Chapter 2
Changes to the native title system – one year on

In my *Native Title Report 2007*, I reported on the changes that were made to the native title system during that year. The changes, which were made through two pieces of legislation which amended the Native Title Act, primarily affected:

- the claims resolution process, including the powers of the National Native Title Tribunal (the NNTT or the Tribunal), the Federal Court of Australia, and the relationship between the two
- native title representative bodies
- prescribed bodies corporate (through the introduction of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*)
- respondent funding.

A range of other changes were also made under the heading 'technical amendments'.

In the *Native Title Report 2007,* I expressed concern about how these changes will impact on the realisation of human rights of Aboriginal and Torres Strait Islander peoples.[1] In particular I was, and I remain, concerned that recognition and protection of native title was not placed at the centre of the government's 'reform' agenda. Instead, the changes were directed at achieving a more efficient and effective native title system.

Indigenous people also want a native title system that functions well, but the version of 'efficiency' promoted in the amendments may not promote the realisation of Indigenous peoples' rights and legitimate aspirations. These rights should be at the centre of any dialogue around the operation of the native title system.

Unfortunately, the Attorney-General has indicated that he does not plan to review the implementation of the changes.[2] It is disappointing that, once again, the impact that the government's system has on Indigenous peoples will not be comprehensively or formally evaluated and considered.

In preparing this report, I asked a number of stakeholders for their opinions on how the changes have impacted on the system. One year on, the changes have not had a notable impact. A number of stakeholders

1 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), pp 24-27. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html.

2 R McClelland, Attorney-General, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.

consider it too early to tell, and that it may take a while for the changes to 'filter through the system'.[3]

In addition, many stakeholders are still not fully aware of the breadth or detail of the changes. In the beginning of 2008, the NNTT undertook its client satisfaction research. This survey found that very few respondents were 'spontaneously aware' of the changes.[4] Once prompted, a total of 72 percent of the survey respondents were aware of the reforms. The majority of the respondents considered that the changes would result in varying degrees of improved efficiency. Overall however, many 'were unsure of the real impact or of the specific nature of these changes'.[5]

Nevertheless, some observations about the changes can be made. From the input I have received, it is clear that many stakeholders consider that the changes do not go far enough to ensure the realisation of Indigenous peoples' rights, and if the Native Title Act is going to have the outcomes envisaged in its preamble, the Australian Government will need to do much more than tinker with the edges of the system.

1. General observations about the 2007 changes

State and territory governments were generally lukewarm about the impact of the changes to date.[6] Many governments voiced uncertainty about whether the changes will result in any marked improvement. One government stated that the changes 'had no discernible impact' and that so far they 'do not appear to have resulted in improvements to the efficiency or effectiveness of the system'.[7] Others considered it too early to comment in detail, but reported that it was difficult to say whether there will be any impact as the new powers of the NNTT have not yet been exercised, and some other changes have not been implemented.[8]

Some governments were slightly more positive that the changes will result in improvements in the future. Victoria's Attorney-General stated that some of the changes with regard to the powers of the NNTT will contribute to 'more efficient

3 G Roche, Manager, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008; G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 27 August 2008.

4 The survey was completed by 213 individuals and organisations that have had contact with the Tribunal since its inception: see G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 5 August 2008, p 10. Based on spontaneous awareness, changes to mediation (15%) and the registration test (14%) were the best known, no other was mentioned by over 10% of the total: see G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 5 August 2008, p 2.

5 G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 5 August 2008, pp 1-2.

6 The government of Western Australia was the only government that I did not receive input for the Report from. The Western Australian Government was in caretaker mode when I was collecting information for this Report.

