White Paper outlining the government's amendments to the *Aboriginal Land Act* was due to be released in September 2006, but has not been to date. It is anticipated that the proposed *Aboriginal Land Act* amendments will provide a legislative base to support leasing initiatives.

The housing project

Conceptually, the Yarrabah Housing Project is about the integration of core social values which include a belief in community engagement, the right to adequate housing, and a commitment to develop local enterprises that will sustain local community employment and economic growth. Fundamental to this process is the involvement of traditional owners and community members in planning and decisions affecting the tenure arrangements and all aspects of the housing development. The CEO of the Council, Mr Leon Yeatman, describes the Yarrabah Housing Project as setting up a system 'which will help us to govern land use in the future.'[15]

The Council has engaged consultants to assist in developing a land use plan and ultimately a town plan. The town plan will identify housing lots for future development and other land use provisions including the provision of heritage areas for future generations. Proposals are being developed that address both the short term housing needs and the long-term sustainability of community development at Yarrabah.[16]

An additional 300 homes are required over the next 10 years. The responsibility for achieving these housing targets rests with the Council, the Yarrabah community, and relevant government agencies. The Council is seeking the Queensland government's

13 **Department of Natural Resources and Mines, Queensland Government,** *Summary of the Discussion Paper, Review of the Aboriginal Land Act 1991* (Qld), April 2005, p10.

14 **Department of Natural Resources and Mines, Queensland Government,** *Summary of the Discussion Paper, Review of the Aboriginal Land Act 1991* (Qld), April 2005, p10.

15 **Yeatman, L., (CEO, Yarrabah Aboriginal Shire Council),** *Correspondence with the Aboriginal and Torres Strait Islanders Social Justice Commissioner*, Interview, 22 September 2006.

16 **Unpublished, Yarrabah Aboriginal Shire Council,** *Beyond the Reserve – Improving our Housing: Yarrabah's proposals for improved housing in the community,* prepared for the Housing Negotiation Table Meeting, Yarrabah, 29-30 May 2006, *Information provided by Yarrabah Aboriginal Council to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, pp1-3.

assistance to explore an option to borrow funds for housing construction. Rental income will be used to service the loan. The Council is also considering an option to use its own resources to leverage funds from the government in a matched funding arrangement through a Shared Responsibility Agreement.[17] Private finance is also being considered, though this will only be an option when tenure resolution has occurred.[18]

A Yarrabah building enterprise: Y-Build

The Yarrabah Council is hoping to commence construction of housing and infrastructure in 2006. The Council have developed a construction workforce, Y-Build, which is community owned and managed. Y-Build was 'developed in response to the *State Government Housing Reform Agenda* which (recommended realignment of) housing repairs and maintenance program.'[19] It is expected that in the future Y-Build may tender for work outside of the community and thereby create an external income stream.

The Council and community rejected the proposal for Q-build to provide housing services to Yarrabah. Q-Build is the Queensland Government's housing construction and maintenance provider. While Q-Build is currently the broker for repairs and maintenance, the majority of construction work in Yarrabah is undertaken by local Council employees. These employees will be part of Y-Build once the company is fully operational. Approaches have been made to the Queensland Government to seek funds for local training and apprenticeships in order to train additional Indigenous employees for the pool of workers that will be required for Y-Build.[20]

The housing project brings together a number of projects for the Council. 'We are not just dealing with things in isolation… (we are) knocking over two or three things at the same time.'[21]

The Yarrabah Shire Council

> The big challenge for us long term is whether this Council remains the local government body or not. There is a big threat at the moment for amalgamation to occur. The bureaucratic model usually takes longer to adapt than the policy does.[22]

17 **Unpublished, Yarrabah Aboriginal Shire Council,** *Beyond the Reserve – Improving our Housing: Yarrabah's proposals for improved housing in the community,* prepared for the Housing Negotiation Table Meeting, Yarrabah, 29-30 May 2006, *Information provided by Yarrabah Aboriginal Council to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, p3.

18 **Yarrabah Aboriginal Shire Council,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 22 September 2006.

19 **Yarrabah Aboriginal Shire Council,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 22 September 2006.

20 **Unpublished, Yarrabah Aboriginal Shire Council,** *Beyond the Reserve – Improving our Housing: Yarrabah's proposals for improved housing in the community,* prepared for the Housing Negotiation Table Meeting, Yarrabah, 29-30 May 2006, *Information provided by Yarrabah Aboriginal Council to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, pp5-6.

21 **Yarrabah Aboriginal Shire Council,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 22 September 2006.

22 **Yarrabah Aboriginal Shire Council,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 22 September 2006.

Yarrabah Aboriginal Shire Council was established as the local government body in 1984 when the Queensland Government granted land rights and self-management to 14 Aboriginal communities. The Yarrabah Aboriginal Shire Council (the Council) was previously subject to the *Community Services (Aborigines) Act 1984* (Qld), though it is now in transition to mainstream Shire Council status under the *Local Government Act 1993* (Qld).[23] The Yarrabah Aboriginal Shire Council considers this transition as an opportunity to achieve full self management.

In order to bring the Aboriginal Community Councils up to a standard to operate under the new *Local Government Act 1993* (Qld) the Queensland Government is providing financial management training.[24] A four year transition period is being negotiated for councils to develop capacity to transition to Aboriginal Shire status. Aboriginal Shire Councils will continue to have responsibility to manage the complexities of communal tenure with the added administration of community leases. Communal land tenures require different provisions than those of townships and cities that operate under a freehold Torrens system. For example, the absence of individual private property means that Aboriginal Councils can not raise rates, a key source of revenue for other local governments. Special provisions have been included in the *Local Government Act 1993* (Qld), including the power to raise revenue through a general levy on residents. Levies have provided revenue for Aboriginal Councils for maintenance on homes and other essential services.[25] In the transition phase, councils such as Yarrabah are negotiating town plans which are essential for the transition to Aboriginal Shire Council.[26]

The Yarrabah Aboriginal Shire Council is responsible for all major planning and for the supply of essential services that are common functions of local government. However it has the additional responsibilities for community housing and community employment. In terms of housing, the Council has responsibility to maintain the existing housing stock and to construct new housing using labour partially funded under the Community Development Employment Program (CDEP). The Council employs both Indigenous and non-Indigenous qualified tradesmen to manage the construction and to train indentured Indigenous apprentices.[27] The Council currently provides full time employment to over 260 Indigenous and non-Indigenous personnel. In addition 795 community personnel are employed under the Council CDEP Scheme.[28]

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23 **Department of Local Government, Planning, Sport and Recreation,** *Community Governance Improvement Strategy,* December 2004, Queensland Government, p5, available online at http://www.lgp.qld.gov.au/Docs/local_govt/cgis/cgis_web_version.pdf, accessed 13 December 2006.

24 **Department of Aboriginal and Torres Strait Islander Policy,** *Meeting the Challenges of Community Governance, A White Paper on New Laws for Aboriginal Community Governance,* October 2003, p10.

25 **Department of Aboriginal and Torres Strait Islander Policy,** *Meeting the Challenges of Community Governance, A White Paper on New Laws for Aboriginal Community Governance,* October 2003, pp3-18.

26 **Yarrabah Aboriginal Shire Council,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 22 September 2006.

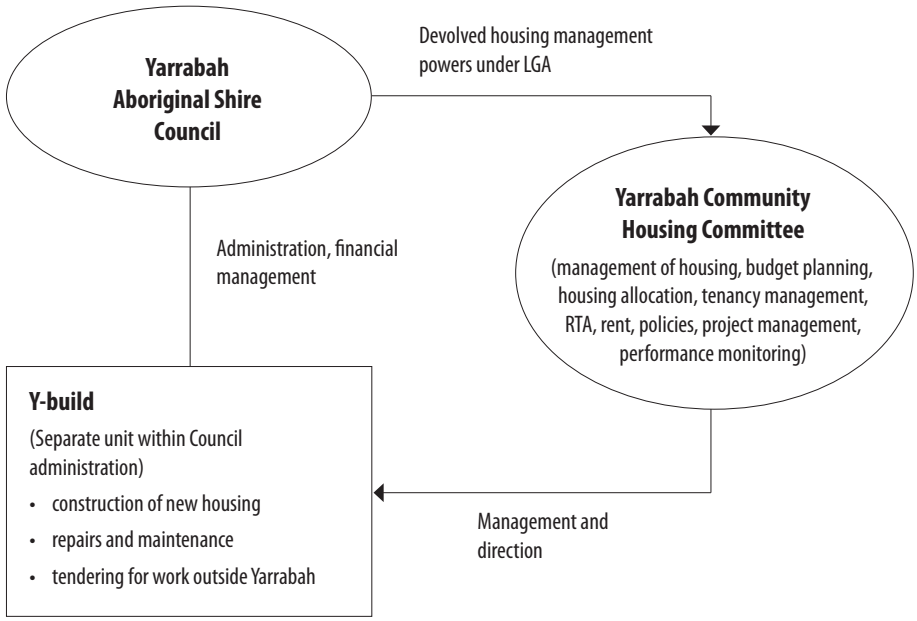
27 **Unpublished,** *Five Year Development Plan 2003-2007,* Yarrabah Aboriginal Council, July 2003, p45, *Information provided by Yarrabah Aboriginal Council to the Aboriginal and Torres Strait Islander Social Justice Commissioner.*

28 **Unpublished,** *Five Year Development Plan 2003-2007,* Yarrabah Aboriginal Council, July 2003, p47, *Information provided by Yarrabah Aboriginal Council to the Aboriginal and Torres Strait Islander Social Justice Commissioner.*

Due to the heavy burden on Council to provide almost all community services, the Council and community have proposed a model to reduce this burden. This involves new provisions under Part 5 of the *Local Government (Community Government Areas) Act 2004* (Qld) to establish a Yarrabah Community Housing Management Committee. With these provisions, the Council could devolve housing responsibility to the Housing Management Committee. The Council would continue to provide administrative and housing management support, but decision-making would occur through the Committee. The objective for the proposed Community Management Structure for Housing at Yarrabah is to:

- engage the community more in decisions about housing management;
- entrench non-politicised, rational, policy-based decision-making about housing; and
- reduce the heavy burden on the Council which has the responsibility to make decisions about almost every aspect of community life.[29]

Chart 1: Proposed housing management model for Yarrabah



29 Unpublished, Yarrabah Aboriginal Shire Council, *Beyond the Reserve – Improving our Housing: Yarrabah's proposals for improved housing in the community,* prepared for the Housing Negotiation Table Meeting, Yarrabah, 29-30 May 2006, *Information provided by Yarrabah Aboriginal Council to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, p7.

