The report overview:
Native title 15 years on

The year 2007 is the fortieth anniversary of the 1967 constitutional referendum. The referendum changed the Australian Constitution however it didn't specify directions to be taken. In many ways, it could be said that the referendum represented promises to Indigenous Australians for new ways of enjoying human rights, and promises to other Australians that Indigenous citizens could expect a new and equal deal.

Unfortunately, in the last 40 years, the change towards equal rights and equal opportunities for Aboriginal peoples and Torres Strait Islanders has been slow and, some might argue, non-existent. The question therefore is why?

Australia has accepted international standards for the protection of 'human rights and fundamental freedoms' set out in the *Universal Declaration of Human Rights*. Australia has also ratified and agreed to be bound by other instruments of international law including the *International Convention on the Elimination of All Forms of Racial Discrimination,* the *International Covenant on Economic, Social and Cultural Rights,* and the *International Covenant on Civil and Political Rights.*

Additionally, in 2007, the international community moved further to acknowledge fundamental human rights for Indigenous peoples. The *United Nations Declaration on the Rights of Indigenous Peoples* was accepted by the General Assembly of the United Nations and proclaimed as a standard of achievement to be pursued in a spirit of partnership and mutual respect.[1]

How far have we progressed to truly embrace inalienable human equality?

Two thousand and seven was the fifteenth anniversary of *Mabo No 2,* the High Court decision that prompted the government to pass the *Native Title Act 1993*.[2] In passing the Act the Australian Parliament took into account that the Government had acted to protect the rights of all of its citizens, and in particular its Indigenous peoples, by recognising the international standards for the protection of universal human rights and fundamental freedoms.[3] The Act was intended to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders. It was intended to further advance the process of reconciliation among all Australians.[4]

These significant anniversaries make it an appropriate time to ask the big questions of the Native Title Act: Does it deliver on its principal objects? Does it truly provide for the recognition and protection of native title? Has the Australian Parliament given proper weight to following the preamble to the Act? Does it offer real economic and social development opportunities for Indigenous peoples? When

engaging with the systems established under the Act, are Indigenous people able to exercise free and informed consent?

A deeper look

Not only must a civilised country conduct its affairs by the rule of law, but the law must be just in its compilation and just in its application. Social and economic benefits must not ignore the least advantaged citizens; indeed it is usually argued that the disadvantaged need special attention.

The Israeli philosopher Avishai Margalit has suggested that a society must also be a decent society that can't tolerate humiliation. He talks of '… an old fear that justice may lack compassion and might even express vindictiveness'. He places self-respect ahead of personal freedoms and basic survival because, as a learned observer has pointed out, 'Without the possibility of self-respect, a person's life has no point; pursuit of life's goals is a meaningless exercise'.[5]

This leads us to ask deeper questions of the Native Title Act: is it just in its structure? Is it just in its application? Does it offer real opportunities for building the self-respect of the disadvantaged and marginalised Australia's Indigenous peoples?

The Australian Parliament recognised this need to question the Native Title Act. The Parliament made provision in the Act requiring that I report on its operation and the effect of it on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders. This deeper questioning of the Native Title Act underpins this report.

Having asked these questions this report seeks to answer the question: how can the Native Title Act and the system it establishes, be improved to increase the exercise and enjoyment of human rights of Indigenous peoples?

And it seems especially appropriate to be asking these questions in 2008, with the new government's expressed concern for Australia's Indigenous peoples.

I believe that Australia failed its Indigenous peoples and the rest of its citizens, by not keeping its promises that were implicit in the 1967 referendum. The Native Title Act tends to humiliate the people it should serve; indeed I fear in Margalit's words that its *'justice may lack compassion and might even express vindictiveness'*. It has failed to deliver Burnside's self-respect.[6]

This failure needs to be addressed. There needs to be a rethink of the native title system, with open mind, and free-spirit. There needs to be a rethink of the way native title is determined across the country. This rethink must focus on increasing the recognition of native title and strengthening its protection. Foremost it must answer the questions: how may we make it more just? How may we make the Act deliver on Australia's human rights obligations?