7 M Scrymgour, Northern Territory Minister for Indigenous Policy, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

8 J McNamara, Executive Director, Indigenous Services, QLD Department of Natural Resources and Water, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008; R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

and effective mediation of matters'.[9] Similarly, South Australia's Attorney-General commented that 'to some degree the amendments have improved the efficiency and effectiveness of the system.'[10]

Native Title Representative Bodies' (NTRBs)[11] views are consistent with those of the state and territory governments. While one NTRB reported that the amendments 'have not to date had very much practical effect on [their] operations'[12], they did state that they have 'generally been positive'[13]. Another expressed uncertainty about whether the legislative reforms had achieved their purpose.[14]

The Prescribed Bodies Corporate (PBC) representatives that I spoke to found it difficult to comment on the impact of the changes, as some of the changes have not yet been implemented. One PBC commented that 'there's been no discernible difference'.[15] The most common PBC comment was that funding and support is their most pressing concern, which continues to threaten their future operation and their ability to comply with the changes. One PBC employee from the Torres Strait commented that:

> The 2007 changes…it's very slow coming up in the Torres Strait. We just got the [Office of the Registrar of Indigenous Corporations] people starting to do the governance training … but we're still finding it difficult to get funding from the [Torres Strait Regional Authority] for the individual PBCs.[16]

Observations and feedback I received about specific changes are detailed in this chapter. In addition, many stakeholders offered their views about what other areas of the system could be improved and amended in order to better protect the human rights of Aboriginal and Torres Strait Islanders. I have outlined some of these suggestions at the end of this chapter.

2. Changes to the claims resolution process

A major aspect of the 2007 changes dealt with the relationship between the Federal Court of Australia and the NNTT, and the mediation of native title. The changes were made in response to a review of the native title claims resolution process which focused on the more efficient management of native title claims. The government accepted most of the review's recommendations and adopted the option for

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9 R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

10 M Atkinson, Attorney-General of South Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

11 For ease of reference I will use the term NTRB to include both Native Title Representative Bodies and Native Title Service Delivery Agencies where applicable. NTRBs are bodies recognised by the minister to perform all the functions listed in the Native Title Act in Div 3 of Part 11. Native Title Service Delivery Agencies are bodies that are funded by government to perform some or all of the functions of a representative body: see s 203FE of the *Native Title Act 1993* (Cth).

12 B Wyatt, CEO, Goldfields Land and Sea Council Aboriginal Corporation, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 4 September 2008.

13 South Australia Native Title Services, *Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008*, 18 July 2008.

14 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008.

15 T Wooley, public officer, De Rose Hill – Ilpalka Aboriginal Corporation and Yankunytjatjara Native Title Aboriginal Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 8 September 2008.

16 J Akee, Mer Gedkem Le (Torres Strait Islanders) Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 29 September 2008.

institutional reform which provides the NNTT with an exclusive mediation role, in which the Federal Court can intervene at any time.[17]

Overall, many stakeholders were not inclined to provide positive feedback on the changes that were made. There is a continuing lack of faith in the NNTT's capacity to mediate claims effectively and in the Tribunal's and the Court's ability to work together for the benefit of the system. I raised concerns about increasing the NNTT's mediation powers in the *Native Title Report 2007*.

2.1 Relationship between the NNTT and the Federal Court

(a) Administrative changes aimed at improving communication between the NNTT and the Federal Court

The NNTT and the Federal Court have continued and expanded on initiatives that were started in order to improve the communication between the two bodies. The President of the NNTT stated that:

> Around the country the Tribunal has been more consistent and comprehensive in [its] regional planning… We are reporting the progress, or lack of progress, and the reasons why to the Court. Some of the Tribunal members and employees are appearing before the Court on behalf of the Tribunal to improve communications between the institutions. There has been some resistance to some of these initiatives in parts of the country, but I am convinced that such rigour is needed and that transparency and accountability is important...[18]

The Court has amended the Federal Court Rules to provide for the procedures necessary to implement a number of the changes. In addition, the Federal Court Native Title Registrar noted that:

> The Court has worked closely with the Tribunal to ensure that its relationship with the Tribunal is effective in assisting the timely resolution of native title claims and that practices in the resolution of native title claims are transparent.[19]

This has included regular liaison meetings between the Court and the NNTT, *ad hoc* discussions and briefings, joint information sessions on the legislative reforms, and regular regional review hearings.[20]

However, most other stakeholders did not comment on whether they have witnessed any improvement in the relationship between the Court and the NNTT. One NTRB did state that they have 'seen very little evidence to the fact that those legislative reforms have delivered [enhanced communication between the NNTT and the Court]'.[21]

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17 See chapter 2 of T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008) for a detailed description of the amendments and my concerns.

18 G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 27 August 2008.

19 J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 21 August 2008.

20 J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 21 August 2008.

21 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008.