Negotiations

The key players in the negotiations are:

> the representatives of the Guru-gulu clan group who directly assisted in the coordination of native title interests; the National Native Title Tribunal; North Queensland Land Council; traditional owners for their positive contribution and support; the Yarrabah Aboriginal Shire Council and the community advisory body for management and governance of the process.[30]

While Council acknowledges that not everyone will agree on housing project and land tenure resolution, the Council is serious about its obligations to engage with the community. The Council has committed to inform community members about future planning, and to provide opportunity for advice and feedback.[31]

> There is a willingness on the part of the Council to engage with the relevant parties, so we can preserve the historical and cultural values. In this respect we have got two hats. You are a traditional owner/ community member but also a key decision-maker of Council which potentially puts you in a complex situation.[32]

The Council has identified community engagement as one of the key strategies that contributes to good governance. To this end, the Council have included the Yarrabah Housing Project in the Queensland Negotiation Table process.[33] Negotiation Tables are part of the Queensland Government *Meeting Challenges, Making Choices* initiative to address priority issues at the local level.[34] The Negotiation Tables involve a sustained process of consultation, planning and negotiation between community leaders and local, state and federal government agency representatives. In most cases there is a Government 'champion' to facilitate the Negotiation Tables, usually the Director General of a State Government agency. Negotiation Tables have six main steps:

- identification of community needs;
- creation of a whole-of-community plan that identifies community needs and aspirations;
- response from the government at the negotiation table;
- development of a mutually agreed community action plan and shared responsibility agreement that clearly define the commitments of all participants;

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30 **Yarrabah Aboriginal Shire Council,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 22 September 2006.

31 **Mundraby, V.,** *Beyond the Reserve, Community Negotiation Tables: Improving our Housing,* DVD produced by Yarrabah Aboriginal Shire Council.

32 **Yarrabah Aboriginal Shire Council,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Interview, 22 September 2006, p5.

33 **Note: Negotiation tables are the main method used in Queensland Aboriginal and Torres Strait Islander** communities to resolve priority issues at the local level. They involve a sustained process of consultation, planning and negotiation between community leaders and local, state and federal government agency representatives, and draw together the efforts and contributions of all parties to improve the quality of life of community members. Department of Aboriginal and Torres Strait Islander Policy, *Partnerships Queensland - Future directions framework for Aboriginal and Torres Strait Islander Policy in Queensland 2005-10*, Queensland Government, 2005, p30.

34 **Department of Aboriginal and Torres Strait Islander Policy,** *Meeting the Challenges of Community Governance, A White Paper on New Laws for Aboriginal Community Governance,* October 2003, p.30.

- development of Government service delivery responses; and
- performance measurement and reporting.[35]

Yarrabah community residents are invited to attend Negotiation Tables and other forums where they can have a say in the community projects. The Council provided community information workshops to canvass housing issues and prepare residents for formal meeting processes. Workshops were held with the Women's Corporation, Girriny Yealamuka Health Service, the rehabilitation centre and the school. As a result of the meetings a Community Reference Group was established.[36]

The following four stages describe Yarrabah participation in the housing Negotiation Table.

- Newsletters, flyers and letters were distributed as part of a community housing information campaign aimed at informing residents about meetings and the Negotiation Tables;
- Community information meetings were conducted to involve residents in discussion about housing matters. This resulted in the establishment of a Community Reference Group. The Reference Group identifies community priorities and actions and also had responsibility to select a Community Negotiating Team with responsibility to formally negotiate at the Negotiation Table;
- A housing Negotiation Table was conducted and the Community Negotiating Team and community members discussed concerns, aspirations, proposed outcomes, actions and resource requirements with government agencies; and
- Community Action Plans were developed to reflect the shared responsibility of Government and community in meeting the proposed outcomes. The Community Action Plan includes a monitoring and implementation phase for Government, community and Council.[37]

The outcome of the Housing Negotiation Table at Yarrabah was a Community Action Plan on Housing that set clear tasks and timeframes for the relevant government agencies, the Council and the community. This included a resource plan. Seven items were identified for the Plan:

- future housing construction needs in Yarrabah;
- identification of housing design and accommodation types;
- employment and training requirements;
- housing service delivery models;
- community home ownership options;
- transitional accommodation models for Yarrabah; and

35 **Department of Aboriginal and Torres Strait Islander Policy,** *Partnerships Queensland – Future directions framework for Aboriginal and Torres Strait Islander Policy in Queensland 2005-10*, Queensland Government, 2005, p30.

36 **Unpublished, Yarrabah Aboriginal Shire Council,** *Beyond the Reserve – Improving our Housing: Yarrabah's proposals for improved housing in the community,* prepared for the Housing Negotiation Table Meeting, Yarrabah, 29-30 May 2006, *Information provided by Yarrabah Aboriginal Council to the Aboriginal and Torres Strait Islander Social Justice Commissioner,* p1.

37 **Unpublished Yarrabah Aboriginal Shire Council,** *Information provided by Yarrabah Aboriginal Council to the Aboriginal and Torres Strait Islander Social Justice Commissioner*.

- monitoring and implementation of the Community Action Plan.[38]

Building in Yarrabah

A housing estate of Djenghi in Yarrabah is the first phase of the Council Housing Project. While this project commenced 10 years ago through the Queensland State housing program, it will be integrated as part of the 99 year lease and home ownership project. It is a joint project with the Queensland Department of State Development and is being driven by housing need in the community.

> To ensure the community was still able to proceed with the creation of a new housing estate at Djenghi, the Council initiated a proactive process, with the assistance of the North Queensland Land Council and Native Title claimants to conduct the very first official site clearance and mapping within the Yarrabah DOGIT. This process exposed the parties to the key aspects of planning for the community. The parties have thus worked to establish trust in the process to ensure the potential to improve the standard of living in the Yarrabah community is realised.[39]

Achievements under the Djenghi project include the construction of up to ten new houses over the last three years and the identification of 100 new lots under the Djenghi building proponent.

Conclusion

While the building component of the project is not progressing quickly, the preconditions are in place for building activity to escalate in the future. Projects such as the one at Yarrabah are ambitious and they take time. The Yarrabah project includes the integration of various complex processes. They are:

- land tenure resolution;
- transition from community council to shire council status;
- the need to develop an income stream;
- community consultation processes;
- the development of a community building enterprise;
- the pending outcomes of the review of the *Aboriginal Land Act 1991*(Qld); and
- the uncertainty of the Queensland governments plans to transfer the DOGIT lands as inalienable freehold.

38 **Unpublished, Yarrabah Aboriginal Shire Council,** *Beyond the Reserve – Improving our Housing: Yarrabah's proposals for improved housing in the community,* prepared for the Housing Negotiation Table Meeting, Yarrabah, 29-30 May 2006, *Information provided by Yarrabah Aboriginal Council to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, pp1-11.

39 **Yarrabah Aboriginal Shire Council,** *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner,* Email, 8 February 2007.

The Australian Government's current Indigenous policy approach is based on the belief that sustainable improvement in the quality of life of Indigenous people can only be achieved through economic development. For communities like Yarrabah, determined to achieve better outcomes and standards of living, economic development and community participation are being pursued as a means to maintain a thriving community. However, the administrative challenges ahead are considerable. It is now important that the Queensland Government provide full support to assist the developments in Yarrabah and to maintain momentum. The Government has a responsibility to move quickly to provide certainty regarding land rights provisions under the *Aboriginal Land Act 1991* (Qld).

Yarrabah community has been involved in sustained activity to develop its own economic interests and to retain authority to govern all commercial interests over the land. It is now incumbent on the Queensland Government and to the fullest extent possible, the Australian Government, to do its part to see the project through to full implementation.