Landscape

My questioning of the Act takes place in the context of a range of events that happened in the period covered by this report. A close look and analysis of these events forms the body of my report.

Overall, the central conclusion of this report is that the Native Title Act is not delivering fully on its objects. Proper consideration is not being given to the preamble to the Act which encapsulates the reasons Parliament passed the Act in the first place, and the matters it took into consideration.

- **Changes were made to the native title system** by the most significant amendments to the Native Title Act since 1998 (when the Act was amended in response to the High Court's *Wik* decision[7]). They were the result of the government's intention to change the native title system first announced in 2005. Other non-legislative changes were also made to the system.
- **The Corporations (Aboriginal and Torres Strait Islander) Act** was passed. It established a new regime for Aboriginal corporations (including 'prescribed bodies corporate', a form of corporation required under the Native Title Act).
- **A number of significant Federal Court decisions** were handed down. They further showed the difficulties in obtaining recognition of native title under the Act, and the difficulties in obtaining compensation for extinguishment of native title.
- **Intervention in the Northern Territory** was announced by the government, ostensibly in response to the findings of the *Little Children are Sacred* report. The intervention was given full effect later in 2007.
- **Commercial fishing and Indigenous rights** became a topical issue with the *Gumana* (Blue Mud Bay) case and the Gundjitmarra peoples' native title claim.
- **Indigenous peoples' initiatives** took place around the country to exercise and enjoy their human rights as a result of or in response to the operation of the Native Title Act. The right to economic and social development (discussed in many of my previous reports) was pursued through innovative projects.

Two such innovative studies I consider in this report:

- **The Western Arnhem Land project** involves traditional fire management and the generation of income through limiting the release of carbon dioxide greenhouse gas into the atmosphere. It is a promising and timely approach to pursuing economic, environmental, social and cultural outcomes.
- **A central Queensland local government template agreement** is being finalised. It offers a model that may be of assistance to other Indigenous people seeking to enter into agreements with local councils.

These events, that occurred over the reporting period, affect five areas central to native title, the native title system, and the exercise and enjoyment of human rights of Indigenous peoples.

1. The importance of native title

It is vital to Indigenous people and their future that there is recognition of the rights and interests they have in country according to their traditional laws and customs. It is important for the advancement of reconciliation between Australia's past and present, and between Indigenous and non-Indigenous Australians.

The Native Title Act established a system whereby Indigenous people could gain recognition by Australian law of their native title rights and interests in land and waters. Recognition by Australian law brings with it the possibility to assert those rights as against the whole world. The full capacity of the Australian legal system is then, potentially, available to enforce those rights. The native title subsequently recognised may be utilised for economic, social and cultural benefits.

Two reasons stand out why recognition of native title by Australian law is vital to Indigenous peoples.

The first is the recognition of Indigenous people, their society and their laws and customs. This takes place when the Federal Court makes a determination under the Native Title Act, that native title exists and who holds it.

The second is the actual rights and interests recognised. These rights and interests can be a step along the way to achieving economic, social, and cultural outcomes for Indigenous peoples. This requires political will. As Justice Merkel in the *Rubibi* case, pointed out:

> the resolution of native title claims as a means to an end, rather than an end in itself. Achieving native title to traditional country can lead to the enhancement of self respect, identity and pride for indigenous communities ... native title can also be seen as a means of indigenous people participating in a more effective way in the economic, social and educational benefits that are available in contemporary Australia. Obtaining a final determination of native title, where that is achievable, can be a stepping-stone to securing those outcomes but cannot, of itself, secure them.[8]

2. Operation of the native title system

Any system established to provide for the recognition and protection of native title must do just that. The native title system has been successfully used in many parts of the country. There are registered determinations of native title on the Native Title Register. There is an increasing number of Indigenous land use agreements entered into each year. It is a complex system, involving many interlinked agencies, governments, organisations and people.

Despite these successes I am concerned, after reviewing the events over the reporting period, and from my time as Aboriginal and Torres Strait Social Justice Commissioner, that the system is not delivering full recognition and protection of native title.