(b) Mediation of native title proceedings – the NNTT's new powers and functions

As I mentioned above, the changes made in 2007 gave the NNTT exclusive mediation powers.[22] However, the Federal Court Native Title Registrar emphasised that:

> The reforms to the native title system … have not changed the underlying principle that native title determination applications are proceedings in the Court and that mediation in the [NNTT] is an adjunct to those proceedings and directed to their prompt resolution.[23]

In any case, it is difficult to ascertain what the impacts of these changes will be, as it appears that many of the Tribunal's new powers are yet to be used:[24]

> … it's interesting to see that after the Tribunal got the powers, how many of those powers have they in fact used? That's going to be the burning question… whether much transpired from it I think is the question that needs to be asked.[25]

The Federal Court has confirmed this, indicating to me that it 'has not heard any matters in which it has considered the NNTT's use of its new mediation powers, for example directing parties to attend or produce documents.'[26] The powers of the Tribunal to refer issues of fact and law or the question of whether a party should cease to be a party to the Court have not been used.[27]

Additionally, the Court hasn't heard any matters in which the NNTT has reported to the Federal Court that a party or its representative did not act in good faith during mediation.[28] However, the President of the Tribunal stated that '[r]eports from some Tribunal members suggest that the good faith conduct obligation has had a positive effect on the conduct of some parties'.[29]

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22 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), pp 39-46.

23 J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 21 August 2008.

24 J McNamara, Executive Director, Indigenous Services, QLD Department of Natural Resources and Water, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008; T Kelly, NSW Minister for Lands, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 1 September 2008. Although the NNTT has issued a number of Procedural Directions to ensure that when the powers are used, they are implemented consistently.

25 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008.

26 J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 21 August 2008.

27 J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 21 August 2008.

28 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), p 45. The amendments introduced a requirement that each party and each person representing a party in native title proceedings, must act in good faith in relation to the mediation (s136B(4) *Native Title Act 1993*): see J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 21 August 2008. However, the NNTT has issued a Procedural Direction which sets out 'a range of matters that the presiding Member should take into account in deciding whether he or she considers that a person did not act or is not acting in good faith in the conduct of a mediation': see G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 27 August 2008, citing National Native Title Tribunal, Procedural Direction No.2 of 2007.

29 G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 27 August 2008.

The one new power that the NNTT does appear to be using regularly is its right to appear before the Federal Court when the Court is considering a matter currently being mediated by the NNTT,[30] but there is little feedback on the impact this has had.

Nonetheless, even though the Tribunal hasn't used many of its new powers, it considers:

> …early indications are that in some areas parties are engaging in a more productive fashion in mediation...[31]

There were mixed responses from stakeholders about the usefulness of the Tribunal's new mediation functions. One NTRB relayed to me that it is not supportive of the NNTT having additional powers and questioned the Tribunal's level of mediation expertise.[32] Similarly, South Australia's Attorney-General considers that '[i]f the NNTT, especially, tries to use its new powers to take more control of our state-wide negotiations, it will become a serious hindrance.'[33] He views the impact of the changes to the Tribunal's mediation powers with some scepticism:

> The changes assume that close management of claims by the Federal Court and NNTT is desirable and helpful. Under [South Australia's] approach, and any approach that tries to reach broader settlements that incorporate non-native title benefits, this is questionable. The court and NNTT tend to be impatient with long periods taken to negotiate settlements, as their statutory role is resolving applications for determination of native title.[34]

This view is consistent with the Federal Court's observations that:

> There have, however, been a number of instances … where parties have requested that matters not be referred to the NNTT for mediation as other strategies are being pursued…[35]

The integral role of mediation and the relationship between the two key administrative bodies in the system in resolving native title issues was acknowledged by the Claims Resolution Review and the consequent changes that were made to the native title system in 2007. Nonetheless, the Tribunal's new powers haven't been used to make any significant change to the system, and one year later, very little improvement can be seen. The concerns I raised in the *Native Title Report 2007* remain, and I am not optimistic that without further change, any significant improvement in native title claims resolution will be forthcoming.

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30 J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 21 August 2008.

31 G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 27 August 2008.

32 B Wyatt, CEO, Goldfields Land and Sea Council Aboriginal Corporation, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 4 September 2008.