Appendix 1

Table 1: Possession rights and subsurface rights to land and seas under Land Rights Legislations Australia, 2006				
	Possession rights	**Subsurface rights to land and seas**	**Rights to development inc. licensing and veto powers**	**Royalties and compensation**
Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)	Land granted is freehold title (estate in fee simple) which is held by an Aboriginal Lands Trust. As a result of recent amendments,[1] this land is now capable of being alienated. Persons may not enter or remain on Aboriginal land or the seas adjoining Aboriginal land without a permit (s70). This also applies to sacred sites (s69(1)).	The Act preserves Crown ownership of all minerals (s12(2)). The Northern Territory Legislative Assembly has the right to make laws regarding entry and fishing in waters adjoining and within 2km of Aboriginal land (s41(20(d)). As such, it has the power to close the seas to non-Aboriginal persons, protecting Indigenous fishing rights.[2]	The grant of an exploration license (s40) or mining license (s46) requires the consent of both the relevant land council and the Minister. The land council must consult with the traditional Aboriginal owners of the land and other Aboriginal communities or groups must also receive an opportunity to express their views (s46(4)(b)). Landowners have the right to negotiate the terms and conditions of the agreement, however, arbitration is also available. The terms of any agreement must be reasonable (s46(4)(a)) and (s42(2)(a)).	An amount equivalent to the royalties received for mining on Aboriginal land is paid from the Commonwealth Consolidated Revenue Fund into the Aboriginals Benefit Account (ABA). 30% of this amount is directed to Land Councils to be used for council administrative costs, for 'the benefit of Aboriginals living in the Northern Territory,' and for the distribution of royalties to traditional owners affected by mining activity (s35(2)(a)(b)). The remaining 70 % of the ABA is administered by the Commonwealth Government,

1 *Aboriginal Land Rights (Northern Territory) Act 2006* (Cth).
2 LexisNexis, *Halsbury's Laws of Australia*, (at 21 February 2007) at [5-335].

	Possession rights	Subsurface rights to land and seas	Rights to development inc. licensing and veto powers	Royalties and compensation
Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (continued)			The Governor-General can override the landowners' decision to refuse a permit if it is "in the national interest".[3]	including for funding of the 99 year lease scheme (s19A). (s44A) provides that direct payments can be made to traditional owners for disturbance of the land but not as compensation for the value of the minerals.
Aboriginal Land Rights Act 1983 (NSW)	Title granted is freehold title (estate in fee simple) (s36(9)). The land granted must be Crown land that is not being used and is not needed (or likely to be needed) for a residential or public purpose. Uniquely, claimants do not need to establish a traditional connection with the land.	A grant of land includes "the transfer of the mineral resources or other natural resources contained in those lands" (s45(2)). This gives Aboriginal Land Councils the power to exploit mineral and other natural resources (s41b). However, the "prerogative rights and powers of the Crown with respect to gold mines and silver mines or … coal and petroleum" remain intact (s45(11)).	Any dealings with the land must be done "in connection with the use, development and improvement of land" and for a community purpose (s38(4)). Mining operations must not occur without the consent of the relevant land council (s45(4)). This consent may be subject to conditions (including the payment of royalties or fees) (s45(4)).	An Aboriginal Land Council may consent to mining operations conditional on the payment of fees and/or royalties (s45(4)). These are payable to the NSWALC into a separate "Mining Royalties Account". 40% of these funds are paid to the NSWALC, with the remainder paid to the Local Aboriginal Land Council.

3 Northern Land Council, *The Land Rights Act* available online at http://www.nlc.org.au/html/land_act_act.html, accessed 21 February 2007.

	Possession rights	Subsurface rights to land and seas	Rights to development inc. licensing and veto powers	Royalties and compensation
Aboriginal Land Rights Act 1983 (NSW) (continued)	Title granted is subject to "any native title rights and interests existing in relation to the lands immediately before the transfer" (s36(9)).		The Act provides for agreements or court orders to allow specified Aborigines to access the land for hunting, fishing and gathering (s47, s48).	The Act established a statutory fund comprising 7.5% of state land tax over the period 1983-1998. The interest from this $538 million fund[4] is allocated to the Aboriginal land council system, but the capital base remains intact. This money is intended as compensation for land dispossession and the revocation of reserves.[5]
Aboriginal Land Act 1991 (Qld)	Land granted is either inalienable freehold title (s30, s60(1)(a), s66(a) or a perpetual or fixed term lease s60(1)(b), s64 and s66(b)).	Any grant of land must contain a reservation to the Crown in relation to all minerals and petroleum, both on and below the surface (s42).	Grantees may lease land, create a license over it, consent to the creation of a mining interest, grant an easement, surrender land to the Crown or enter into a conservation agreement (s39). A mining lease may only be granted over land with the written consent of the Governor in Council.[6]	Indigenous landowners are entitled to a percentage equivalent of royalties' payable under the *Mineral Resources Act 1989* or the *Petroleum Act 1923* (s88). These should be used for Aboriginal benefit, particularly for those disadvantaged by mining on their land.

4 At the end of the 2003/2004 financial year.

5 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005,* Human Rights and Equal Opportunity Commission (HREOC), Sydney 2005, Chapter 1: Background the origin of land rights and barriers to economic development through native title, p26.

6 LexisNexis, *Halsbury's Laws of Australia,* (at 21 February 2007) at [5-385].

	Possession rights	Subsurface rights to land and seas	Rights to development inc. licensing and veto powers	Royalties and compensation
Aboriginal Land Act 1991 (Qld)	Interests (such as mining interests) that existed prior to transfer continue to burden the land (s33).	Forestry and quarry rights will generally be retained by the grantees of the land (s43). This can be overridden by a Crown decision that the interests are vital to the State.		*The Mineral Resources Amendment Act 1990* (Qld) allows for compensation of Aboriginal social, economic and cultural interests. Compensation is no longer limited to the rectification of actual damage.
Torres Strait Islander Land Act 1991 (Qld)	Land granted is either inalienable freehold title (s28, s57(1)(a), s63(a) or a perpetual or fixed term lease s57(1)(b), s61 and s63(b)).	Any grant of land must contain a reservation to the Crown in relation to all minerals and petroleum, both on and below the surface (s39).	Grantees may lease land, create a license over it, consent to the creation of a mining interest, grant an easement, surrender land to the Crown or enter into a conservation agreement (s36). A mining lease may only be granted over land with the written consent of the Governor in Council.	Indigenous landowners are entitled to a percentage equivalent of royalties' payable under the *Mineral Resources Act 1989* or the *Petroleum Act 1923* (s88). These should be used for Aboriginal benefit, particularly for those disadvantaged by mining on their land.

	Possession rights	Subsurface rights to land and seas	Rights to development inc. licensing and veto powers	Royalties and compensation
Aboriginal Lands Trust Act 1966 (SA)	Freehold title (or any other lesser estate or interest that had been vested in the Crown) can be granted (s16(1)). Dealings by the Trust do not extinguish or affect native title rights in land unless consent is received from the Minister and the native title holders (s16AAA).	Crown reservation exists over "all gold, silver, copper, tin and other minerals, ore, minerals and other substances containing metal and all gems and precious stones, coal and mineral oil in and upon any such lands" (s16(2)).	The *Mining Act 1971* (SA) and the *Petroleum Act 1940* (SA)[7] shall not confer mining rights in respect of land vested in the Trust (s16(8)) unless the Governor makes a proclamation granting rights of "entry, prospecting, exploration or mining" that have been conferred by the above two Acts (s16(9)). The Minister must give proper consideration to the protection of "any Aboriginal sites or objects" when granting mining licenses (s30(2) of the *Mining Act*).	An amount up to (but not exceeding) the amount received in royalties from licenses must be paid to the appropriate Trust. The owner of land is entitled to compensation as to be agreed on between the parties, or by the appropriate court (s54, s61, *Mining Act*). Non monetary compensation is also available (s63ZA, *Mining Act*).

7 This Act has been replaced by the *Petroleum Act 2000* (SA).

	Possession rights	Subsurface rights to land and seas	Rights to development inc. licensing and veto powers	Royalties and compensation
Pitjantjatjara Land Rights Act 1981 (SA)	Title granted is inalienable freehold land (s15(1)). However title remains burdened with any pastoral leases that existed at the time of grant (s15(3)). All Anangu have unrestricted access to the land (s18). Anyone who enters the land without permission is guilty of an offence and is liable to pay a fine (s19).	The combined operation of the *Mining Act* (s16), the *Petroleum Act 2000* (SA) and the *Aboriginal Lands Trust Act* provides that all minerals and petroleum are vested in the Crown.	Title holders may refuse a request for access the land (s19(5)) or to undertake mining (s20(6)). However, the applicant may seek independent arbitration in the Federal Court which can uphold or disallow a refusal to grant permission (s20(15)) considerations. Title holders are entitled to attach financial conditions to a grant of permission. (s24).	Royalties from mining interests are to be paid into a separate account (s22). Payments "must be reasonably proportioned to the disturbance to the lands, Anangu, and their ways-of-life" (s24(2)). Royalties are divided equally between the claimants, the Minister (for the purpose of Indigenous health) and the General Revenue of the State.
Maralinga Tjarutja Land Rights Act 1984 (SA)	Freehold title is granted (estate in fee simple) (s13).	The combined operation of the *Mining Act* (s16), the *Petroleum Act 2000* (SA) and the *Aboriginal Lands Trust Act* provides that all minerals and petroleum are vested in the Crown.		Royalties from mining interests are to be paid into a separate account (s24). Payments "must be reasonably proportioned to the disturbance to the lands, the traditional owners, and their ways-of-life" (s26(2)). Payment must not exceed what would be payable under the *Mining Act* or the *Petroleum Act* (s26(3)).