Many Aboriginal peoples and Torres Strait Islanders feel the system doesn't deliver. They hold the view that native title delivers little in the way of meaningful recognition of the full range of rights and interests, obligations and responsibilities they have in country under the traditions and customs of their own society.

The 'recognition' that does occur is criticised as mistranslating and transforming Aboriginal 'cultural connection' to land. The whole process is seen by many to exacerbate old conflicts and create new ones, between Aboriginal people and with non-Indigenous Australians.[9]

One *Wati* man from the Western Desert speaking recently to his lawyers spoke of the dispossession happening of his people's land for many years now. 'From his perspective, the Native Title Act has not brought justice and in fact has simply formalized and legalised the dispossession of his people's country'.[10]

There are two overarching constraints on the capacity of the native title system to fully deliver recognition and protection of native title:

- the law, both the Native Title Act, and the common law; and
- the design and operation of the system.

The previous government endeavoured to tackle some of the problems with the system. It began the latest round of reviewing elements of the native title system and made changes in 2005. Some of the changes made as a result of this process may improve the efficiency and effectiveness of the system. That was the intent behind the changes. It also intended to promote agreement-making and negotiated outcomes to native title issues instead of litigation.

Of the recent changes to the system, four main areas are considered in detail in this report:

- the claims resolution process;
- representative Aboriginal and Torres Strait Islander bodies;
- respondent funding; and
- prescribed bodies corporate.

In each area I raise concerns and make recommendations. My consideration of prescribed bodies corporate is also in the context of the new *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). This legislation offers the potential to significantly improve the governance and operation of Indigenous corporations. The concerns I raise in the report should not detract from the possibilities in this Act and the hard work and dedication that went into its creation.

The focus of the changes to the native title system was really on saving money and reducing the time taken to resolve matters. Cost and time were the 'reform criteria'. The changes ought to have been focused on providing for recognition and protection of native title. This is the main object of the Native Title Act. Saving time and money are important, however, not at the expense of native title.

I am concerned that Indigenous peoples' rights are yet again restricted and curtailed. If not directly then through an increase in the complexity of the system, the bureaucratic hurdles that must be surmounted, and the legal maze that must be wound through. The native title system is too complex. It is too legalistic. And it is too bureaucratic. And it hinders rather than helps Indigenous Australians towards their full realisation of rights.

It must always be remembered that this system was established by an Act passed as a special measure for the benefit of Indigenous peoples. The most disadvantaged people in Australia face one of the most complex pieces of legislation in the country to gain recognition of their native title. They seek to gain recognition of rights and interests in land and waters that they have held for over 40,000 years; over country they have always known was theirs.

3. Barriers to recognition of native title

The interpretation by the common law of the Native Title Act has placed great barriers in the way of Indigenous people claiming their native title.

Native title claims are complex, and impose demands on the parties that are unprecedented in adversarial litigation.[11] Evidence is required of the claimant community's connection with the claim area, and the community's observance and acknowledgement of traditional laws and customs since the British asserted sovereignty. This differs around the country. In the eastern states it is back to 1788, in Western Australia to 1829.

In a heavily contested claim, an adversarial process leads those opposing the claim to raise every objection and to contest every point available to them. The onus is on the claimant to prove their case. In the *Wongatha* case Justice Lindgren faced 30 expert reports, to which 1,426 objections were lodged. In the *Jango* case, the Yulara compensation case, certain expert anthropologists' reports were the subject of over 1,000 objections by the respondents.

I consider these cases in this report, along with two others, and the issues they raise in the chapter on selected native title cases. The four selected cases highlight some of the almost insurmountable hurdles that Indigenous people face in the courts, in their endeavours to gain recognition of their native title. To establish the continuity of traditional laws and customs needed for recognition of native title there must be what the courts have termed a 'normative society'. This is a significant hurdle placed by the courts. It is a requirement that is not in the legislation. Rather it has arisen from the court's interpretation of the definition of native title in the Native Title Act.

Since the Hight Court's decisions in the *Ward* and *Yorta Yorta* cases the first reference for determining what native title is and what is needed for recognition is the Native Title Act. Section 223 defines native title. The courts have interpreted this section in a way that has limited the rights and interests Indigenous people may claim.