33 M Atkinson, Attorney-General of South Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

34 M Atkinson, Attorney-General of South Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

35 J Eaton, Native Title Registrar, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 21 August 2008.

2.2 Registration test amendments

In my *Native Title Report 2007*, I noted that new provisions had been inserted into the Native Title Act, enabling the Federal Court to dismiss applications that do not meet the merit conditions of the registration test (which are set out in s 190B of the Native Title Act).[36] I also noted other changes to the application of the registration test, including that it must now be applied to applications that had not previously been subject to the test, it must be reapplied to those applications that had previously failed the test, and it does not have to be reapplied in limited situations where a registered claim is amended.[37]

Between 1 July 2007 and 30 June 2008, the Native Title Registrar made 104 registration decisions. A total of 23 applications were registered[38], 81 were not accepted:

> The high failure rate reflects the large number of claims that had to be re-tested under the [2007] amendments… The majority of the claims had previously failed the registration test, were not on the Register of Native Title Claims and were not amended following the commencement of the transitional provisions. The registration test status quo was maintained for many claims (ie they were not on the Register when the decision was made, and so the native title claim group did not lose procedural rights).[39]

Generally the amendments to registration testing have been seen as quite positive. Victoria's Attorney-General stated that '[i]t may be that the new powers of the Federal Court to dismiss…applications that have not been able to pass the registration test, may have some benefits in efficiencies of the State's resource commitments.'[40]

NTRBs have also supported this change as it will allow them to concentrate their resources better:

> …in our area, a number of the early claims…were deficient…by putting some of the claims through that process again actually did bring to light how deficient they were and as a result are in the process of being struck out. So even though, superficially it might sound like a hard provision, it was necessary... it was a trigger to open up claims and show they were properly constituted, and properly authorised…[41]

Other NTRBs have commented that the ability to make minor changes to the claim and not go through the registration test again is an improvement to the system that resulted from the 2007 changes.[42]

However, very real concerns have been raised with me about the possibility that the amendments could limit the rights of Indigenous claimants if the powers aren't used with caution:

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36 *Native Title Act 1993* (Cth) ss 190F(5)-(6); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), p 52.

37 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), p 53.

38 17 just accepted, and 6 amended claims were accepted for registration without the registration test being applied under s 190A(6A) of the Native Title Act.

39 National Native Title Tribunal, *National Report: Native Title*, June 2008 (2008). At: At: http://www.nntt.gov.au/Applications-And-Determinations/Procedures-and-Guidelines/Documents/National%20Report%20Card%20-%20June%202008.pdf (viewed July 2008).

40 R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

41 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008.

42 South Australia Native Title Services, *Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008*, 18 July 2008.

> [The court's power to dismiss unregistered claims] may be helpful in dealing with unsustainable claims and paving the way for viable new claims, although this will depend to a large extent on how the court applies the new provisions… Dismissals need to be dealt with on a case by case basis with NTRBs being afforded sufficient time and due process to ensure a claim group has exhausted all avenues to satisfy the registration test or to demonstrate other reasons why a particular unregistered claim should not be dismissed.[43]

Given the serious consequences that can eventuate if a claim is dismissed, I recommend that the Attorney-General work with NTRBs to monitor the use of the Court's powers in order to determine whether the provisions need to be amended to better protect the important procedural rights for claimants that come with registration of their claim.

(a) Merit conditions of the registration test

In the *Native Title Report 2007*, I outlined my concern that the interpretation given to section 190B (the merit conditions of the registration test) by delegates of the Native Title Registrar has varied over time.[44] Given that the 2007 changes allow the Court to dismiss claims if they fail the registration test under s 190B, its application by the Registrar is considerably more important – failure to pass the registration test has even more significant implications than before.

Last year there was an opportunity for the Federal Court to provide more clarity on the application of s 190B. Instead, what applicants need to do to pass the test is more ambiguous and less settled than before.

In August 2007, the Federal Court handed down its decision in *Gudjala People 2 v Native Title Registrar*[45] (the Gudjala decision), which concerned an application for review of a decision not to accept an application for registration.[46] The case was dismissed, but in handing down the decision Justice Dowsett set out detailed requirements for what was necessary to pass the registration test. Many of these requirements appear to be significantly more stringent than the requirements were previously thought to be.