	Possession rights	Subsurface rights to land and seas	Rights to development inc. licensing and veto powers	Royalties and compensation
Land Act 1994 (Qld)	Land is held by virtue of a Deed of Grant in Trust (DOGIT). Security of tenure is relatively weak; a DOGIT can be cancelled at any time; the land could revert to the Crown, or can be resumed for public purposes. Land below the high watermark remains the property of the State (s9).	Grant recipients may take forest products or quarry material for their own purposes, but are not permitted to benefit from them economically.	A DOGIT lease excludes improvements being made to state owned buildings or external infrastructure without Ministerial consent (s59). Residential leases also require Ministerial consent (s57). Each grant area is managed by a Local Government Council who is responsible for by-laws, appointing community police, housing, infrastructure, licenses and permits for hunting and camping.	If a lease is resumed while a community has a remaining lawful interest in the land, they may be eligible for compensation (s219).
Pastoral Land Act 1992 (NT)	The *Land Acquisition Act 1978* (NT) provides that freehold title is received (s46(1A)). However, lessees must pay rent (s38(1)(c)). Land rights granted must not be exercised within two kilometres of an established homestead.	The Crown maintains a reservation on all minerals and timber in or on the leased land (s38(1)(b) and s38(1)(k)).	The title granted is highly conditional and recipients have minimal control over the land.	Native title holders are entitled to compensation if their registered native title rights and interests have been infringed by a grant under this Act (s72C).

	Possession rights	Subsurface rights to land and seas	Rights to development inc. licensing and veto powers	Royalties and compensation
Aboriginal Lands Act 1991 (Vic)	Freehold title (estate in fee simple) is granted (s6).	No resource rights are obtained under this Act. Grants are conditional on being used for "Aboriginal cultural and burial purposes" (s6(5)).		"No compensation is payable by the Crown in respect of anything done under or arising out of this Act." (s9).
National Parks and Wildlife Act 1974 (NSW)	Freehold title (estate in fee simple) is granted (s71P). This is then leased to the Minister and reserved for conservation purposes. Land management activities are subject to the operation of native title rights and interests (s71BI).	It is "unlawful to prospect or mine for minerals in a national park or historic site, except as expressly authorised by an Act of Parliament" (s41(1)).		
Land Administration Act 1997 (WA)	Freehold title is granted to an Aboriginal person or (more commonly) an Aboriginal Corporation (s83).	Minerals in Crown land "are reserved to the Crown and remain so reserved after the Crown land is transferred in fee simple under this Act" (s24).		Compensation can be claimed by native title holders when their rights and interests have been interfered with (s156).

	Possession rights	Subsurface rights to land and seas	Rights to development inc. licensing and veto powers	Royalties and compensation
Land Administration Act 1997 (WA) (continued)				However, compensation is not payable for any underground work that has occurred (unless the surface is somehow affected) (s162).
Aboriginal Affairs Planning Authority Act 1972 (WA)	A variety of titles are managed by Aboriginal Lands Trust (ALT), including reserves, freehold properties, pastoral leases and special purpose leases. The ALT has the capacity to issue or refuse permits to enter reserves (Part 3).		No application for the grant of any interest, licence, right, title or estate (a) shall be refused without the prior consent of the Authority; (b) shall be processed except in consultation with the Authority; (c) shall be taken to be approved unless the approval of the Authority . . . is referred to in the document evidencing the grant (s30). However, applications concerning mining and minerals are specifically excluded from these provisions.	

	Possession rights	Subsurface rights to land and seas	Rights to development inc. licensing and veto powers	Royalties and compensation
Aboriginal Lands Act 1995 (Tas)	Land is held in perpetuity by the Aboriginal Land Council of Tasmania on trust for Aboriginal persons (s27). There exists a Crown reservation for the upkeep of drains, sewers and waterways (s27(4)) as well as a limited reservation concerning public access to some parcels of granted land.	The land granted "is vested to a depth of 50 metres and includes minerals *other than* oil, atomic substances, and geothermal substances . . . and helium" (s27). The Council is to have regard to the interests of local Aboriginal communities when managing the land (s18(3)).	The *Mineral Resources Development Act 1995* (Tas) provides that the Minister cannot grant a lease or license on Aboriginal land without the agreement of the Aboriginal Land Council of Tasmania (s179).	
Aboriginal Lands Act 1970 (Vic)	Freehold title is granted (s9). Recipients also receive a perpetual license to occupy and use the land.	"No special provision is made for exploration or mining on *Aboriginal Lands Act* land".[8]	No person may enter onto land in respect of which a licence is granted under the Act (s9).	

8 LexisNexis, *Halsbury's Laws of Australia*, (at 21 February 2007) at [5-948].

Appendix 2

National funding and programs to support Indigenous economic development

Appendix 2 summarises information from a 2006 HREOC survey of the seven Australian Government departments and two statutory authorities with responsibility to administer the 33 national Indigenous economic development programs. Information from the 33 programs is for the 2005-2006 period.

Table 1 summarises application numbers and expenditure data by program.

Table 1: Applications and expenditure for national Indigenous economic development programs 2005-2006

Funding Program	No. of successful applications	No. of unsuccessful applications	Total No. of applications	Expenditure $
Indigenous Capital Assistance Scheme – DEWR	N/P*	N/P	21 (ICAS loans)	
Indigenous Small Business Fund – DEWR	N/P	N/P	N/P	
Emerging Indigenous Entrepreneurs Initiative – DEWR	N/P	N/P	N/P	
Structured Training and Employment Projects – DEWR	N/P	N/P	N/P	
Indigenous Employment Centres – DEWR	N/P	N/P	N/P	$77,710,000

Funding Program	No. of successful applications	No. of unsuccessful applications	Total No. of applications	Expenditure $
Wage Assistance – DEWR	N/P	N/P	N/P	
Corporate Leaders for Indigenous Employment Project – DEWR	N/P	N/P	N/P	
CDEP Placement Initiative – DEWR	N/P	N/P	N/P	
Indigenous Community Volunteers – DEWR	N/P	N/P	N/P	
Community Housing and Infrastructure Program – FaCSIA	53	52	105	$18,196, 771
Indigenous Land Management Facilitator Program – DEH	N/A**	N/A	N/A	$584,000
Indigenous Heritage Program – DEH	70	61	131	$3, 256,000
Indigenous Protected Area Program – DEH	30	N/P	30	$1, 366,500
Environmental Education Grants – DEH	0	0	0	Nil
New Industries Development Program – DAFF	N/A	N/A	N/A	N/A
Australian Government Envirofund (NHT) – DAFF	3	2	5	$91,460
Regional Partnerships Program – DOTARS	13	2	15	$1,057,166

Funding Program	No. of successful applications	No. of unsuccessful applications	Total No. of applications	Expenditure $
Sustainable Regions Program – DOTARS	1	1	2	$996,782
Indigenous Partnership Program – DITR	N/A	N/A	N/A	N/A
Australian Tourism Development Program – DITR	6	N/P	6	$1,159,220
Business Ready Program for Indigenous Tourism – DITR	6	28	34	$824,000
Indigenous Telecommunications (TARPIC) – DCITA	N/A	N/A	N/A	N/A
National Arts and Crafts Industry Support Program – DCITA	53	49	102	$4, 249,350
Networking the Nation	N/A	N/A	N/A	N/A
IT Training and Support	N/A	N/A	N/A	N/A
Satellite Phone Subsidy Scheme – DCITA	53	16	69	$4,124
Indigenous Broadcasting Program – DCITA	76	42	118	$13,282,202
Land Acquisition Program – ILC	8	65	73	$7,934,024
Land Management Programs – ILC	38	24	62	$13,180,288
Indigenous Business Development Program – IBA	86	24	110	$27,197,000

Funding Program	No. of successful applications	No. of unsuccessful applications	Total No. of applications	Expenditure $
Loans and Joint Venture Capital – IBA (Investments)	33	48	81	$45,570,000
Home Ownership Program – IBA	580	N/P	580	$29,746,000
Home Ownership on Indigenous Land – IBA	0	0	0	$99,000
Totals:	**1,109**	**414**	**1,544**	**$246,503,887**

*N/A: Not Applicable

*N/P: Not Provided

The following section summarises by program:

- The aims and objectives of each program; and
- The reasons for unsuccessful funding applications.

The Indigenous Land Corporation (ILC)

The Indigenous Land Corporation (hereon referred to as the ILC) is a statutory authority with responsibility to fulfill the dual functions of land acquisition for grant to Indigenous corporations and land management. The ILC assists Indigenous Australians acquire land and manage Indigenous-held land in a sustainable way to provide cultural, social, economic or environmental benefits for themselves and future generations.[1]

The ILC administers two programs.

- The Land Acquisition Program
- The Land Management Program

Under the *Land Acquisition Program* Indigenous Australians can apply for land purchases against the following four criteria: cultural, social, environmental and economic land use purposes. The land purchase is made by the ILC trust on the open market. Applicants enter into a lease with the ILC, and ownership vests with the ILC. The lease is subject to conditions including a staged work plan, capacity development activities with progress reporting requirements. If the work plan is completed successfully the land is usually granted after a period of three years. In the 2005-2006 financial year there were 73 land acquisition applications, 8 were

1 Indigenous Land Corporation, *Homepage*, Website, available online at: http://www.ilc.gov.au/site/page.cfm accessed 26 February 2007.

successful. Land was purchased at a total cost of $7,934,024.[2] According to the ILC, applications were assessed against the following criteria: the capacity and commitment of the applicant group; the project viability and sustainability, and land suitability. Reasons for unsuccessful applications were incomplete applications, application for funds outside of the program guidelines, or the situation where the property is sold prior to Board submission.