4. Protection of native title

The Native Title Act establishes a system for future dealings affecting native title. The 'future act regime' is there to protect native title. The federal government announced its intervention in the Northern Territory to tackle sexual abuse of Indigenous children in June 2007. The legislation passed to provide for the intervention measures expressly excludes the operation of the future act regime. In this report I consider this aspect of the intervention. This casual disposal of the protections afforded native title demonstrates an underlying approach to native title that sees it more as an impediment than as an opportunity. It is an approach needing change.

Also set up under the Native Title Act is a scheme for claiming compensation for extinguishment of native title. The criteria for extinguishment laid down by Australian law mean that in large parts of Australia native title has been extinguished. A native title claim may be largely successful only for the claimants to find, as the Yawuru people did, in the *Rubibi* case, that their native title was partially or totally extinguished over significant parts of their claim area.[12]

Compensation for extinguishment of native title is extremely difficult to obtain, despite the statutory scheme for compensation established under the Native Title Act. As the Yankunytjatjara and Pitjantjatjara people found when the Federal Court dismissed their claim for compensation for extinguishment of native title at the town of Yulara, in the shadows of Uluru. The *Jango* case was the first Federal Court trial for compensation under the Native Title Act. If Indigenous people are unable to be compensated for the loss of rights and interests they have in land, under their traditional laws and customs, in the shadows of Uluru, the most iconic of Aboriginal sacred sites, where will they be compensated? This is one of four selected Federal Court decisions I review in detail in this report.

There has been no compensation awarded by the Federal Court. Of the 33 applications for compensation lodged with the court since the Act came into operation, most have been discontinued. The few remaining are not being actively pursued.

The compensation scheme established under the Act must be reviewed. Something is not working.

5. Sustainable development and native title

Around the country there are very positive initiatives undertaken by Indigenous people to use their land and their culture, as well as the native title system and native title, to gain economic, social, cultural and environmental outcomes. The particular case of commercially using native title rights to fish is considered in this report. There are also two other studies.

One case study looks at a template Indigenous land use agreement in central Queensland that has been drawn up for agreements involving local government. It may serve as a model for other template agreements involving local government, showing the way in grappling with the complex problems of agreement making under the Native Title Act.

The other study is an innovative use of traditional fire burning practices in Arnhem Land to generate income through reducing carbon in the atmosphere. As adapting to climate change becomes increasingly necessary, projects such as the Western Arnhem Land Fire Management project are breaking ground in their approaches to utilising land, traditional knowledge, and the evolving carbon markets.

1 Although it was opposed by Australia.
2 The High Court handed down its decision in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 on 3 June 1992.
3 It is expressly stated in the preamble to the *Native Title Act 1993* (Cth).
4 Preamble to the *Native Title Act 1993* (Cth).
5 Burnside, J., *Watching Brief: reflections on human rights, law and justice,* Scribe, November 2007, Carlton North, Victoria, p19.
6 Burnside, J., *Watching Brief: reflections on human rights, law and justice,* Scribe, November 2007, Carlton North, Victoria, p19.
7 *Wik Peoples v Queensland* (1996) 187 CLR 1.
8 *Rubibi Community v State of Western Australia (No 7)* (with Corrigendum dated 10 May 2006) [2006] FCA 459 (28 April 2006) per Merkel J, Corrigendum.
9 The Social Effects of Native Title: Recognition, Translation, Coexistence, Benjamin R. Smith and Frances Morphy (Editors), Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra, Research Monograph No. 27/2007, page 1.
10 Managing the Western Australian Resource Boom, correspondence from Mr Michael Meegan, Principal Legal Officer, Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, Yamatji Land and Sea Council, Pilbara Native Title Service, to the Native Title Unit, HREOC, December 2007.
11 *Rubibi Community v State of Western Australia (No 7)*(with Corrigendum dated 10 May 2006) [2006] FCA 459 (28 April 2006) per Merkel J, Corrigendum.
12 *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459, (28 April 2006), Merkel J, Corrigendum.