For example, Justice Dowsett held that in order to meet the requirement in section 190B(5)(a) of the Native Title Act[47], it is not sufficient to show that all members of the claim group are descended from people who had an association with the claim area at the time of European settlement, and that some members of the claim group are presently associated with the claim area. He considered that the application must address the history of the association since European settlement, and must provide evidence that the claim group as a whole, not just some of its members, are presently associated with the area.[48]

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43 B Wyatt, CEO, Goldfields Land and Sea Council Aboriginal Corporation, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 4 September 2008.

44 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), p 53.

45 *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167.

46 See s190D(2) of the *Native Title Act 1993*.

47 Section 190B(5)(a) requires that claimants assert that the claim group 'have, and the predecessors of those persons had, an association with the area'.

48 *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167, 51-52.

In April 2008, the National Native Title Tribunal released a guide to understanding the registration test.[49] It was designed 'to assist in preparing a new application for a determination of native title (a claimant application), or amending an existing application'.[50] It appears to follow the more stringent requirements outlined in the Gudjala decision.

However, in August 2008 the Full Federal Court allowed an appeal from the Gudjula first instance decision, and the matter was remitted to the primary judge.[51] One of the reasons for allowing the appeal was that Justice Dowsett 'applied to his consideration of the application a more onerous standard than the [Native Title Act] requires'.[52]

The Full Federal Court explained:

> …it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim.
>
> Turning to the specifics of this case, we think there are observations of the primary judge in his reasons which suggest that his Honour approached the material before the Registrar on the basis that it should be evaluated as if it was evidence furnished in support of the claim. If, in truth, this was the approach his Honour adopted, then it involved error...[53]

In response to this decision, the NNTT is currently preparing a new guide to understanding the registration test.

However in the meantime, there is still – if not more – uncertainty about what is required for an application to pass the registration test, and yet the consequences of not passing the test are now even more significant. It is imperative that greater clarity and consistency in registration testing is achieved as soon as possible.

3. Changes to native title representative bodies

The 2007 changes also affected the bodies that represent Aboriginal and Torres Strait Islander groups to enable them to gain protection and recognition of their native title rights. The changes affected NTRBs' recognition, their areas, the bodies eligible to be NTRBs, their governance, reporting, and funding.[54]

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49 National Native Title Tribunal, *Native title claimant applications: A guide to understanding the requirements of the registration test*, p 5. At: http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Publications%20particular%20to%20business%20streams/Native%20title%20claimant%20applications%20April%202008.pdf (viewed 17 September 2008).

50 National Native Title Tribunal, *Native title claimant applications: A guide to understanding the requirements of the registration test*, p 5. At: http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Publications%20particular%20to%20business%20streams/Native%20title%20claimant%20applications%20April%202008.pdf (viewed 17 September 2008).

51 *Gudjala People 2 v Native Title Registrar* [2008] FCAFC 157.

52 *Gudjala People 2 v Native Title Registrar* [2008] FCAFC 157, 7 (French, Moore, Lindgren JJ).

53 *Gudjala People 2 v Native Title Registrar* [2008] FCAFC 157, 92-93 (French, Moore, Lindgren JJ).

54 See chapter 3 of T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008),

3.1 Recognition periods

The 2007 changes introduced fixed term recognition periods for NTRBs of between one and six years. In the *Native Title Report 2007,* I expressed a number of concerns about the changes including the amount of ministerial discretion in recognising these bodies, the additional administrative burdens placed on them, the uncertain position that bodies with short recognition periods are put in, and the preclusion of judicial review for the decision.[55]

The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) considers that this change:

> has already had a positive impact on service delivery by NTRBs. NTRBs are much more conscious of the need to perform efficiently and effectively as a result of this change, and are very much aware that their performance will be subject to detailed assessment as they approach the end of their recognition period.[56]

Unfortunately, FaHCSIA did not elaborate on exactly how there has been a positive impact on service delivery, and how this might have affected the Aboriginal and Torres Strait Islander people that the bodies are established to represent.