Under the *Land Management Program* Indigenous Australians can apply for funds to assist in the managed care, improvement or development of either ILC or Indigenous held land. ILC provides training, and support as well as advice on commercial enterprise. Financial assistance is available in the form of financial guarantees, loans and grants for land management activities. In the 2005-2006 financial year there were 62 applications of which 38 were successful. ILC advised a total expenditure of $13,180,288 for 11 land management projects during the 2005-2006 financial year.

An internal ILC evaluation report[3] of the Land Acquisition Program found that of the 42 groups interviewed about the program:

- 11 of 16 indicated their land was being used for cultural purposes, including artwork production for galleries, family gatherings, museums or keeping places, taking kids out on country and gathering or growing bush foods;
- 56 percent of groups interviewed agreed that assistance provided by the ILC has helped to address social problems including drug and alcohol rehabilitation, family violence prevention and education and work experience;
- Over half of the groups interviewed agreed that land improvements had occurred as a result of ILC assistance, including revegetation, weeds, fire and feral animal management programs were conducted and the protection of watercourses and threatened species was being achieved;
- 11 of the desktop assessed projects recorded that ILC assistance had contributed to employment outcomes. Of the 16 groups interviewed face-to-face, nine indicated that Indigenous people were employed on their land as a result of ILC assistance.
- Of the 16 groups interviewed, ten indicated Indigenous training outcomes as a result of ILC assistance and of those desktop assessed, 14 recorded training outcomes. It was noted that not only economic projects delivered employment outcomes with over half of the total recorded employment outcomes being generated through the social projects.[4]

2 Note: Data provided to HREOC by the ILC for the purposes of the survey lists 73 applications for the Land Acquisition Program. The Indigenous *Land Corporation Annual Report 2005 – 2006* lists 74 applications. Indigenous Land Corporation, *Annual Report 2005-2006*, p33, available online at: http://www.ilc.gov.au/site/page.cfm?u=76 accessed 27 February 2007.

3 Indigenous Land Corporation, *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2006,* 7 November 2006.

4 Indigenous Land Corporation, *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2006,* 7 November 2006.

Indigenous Business Australia (IBA)

Indigenous Business Australia is a statutory authority with responsibility to provide opportunities for Aboriginal and Torres Strait Islanders to build assets and wealth in partnership with the Australian Government's Indigenous Economic Development Strategy. In 2005–2006 Indigenous Business Australia administered four programs supporting enterprise and economic development. They were:

- The Indigenous Business Development Program
- The Loans and Joint Venture Capital program (IBA Investments)
- Home Ownership program (IBA Homes)
- Home Ownership on Indigenous Land program

The *Indigenous Business Development Program* supports small and medium businesses in their establishment and their ongoing performance. It provides business grants and loans and assistance with set up costs. In the financial year 2005-2006, the program received 122 applications and approved 86 loans with 12 loan applications subsequently withdrawn. The total expenditure for the financial year was $27,197,000.[5] The most common reason for unsuccessful applications was that the business did not demonstrate commercial viability.

The *Loans and Joint Venture Capital* program (IBA Investments) seeks to 'stimulate an environment where the private sector and Indigenous groups, families and individuals seek to involve each other in business opportunities.'[6] The program facilitates and supports business ownership and management of commercial enterprises through joint ventures. Enterprises are selected on the basis for their capacity to provide long-term commercial returns. In 2005-2006 financial year the program outputs were $45,570,000. A total of 81 projects were considered and 33 investments were monitored.[7]

The *Home Ownership* program aims to provide a range of competitive housing loans to eligible Aboriginal and Torres Strait Islander peoples who may not qualify for assistance from mainstream lending institutions. The program approved 580 new loans during the 2005-2006 financial year with a total expenditure of $29,746,000.[8]

The *Home ownership on Indigenous land* program objectives are to provide a range of home loans to eligible Indigenous people to assist them in buying their own homes on community-titled land. While loans were not made during the 2005-2006 financial year, cost outputs for the development of the program were $99,000 for this period.

Department of Employment and Workplace Relations (DEWR)

The Department of Employment and Workplace Relations administers the majority of Australian Government Funding Programs that focus on supporting Indigenous enterprise and economic development including:

5 **Indigenous Business Australian,** *Annual Report 2005-2006*, Australian Government, p 34.
6 **Indigenous Business Australian,** *Annual Report 2005-2006*, Australian Government, p 16.
7 **Indigenous Business Australian,** *Annual Report 2005-2006*, Australian Government, p 16.
8 **Indigenous Business Australian,** *Annual Report 2005-2006*, Australian Government, p 27.

- Emerging Indigenous Entrepreneurs Initiative
- Indigenous Small Business Fund
- Indigenous Capital Assistance Scheme
- Structured Training and Employment Projects
- Indigenous Employment Centres
- Wage Assistance
- Corporate Leaders for Indigenous Employment Project
- CDEP Participant Employment Placement Initiative
- Indigenous Community Volunteers

In response to the survey request for budget information for each of these programs during the 2005-2006 financial year, DEWR claimed that it was not able to disaggregate funds for the nine programs. Instead DEWR provided a single budget figure of $77,710,000 which was expenditure against all nine programs. The administered budget was $77,716,000.[9]

The *Emerging Indigenous Entrepreneurs Initiative* was established in 2005 with an aim to encourage Indigenous entrepreneurs to pursue self-employment and small business opportunities. This program does not provide grants or loans. It provides workshops for emerging Indigenous entrepreneurs supported by departmental commissioned publications including case studies of successful Indigenous enterprises, and information about funding and support programs.[10] Proposals for participation in this program are rejected unless they can demonstrate that the business outcome will lead to multiple enterprise outcomes.[11]

The *Indigenous Small Business Fund* assists Indigenous Australians to learn about business, develop skills and expand businesses. Of the applications received under this fund, 145 were approved.[12] Funding is aimed at the identification and facilitation of business opportunities and supports access to markets and networks.

The *Indigenous Capital Assistance Scheme* offers Indigenous businesses access to commercial finance, professional mentoring and support services. Thirteen loans were approved in the 2005-2006 financial year. The businesses supported by this program were primarily tourism, construction, agriculture and retail trade industries.[13]

The *Structured Training and Employment Projects* provide flexible financial assistance for projects that offer structured training leading to lasting employment for Indigenous jobseekers. In the 2005-2006 financial year, 3,505 Indigenous people were registered under the employment and training program across hospitality,

9 Department of Employment and Workplace Relations, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner,* Email, 26 February 2006.

10 DEWR did not provide statistical or financial data in response to the *Aboriginal and Torres Strait Islander Social Justice Commissioner's – Request for Information in preparation for the Native Title Report 2006.* Information included in this report has been sourced from: Department of Employment and Workplace Relations *Annual Report 2005-06,* p67-77, available online at www.dewr.gov.au, accessed 23 February 2007.

11 Department of Employment and Workplace Relations, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2006,* 10 November 2006.

12 Department of Employment and Workplace Relations *Annual Report 2005-06,* p68, available online at www.dewr.gov.au, accessed 23 February 2007.

13 Department of Employment and Workplace Relations *Annual Report 2005-06,* p69, available online at www.dewr.gov.au, accessed 23 February 2007.

retail, mining, plumbing, carpentry, electrical trades, childcare, aged care, media, technology, aquaculture and agriculture.

Indigenous Employment Centres assist participants in Community Development Employment Projects to move into unsubsidised employment. In the 2005-2006 financial year, 10 new centres were established bringing the total to 43. DEWR invites CDEP organisations to become Indigenous Employment Centres where there are viable labour markets and organisations have been assessed as being able to provide assistance to participants.[14] According to the DEWR *Annual Report 2005-2006*, over 3,700 CDEP participants have been placed in employment with more than 64 percent achieving 13 weeks outcomes.[15]

The *Wage Assistance Program* provides a wage subsidy for 26 weeks for employers who offer continuing full-time work to eligible Indigenous Australia. In the 2005-2006 financial year, DEWR subsidised 2,658 employment placements, bringing the total to over 16,790 since the program's inception in 1999.

The *Corporate Leaders for Indigenous Employment Project* is a partnership between individual companies and the Australian Government aimed at generating sustainable employment for Indigenous Australians. In the 2005-2006 financial year, 17 new private sector companies from a range of industries joined the project. There are currently 82 signed partners.

The Community Development Employment Project Placement Initiative provides an incentive payment to CDEP organisations per participant placement in open employment. In the 2005-2006 financial year 2,184 commencements were recorded.

Indigenous Community Volunteers is a not-for-profit company contracted to deliver the volunteer program on behalf of the Australian Government. The company links skilled volunteers with communities seeking expert assistance in business, financial management and the trades. In the 2005-2006 financial year 225 volunteers were involved in projects with Indigenous communities. In the 2005-2006 financial year there were 397 new project applications.

The Department of Employment and Workplace Relations advised that the most common reason for unsuccessful applications was that applicants did not meet the program guidelines.[16]

Department of the Environment and Heritage (DEH)

The Department of the Environment and Heritage administer four programs that support Indigenous access to funding for land management, improved on-ground heritage outcomes for Indigenous communities and engage Indigenous landowners on managing land for conservation. These programs include:

14 **Department of Employment and Workplace Relations,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2006,* 10 November 2006.

15 **Department of Employment and Workplace Relations** *Annual Report 2005-06,* p67-77, available online at www.dewr.gov.au, accessed 23 February 2007. Note: Annual Report does not clarify whether 3, 700 placements occurred within the 2005-2006 financial year.

16 **Department of Employment and Workplace Relations,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2006,* 10 November 2006.

- Indigenous Land Management Facilitator Program
- Indigenous Heritage Program
- Indigenous Protected Areas Program
- Environmental Education Grants

Of the funding applications received by the Department from Indigenous groups, eighty-three percent of applications were successful.

The *Indigenous Land Management Facilitator Program* funds a network of 13 Indigenous Land Management Facilitators(ILMFs) hosted by either Indigenous organisations or State Government agencies or Natural Resource Management organisations who work with the Indigenous community to improve awareness of and access to natural resource management funding. ILMFs are often involved with planning meetings and the development of Shared Responsibility Agreements and Regional Participation Agreements that relate to land and cultural heritage management.[17] In the 2005-2006 financial year a total of $584,000 was provided to five Indigenous organisations.

The *Indigenous Heritage Program* provides funding 'towards the delivery of improved on-ground heritage outcomes for Indigenous communities and improved alignment with national heritage priorities.'[18] In the 2005-2006 financial year, the total expenditure was $3,256,000. There were 70 successful applications and 61 unsuccessful applications. Applications are most commonly unsuccessful when they are not eligible under program guidelines or they do not adequately address the selection criteria.

The *Indigenous Protected Area Program* aims to engage with Indigenous land owners on managing land for conservation. In the 2005-2006 financial year $1,366,500 was expended for this program. There were a total of 30 successful applicants. The most common reason for unsuccessful application is that the land in question would not represent a significant addition to the National Reserve System, or the Indigenous organisation does not demonstrate a commitment for their land.

The *Environmental Education Grants* is a small grants program providing funds of approximately $250,000 each year. In the 2005-2006 financial year there were no applicants and no funds were allocated.[19]

Department of Industry, Tourism and Resources (DITR)

The Department of Industry, Tourism and Resources provided data on three programs, two of them Indigenous specific and one under a general program area. These include:

- Australian Tourism Development Program (not Indigenous specific)

17 Department of the Environment and Heritage, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2006,* 10 November 2006.

18 Department of the Environment and Heritage, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2006,* 10 November 2006.

19 Department of the Environment and Heritage, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2006,* 10 November 2006.

- Indigenous Partnership Program
- Business Ready Program for Indigenous Tourism

The *Australian Tourism Development Program* is aimed at developing new products or expanding and enhancing existing tourism products and services. In the 2005-2006 financial year a total of $1,159,220 was allocated to 6 Indigenous tourism enterprises.[20] The most common reasons that applications are unsuccessful include:

- The eligibility criteria is not met, for example, the applicant is not an incorporated entity, or insufficient evidence of matching cash is provided;
- The evaluation criteria has not been met to a high degree; and
- The funding available prevents all quality applications from being funded

The *Indigenous Partnership Program* is aimed at hosting regional workshops and committees in areas around Australia where mining is prominent, to provide advice and information to industry and Indigenous stakeholders. Funds are not allocated to Indigenous groups or corporations. Travel assistance is provided to individual Indigenous representatives to enable them to attend regional meetings.

The *Business Ready Program for Indigenous Tourism* is designed to assist Indigenous tourism businesses to 'start up' and to increase the potential of existing businesses to commercialise their products and their services. Funding is provided to business mentors to work with Indigenous tourism businesses. In the 2005 – 2006 financial year there were 34 applications of which six were successful. A total of $824,000 was allocated to the *Business Ready Program for Indigenous Tourism* and six business mentors were funded under the program.

The Department of Agriculture, Fisheries and Forestry (DAFF)

The Department of Agriculture, Fisheries and Forestry administer two programs:

- New Industries Development Program
- Australian Government Envirofund (also known as National Heritage Trust (NHT)).

The *New Industries Development Program* is a research and development program aimed at commercialising business ideas. The program has not received any applications from Indigenous groups.

The Australian *Government Envirofund* aims to help restore and conserve Australia's environment and natural resources. The *Envirofund* provides the opportunity and means for community groups to undertake small on-ground projects and assists them to expand environmental management in broader regional areas. In the 2005-2006 financial year there were five applications. Three were successful and they received a total allocation of $91,460. The most common reasons for unsuccessful

20 Department of Industry, Tourism and Resources, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2006,* 10 November 2006, p6.

applications were a lack of understanding of eligibility criteria and incomplete applications.

The Department of Families, Community Services and Indigenous Affairs (FACSIA)

The Department of Families, Community Services and Indigenous Affairs administers the *Community Housing and Infrastructure Program*. This program provides funding for housing and housing related environmental health infrastructure in rural and remote areas, community housing in urban and regional areas, and funding assistance to discrete Indigenous communities to establish and maintain essential municipal services and infrastructure. In the 2005-2006 financial year there were 105 applications for funding of which 53 were successful, with a total expenditure of $18,196,771. The most common reason for unsuccessful applications was that requests for funding had not met the application guidelines. Poor governance, un-costed applications and large claims for funding were also contributors to unsuccessful applications.

The Department of Communication, Information Technology and the Arts (DCITA)

The Department of Communication, Information Technology and the Arts administers:

- National Arts and Crafts Industry Support Program
- Networking the Nation
- IT Training and Technical Support Program
- Satellite Phone Subsidy Scheme
- Indigenous Broadcasting Program
- Indigenous Telecommunications Program (the Telecommunications Action Plan for Remote Indigenous Communities (TARPIC)).

The *National Arts and Crafts Industry Support Program* is aimed at increasing coordination at a federal level and to establish a program to provide ongoing operational support to art centres. In the 2005-2006 financial year there were 102 applications for funding of which 53 were successful, with a total expenditure of $4,249,350. The most common reasons for unsuccessful applications were that requests for funding had not met the eligibility criteria or were not as competitive as other applications.

The *Networking the Nation Program* assists the economic and social development of rural Australia by funding projects which:

- Enhanced telecommunications infrastructure and services;
- Increased access to, and promote use of, services available through telecommunications networks; and
- Reduced disparities in access to such services and facilities

The *IT Training and Technical Support Program* aims to make basic information and computer technology (ICT) training and technical support more accessible for people and organisations located in very remote areas of Australia. Funding

was allocated to each state and the Northern Territory based on the Australian Bureau of Statistics Accessibility/Remoteness Index of Australia (2001) on the population (14 years and above) living in 'very remote' regions of that State or the Northern Territory. Two competitive grant processes conducted in May 2004 and February 2005 resulted in nine projects being funded, with a total expenditure of $17,579,952. The most common reasons for unsuccessful applications were that requests for funding had not met the eligibility criteria or were not as competitive as other applicants.

The *Satellite Phone Subsidy Scheme* provides financial and strategic assistance to ensure that people residing and working in regional, rural and remote Australia are able to take their place in an information society. In the 2005-2006 financial year there were 69 applications for funding of which 53 were successful, with a total expenditure of $4,124. The most common reason for unsuccessful applications was that requests for funding had not met the eligibility criteria.

The *Indigenous Broadcasting Program* provides support program grants, development grants and special project grants related to the establishment of small scale and community-based broadcasting operations with the capacity to retransmit mainstream radio and television services, and locally produced content. In the 2005-2006 financial year there were 118 applications for funding of which 76 were successful, with a total expenditure of $13,282,202. The most common reasons for unsuccessful applications were that requests for funding did not meet the program guidelines or the low priority of the application.

The *Indigenous Telecommunications Program* is aimed at improving telecommunication services in remote Indigenous communities and focuses on two sets of disadvantage: the broad socio economic disadvantage; and more specifically, the telecommunications services disadvantage. DCITA funds service providers to establish telecommunications services in identified Indigenous communities. Funding allocation for the 2005-2006 financial year was not provided.[21]

Department of Transport and Regional Services (DOTARS)

The Department of Transport and Regional Services administers the *Regional Partnerships Program* and the *Sustainable Regions Program*.

The *Regional Partnerships Program* provides grant assistance to all remote, rural and regional communities across Australia, with four objectives aimed at achieving self-reliant communities. The objectives are: to stimulate growth in regions through economic and social participation opportunities; improve access to services, support planning and help communities make structural adjustments in regions affected by major economic, social or environmental change. Area Consultative Committees (ACCs) have been established to support applicants, of which 56 operate across Australia.[22] The ACCs provide assistance to applicants to understand the objectives and requirements of the program and completion of the application.

21 **Department of Communication, Information Technology and the Arts,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2006,* 31 October 2006.

22 **Department of Transport and Regional Services,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2006,* 26 October 2006.

In the 2005-2006 financial year there were 15 applications for funding of which 13 were successful, with a total expenditure of $1,057,166. The most common reason for unsuccessful applications was that requests for funding did not meet eligibility criteria.

The *Sustainable Regions Program* identified ten regions across Australia as sustainable regions: Atherton Tablelands (QLD); Cradle Coast (TAS); Campbelltown Camden (NSW); Darling Matilda Way (NSW/QLD) Far North East (NSW); Gippsland (VIC); Kimberley (WA); Northern Rivers North Coast (NSW); Playford Salisbury (SA); and Wide Bay Burnett (QLD). Some of these regions have significant Indigenous populations. In the 2005-2006 financial year there were two applications for funding of which one was successful with a funding allocation of $996,782. Total expenditure for this period was not available. The most common reasons for unsuccessful applications were sustainability, competition issues, or insufficient proponent contributions. [23]

23 **Department of Transport and Regional Services,** *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2006,* 26 October 2006.

Appendix 3

Recommendations and relevant international human rights law

The Report recommendations have been cross referenced to the relevant international human rights law.

At the international level there are three broad categories of obligation to which a state may be subject: treaty law, customary international law and emerging international standards. Treaty obligations become binding on states once they have ratified a treaty. This means that the state allows itself to be bound by the conditions and obligations contained within the treaty. Customary international law is enshrined in continuous practice by a majority of states over an extended period of time. Emerging international standards are internationally recognised standards of state behaviour which are either not enshrined in treaties, or do not yet have the force of customary international law. These include Declarations and treaties which are in force, but lack the requisite authority to bind non-ratifying states.

Treaties enshrining human rights bind signatories and in addition, both the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) are tenants of customary international law. Australia has ratified both these treaties as well as the *International Convention on the Elimination of all forms of Racial Discrimination*.

Declarations identifying human rights standards do not contain positive obligations. The *Declaration on the Right to Development* (DRD) was adopted by the United Nations (UN) General Assembly and has been accepted by all governments including Australia. The *Declaration on the Rights of Indigenous Peoples* is an emerging international standard. This is primarily due to two reasons. Firstly, the Declaration is not a Convention, and therefore can only express an in principle agreement between affirming states rather than imposing positive obligations as a treaty. Secondly, at present the Declaration has been adopted by the United Nations Human Rights Council in June 2006 but has not yet been considered for adoption by the United Nations General Assembly.

The *Convention concerning Indigenous and Tribal Peoples in Independent Countries (International Labour Organisation Convention No. 169)* (ILO No. 169) has not yet been ratified by Australia. While this means Australia is not bound by the provisions of the Convention, it does represent internationally acknowledged standards of treatment of Indigenous and Tribal Peoples, of which all states should be cognisant.

The table below lists a series of recommendations flowing from the Report and identifies the provisions of International law to which they correlate. Binding obligations under the ICESR and the ICCPR appear first, followed by emerging international standards under the DRIP and finally, best practice standards as codified in DRD and the ILO (No. 169).

Recommendations: Chapter 1	**Applicable international human rights law**
1.1 That the Australian Government identify the enterprise aspirations of traditional owners and other Indigenous people and assess their capacity to engage in economic development by: • consulting with communities on a regional basis; • auditing existing resources within regions; • auditing community access to government resources; and • strategically targeting resources to communities according to their relative disadvantage.	*International Covenant on Civil and Political Rights* (ICCPR) and the *International Convention on Economic, Social and Cultural Rights* (ICESCR)*:* **Article 1(1)** and **(2)** ICCPR: **Article 27** *International Covenant on the Elimination of Racial Discrimination* (ICERD): **Article 2(2)** *International Declaration on the Right to Development* (DRD): **Articles 1(1),(2), 3(1)** and **8(2)** *United Nations Declaration on the Rights of Indigenous Peoples* (DRIP): **Article 18, 19, 32(1)** and **(2)** *International Labour Organisation Convention* No. 169 (ILO No. 169)**: Articles 6(1)(b)** and **7(3)**
1.2 That the Australian Government develop a communication strategy to inform all Indigenous Australians, including those who are remotely located, of economic development policy, programs, initiatives and potential sources of funding.	ICCPR and ICESCR: **Article 1(1)** and **(2)** ICESCR: **Article 11(1)**, with reference to **General Comment No. 4: *The right to adequate housing***, para. 9 ICERD: **Article 2(1)** DRD: **Articles 1(3), 3(1)** and **8(2)** DRIP **Articles 19, 32(2)** ILO No. 169: **Article 6(1)(a)**

1.3 In consultation with the states and territories, that the Australian Government develop a mechanism to coordinate the reporting obligations of Indigenous corporations and community councils.	DRD: **Article 2(3)** ILO. No. 169 **Article 6(1)(a)**

Recommendations Chapter 2	**Applicable international human rights law**
2.1 That the Australian Government support a range of land leasing options on communal land including options where leases are held by traditional owners through their elected entities for varying periods of time. That the *Community Homes* program be extended to communities with alternative lease schemes where the lease period is commensurate with the maximum loan repayment period.	ICCPR and ICESCR: **Article 1(2)** ICCPR: **Article 12(1)** ICESCR: **11(1),** also General Comment No. 4 para. 8(a), (c), (d), (f) and (g) DRIP: **Articles 19, 26(1), (2)** and **(3)** and **32(2)** ILO No. 69: **Article 6(1)**
2.2 That all land leasing options on communal land be rigorously and progressively monitored and evaluated and that evaluative research be utilised to inform existing and future lease options.	DRD: **Article 4(1)** DRIP: **Article 39** ILO No. 169: **Article 7(3)**
2.3 That the Australian Government provide evidence of models (domestically and internationally) where individual tenure rights have led to improved economic outcomes for indigenous peoples living on communal lands.	ICESCR: **Article 11(1)** with reference to **General Comment No. 4: *The right to adequate housing*** para. 9 ILO No. 169: **Articles 7(3)** DRIP: **Articles 23, 27** and **39**

2.4	Governments legislate to ensure that consent and authorisation processes for 99 year leases are consistent with those required by sections 203BE(5) and 251(A) of the *Native Title Act 1993* for authorising Indigenous Land Use Agreements (ILUAs).	ICCPR and ICESCR: **Articles 1(1)** and **1(2)** ICCPR: **Article 2(3)(a- c)** ICERD: **Article 5(c)** DRIP: **18, 19, 20(1)** and **(2)** ILO No. 169: **Article 8(1)**
2.5	That the Australian Government remove section 64(4A) from the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).	ICCPR and ICESCR: **Articles 1(1)** and **(2)** ICCPR: **Article 2(1)** and **(2)** ICERD: **Article 5(c)** DRIP: **Articles 4, 18, 20(1)** and **(2), 26(1),(2)** and **(3)** and **28(1)** and **(2)**
2.6	That governments ensure employment contingencies for remote Indigenous employees who are unemployed as a result of a transition from community administration to a shire council model.	ICESCR: **Article 6(1)** and **(2), Article 7(a)(i)** with reference to **General Comment No. 13: *The right to education*** para. 11 and 12 ILO No. 169: **Article 2(2)(c), Article 4(1)**
2.7	In recognition of the continuing disadvantage of remote Indigenous Australians, that governments commit to providing subsidised, quality community housing and public housing according to need, and that no funds from rental housing schemes be redistributed to home ownership schemes.	ICCPR: **Article 12(1), Article 27** ICESCR: **Articles 11(1)** with reference to **General Comment No. 4: *The right to adequate housing***, para. 1, 2, 7, 8(b-g) and 9; and **Article 15(1)(a)** with reference to **General Comment No. 14: *The right to the highest attainable standard of health***, para. 1-3 and 11 DRD: **Article 4(1)** DRIP: **Article 21(1) and (2)**

2.8 That houses constructed under the home ownership scheme be of the highest quality and that regulations be developed to indemnify home owners for agreed periods against structural flaws in the house and the associated infrastructure.	ICESCR: **Article 12(1), (2)(b) and (c)** with reference to **General Comment No. 14: *The right to the highest attainable standard of health***, para. 3,4 and 9 DRD: **Article 8(1)** DRIP: **Article 21**
2.9 That the Australian Government develop a planned, supervised and strategic approach to train CDEP employees working on the house building and maintenance programs by ensuring the highest industry construction standards. That the Government maintain national data on the program. That CDEP employees be provided with award wage employment once they have completed the training.	ICESCR: **Articles 6(1)** and **(2)**, **7(a), (b)** and **(c)**, **Article 13(1)** and **(2)** with reference to **General Comment No. 13: *The right to education,*** para. 11-14 ICERD: **Article 5(e)(i), (iii), (iv)** and **(v)** DRIP: **Articles 17(3), 21(1)** and **(2)** and **23** ILO No. 169: **Article 24**
2.10 That the Australian Government direct ICCs to work with Indigenous land entities (including representative bodies) to strategically link Shared Responsibility Agreements to land agreements in ways that will increase economic development projects and opportunities.	ICESCR: **Article 6(1)** and **(2)** ICERD: **Article 5(e)(i)** and **(v)** DRD: **Article 8(1), (2)** DRIP: **Articles 19, 23, 32(1)** and **(2)** and **39** ILO No. 169: **Article 6(1)(a),(b)**
2.11 That governments provide bilateral support to fund and develop regional Indigenous governance structures that are attached to entities capable of the following:	ICESCR: **Article 6(1)** and **(2), Article 13(2)(b)** and **(d)** with reference to **General Comment No. 13: *The right to education,*** para. 11-14

• developing and sustaining an economic development strategy for the region; • applying for funds from governments and other sources; and • coordinating appropriate training and development to support regional economic development.	ICERD: **Articles 5(e)(i), (iv- v)** DRD: **Article 8(1),(2)** DRIP: **Article 4** ILO No. 169: **Article 2(2)(b)**

Australian Legislation and International Instruments

Native Title Act 1993 (Cth)

(5) A representative body must not certify under paragraph (1)(b) an application for registration of an indigenous land use agreement unless it is of the opinion that:

> **(a)** all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement have been identified; and
>
> **(b)** all the persons so identified have authorised the making of the agreement.

Note: Section 251A deals with ***authority*** to make the agreement.

s251A: Authorising the making of indigenous land use agreements

For the purposes of this Act, persons holding native title in relation to land or waters in the area covered by an indigenous land use agreement authorise the making of the agreement if:

> **(a)** where there is a process of decision-making that, under the traditional laws and customs of the persons who hold or may hold the common or group rights comprising the native title, must be complied with in relation to authorising things of that kind—the persons authorise the making of the agreement in accordance with that process; or
>
> **(b)** where there is no such process—the persons authorise the making of the agreement in accordance with a process of decision-making agreed to and adopted, by the persons who hold or may hold the common or group rights comprising the native title, in relation to authorising the making of the agreement or of things of that kind.[1]

1 **Available online at** http://www.austlii.edu.au/au/legis/cth/consol_act/nta1993147/ accessed 28 February 2007.

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

s64(4A): There must be debited from the Account and paid by the Commonwealth such other amounts as the Minister directs to be paid in relation to:

> **(a)** the acquiring of leases by, or the administering of leases granted or transferred to, approved entities under section 19A; or
>
> **(b)** the payment of amounts under leases granted or transferred to approved entities under section 19A.[2]

International Covenant on the Elimination of all forms of Racial Discrimination

Article 2

(2) States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(e) Economic, social and cultural rights, in particular:

> **(i)** The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
>
> **(ii)** The right to form and join trade unions;
>
> **(iii)** The right to housing;
>
> **(iv)** The right to public health, medical care, social security and social services;
>
> **(v)** The right to education and training;

2 **Available online at** http://www.austlii.edu.au/au/legis/cth/consol_act/alrta1976444/s64.html accessed 28 February 2007.

International Covenant on Civil and Political Rights

Article 1

(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

(2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Article 2

(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(3) Each State Party to the present Covenant undertakes:

> **(a)** To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> **(b)** To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> **(c)** To ensure that the competent authorities shall enforce such remedies when granted.

Article 12

(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

International Covenant on Economic, Social and Cultural Rights

Article 1

(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

(2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Article 2

(1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

(2) The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(3) Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 6

(1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

(2) The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

> **(i)** Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
>
> **(ii)** A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.

Article 11

(1) The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

(2) The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

Article 13

(1) The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

(2) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.

Article 15

(1) The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

Article 27

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 the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[3]

General Comments:

International Convention on Economic, Social and Cultural Rights

General Comment No. 4 (Article 11): *The right to adequate housing*
(Relevant sections only, footnotes omitted)

1. Pursuant to article 11 (1) of the Covenant, States parties "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions". The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights…

3. Although a wide variety of international instruments address the different dimensions of the right to adequate housing article 11 (1) of the Covenant is the most comprehensive and perhaps the most important of the relevant provisions…

7. In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This "the inherent dignity of the human person" from which the rights in the Covenant are said to derive requires that the term "housing" be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11 (1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: "Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost".

8. Thus the concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute "adequate housing" for the purposes of the Covenant. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following:

3 **Available online at** http://www.unhchr.ch/html/menu3/b/a_cescr.htm accessed 23 March 2007.

(a) **Legal security of tenure**: Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups;

(b) **Availability of services, materials, facilities and infrastructure**: An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;

(c) **Affordability**: Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by States parties to ensure the availability of such materials;

(d) **Habitability**: Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages States parties to comprehensively apply the *Health Principles of Housing* prepared by WHO which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates;

(e) **Accessibility**: Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement;

(f) **Location**: Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants;

(g) **Cultural adequacy**: The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured.

9. As noted above, the right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants and other applicable international instruments. Reference has already been made in this regard to the concept of human dignity and the principle of non-discrimination. In addition, the full enjoyment of other rights – such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making – is indispensable if the right to adequate housing is to be realized and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.

11. States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others. The Committee is aware that external factors can affect the right to a continuous improvement of living conditions, and that in many States parties overall living conditions declined during the 1980s. However, as noted by the Committee in its General Comment 2 (1990) (E/1990/23, annex III), despite externally caused problems, the obligations under the Covenant continue to apply and are perhaps even more pertinent during times of economic contraction. It would thus appear to the Committee that a general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.

19. Finally, article 11 (1) concludes with the obligation of States parties to recognize "the essential importance of international cooperation based on free consent". Traditionally, less than 5 per cent of all international assistance has been directed towards housing or human settlements, and often the manner by which such funding is provided does little to address the housing needs of disadvantaged groups. States parties, both recipients and providers, should ensure that a substantial proportion of financing is devoted to creating conditions leading to a higher number of persons being adequately housed. International financial institutions promoting measures of structural adjustment should ensure that such

measures do not compromise the enjoyment of the right to adequate housing. States parties should, when contemplating international financial cooperation, seek to indicate areas relevant to the right to adequate housing where external financing would have the most effect. Such requests should take full account of the needs and views of the affected groups.[4]

General Comment No. 14 (Article 12): *The right to the highest attainable standard of health* Relevant extracts only (footnotes omitted)

1. Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realization of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments. Moreover, the right to health includes certain components which are legally enforceable.

2. The human right to health is recognized in numerous international instruments. Article 25.1 of the *Universal Declaration of Human Rights* affirms: "Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services". The *International Covenant on Economic, Social and Cultural Rights* provides the most comprehensive article on the right to health in international human rights law. In accordance with article 12.1 of the Covenant, States parties recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", while article 12.2 enumerates, by way of illustration, a number of "steps to be taken by the States parties... to achieve the full realization of this right". Additionally, the right to health is recognized, inter alia, in article 5 (e) (iv) of the *International Convention on the Elimination of All Forms of Racial Discrimination* of 1965, in articles 11.1 (f) and 12 of the *Convention on the Elimination of All Forms of Discrimination against Women* of 1979 and in article 24 of the *Convention on the Rights of the Child* of 1989… Similarly, the right to health has been proclaimed by the Commission on Human Rights, as well as in the *Vienna Declaration* and *Programme of Action* of 1993 and other international instruments.

3. The right to health is closely related to and dependent upon the realization of other human rights, as contained in the *International Bill of Rights*, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.

4. … However, the reference in article 12.1 of the Covenant to "the highest attainable standard of physical and mental health" is not confined to the right to health care. On the contrary, the drafting history and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition,

4 **Available online at** http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenDocument accessed 23 March 2007.

housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment…

9. The notion of "the highest attainable standard of health" in article 12.1 takes into account both the individual's biological and socio-economic preconditions and a State's available resources. There are a number of aspects which cannot be addressed solely within the relationship between States and individuals; in particular, good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health. Thus, genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles may play an important role with respect to an individual's health. Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health…

11. The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels…

19. With respect to the right to health, equality of access to health care and health services has to be emphasized. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health. Inappropriate health resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population.

27. In the light of emerging international law and practice and the recent measures taken by States in relation to indigenous peoples, the Committee deems it useful to identify elements that would help to define indigenous peoples' right to health in order better to enable States with indigenous peoples to implement the provisions contained in article 12 of the Covenant. The Committee considers that indigenous peoples have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines. States should provide resources for indigenous peoples to design, deliver and control such services so that they may enjoy the highest attainable standard of physical and mental health. The vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected. The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their

traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health…

30. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2.2) and the obligation to take steps (art. 2.1) towards the full realization of article 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health.

31. The progressive realization of the right to health over a period of time should not be interpreted as depriving States parties' obligations of all meaningful content. Rather, progressive realization means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of article 12.[5]

General Comment No. 13 (Article 13): ***The right to Education***
Relevant extracts only (footnotes omitted)

Article 13 (2) (b): The right to secondary education

11. Secondary education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.

12. While the content of secondary education will vary among States parties and over time, it includes completion of basic education and consolidation of the foundations for life-long learning and human development. It prepares students for vocational and higher educational opportunities.

Article 13 (2) (b) applies to secondary education "in its different forms", thereby recognizing that secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings. The Committee encourages "alternative" educational programmes which parallel regular secondary school systems.

13. According to article 13 (2) (b), secondary education "shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education". The phrase "generally available" signifies, firstly, that secondary education is not dependent on a student's apparent capacity or ability and, secondly, that secondary education will be distributed throughout the State in such a way that it is available on the same basis to all. For the Committee's interpretation of "accessible", see paragraph 6 above. The phrase "every appropriate means" reinforces the point that States parties should adopt varied and innovative approaches to the delivery of secondary education in different social and cultural contexts.

5 **Available online at** http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument accessed 22 March 2007.

14. "[P]rogressive introduction of free education" means that while States must prioritize the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary and higher education.[6]

United Nations Declaration on the Right to Development

Article 1

(1) The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

(2) The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 2

(3) States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Article 3

(1) States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.

Article 4

(1) States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.

Article 8

(1) States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

(2) States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.[7]

6 **Available online at** http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.10.En?OpenDocument accessed 22 March 2007.

7 **Available online at** http://www.unhchr.ch/html/menu3/b/74.htm accessed 23 March 2007.

Article 17

(1) Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

(2) States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

(3) Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18 Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19 States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

(1) Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

(2) Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

(1) Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

(2) States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 26

(1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

(2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

(3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

(1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

(2) Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 32

(1) Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

(2) States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of their mineral, water or other resources.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.[8]

8 **Available online at** http://www1.umn.edu/humanrts/instree/indigenousdeclaration.html accessed 23 March 2007.

International Labour Organisation Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries

Article 2

(1) Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

(2) Such action shall include measures for:

> **(b)** Promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;
>
> **(c)** Assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

Article 4

(1) Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

(2) Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

Article 6

(1) In applying the provisions of this Convention, Governments shall:

> **(a)** Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
>
> **(b)** Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

Article 7

(3) Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

Article 8

(1) In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

Article 24

Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.[9]

9 **Available online at** http://www1.umn.edu/humanrts/instree/r1citp.htm accessed 23 March 2007.