The changes also allow the Minister to withdraw recognition of an NTRB if he or she is satisfied that the body is not satisfactorily performing its functions or if there are serious or repeated irregularities in the financial affairs of the body.[57] FaHCSIA reported that the Minister has not used this power since the changes were implemented.[58]

The views of NTRBs on the impact the changes to recognition periods have had on them differs. The Goldfields Land and Sea Council (GLSC) in Western Australia, which received recognition for three years, said that this time frame didn't allow for significant forward and strategic planning in the management of their claims.[59] Similarly, Queensland South Native Title Services considers:

> The whole idea of one year funding or two year funding is ridiculous … with our amalgamation, we have a larger area to look at, if one of the arguments is to attract and retain professional staff, it's very very difficult to do that when you are tied to a one year funding cycle, sure there can be comfort letters to creditors and comments made to employees, but at the end of the day, we have a very large program to role out with the surety of only one year funding.[60]

55 Note, the recognition periods were announced in June 2007, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), pp 70-78.

56 G Roche, Manager, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.

57 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Australian Human Rights Commission (2008), p 75.

58 G Roche, Manager, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.

59 B Wyatt, CEO, Goldfields Land and Sea Council Aboriginal Corporation, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 4 September 2008.

60 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008.

On the other hand, the North Queensland Land Council (NQLC), which received a six year recognition period, said that the changes to the recognition periods have had a 'positive impact on the NQLC'. They consider that the triennial funding allocation allows for better forward planning, and is an improvement over annual funding submissions, giving them greater certainty than the previous system.[61]

3.2 Operation areas

The 2007 changes also included amendments that allow the Minister to extend or vary the area covered by a representative body. Significant changes to representative body areas were made in Queensland over the year, and came into effect on 1 July 2008.[62]

Specifically, the Gurang Land Council and the Mount Isa region of the Carpentaria Land Council have amalgamated with the Queensland South Native Title Services. The Central Queensland Land Council has amalgamated with the NQLC.

These considerable changes have consumed many of the Queensland representative bodies' resources and capacity throughout the year. It has diverted the bodies' efforts away from progressing native title claims, and undermined their ability to represent their Indigenous constituents while they deal with significant change in an under resourced environment.

The NQLC outlined the process undertaken in its amalgamation with Central Queensland Land Council. In the process, a number of problems were encountered. NQLC considers that there was a:

> …lack of a coherent forward strategy by FaHCSIA in their rolling out of the Minister's decisions in this regard. They have been reactive about responding to challenges that have occurred during the realignment of boundary process rather than anticipating potential blockages and having strategies in place to deal with them.[63]

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61 I Kuch, Transition Manager, North Queensland Land Council, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 25 August 2008. On the 7 September 2005, the former Attorney-General issued a media release outlining the 2007 changes (see Attorney-General, 'Practical reforms to deliver better outcomes in native title', (Media Release, 7 September 2005)). However, the changes to provide NTRBs with multi-year funding were not formally announced until the 23 November 2005 when a joint media release was issued by the former Attorney-General and former Minister for Indigenous Affairs (see Attorney-General and the Minster for Immigration, Multicultural and Indigenous Affairs, 'Delivering better outcomes in native title – update on the government's plan for practical reform', (Media Release, 23 November 2005)): E McDermott, Department of Families, Housing, Community Services and Indigenous Affairs, *Email to Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008,* 23 December 2008.

62 On 7 June 2007, the former Minister for Families, Community Services and Indigenous Affairs announced changes to NTRBs in Queensland and noted that certain NTRBs were in discussion about providing a coordinated approach (see Minister for Families, Community Services and Indigenous Affairs, 'Reforms to Native Title Representative Bodies to benefit Indigenous Australians' (Media Release, 7 June 2007). At: http://www.facsia.gov.au/Internet/Minister3.nsf/content/ntrb_7jun07.htm (viewed December 2008)). The Department of Families, Housing, Community Services and Indigenous Affairs informs me that a number of permutations considered before the amalgamations were finalised in 2008. The eventual outcome, which differs from that envisaged in the former Minister's Media Release, was the result of negotiations amongst the NTRBs themselves. (E McDermott, Department of Families, Housing, Community Services and Indigenous Affairs, *Email to Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008,* 23 December 2008).

63 I Kuch, Transition Manager, North Queensland Land Council, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 25 August 2008.

NQLC informs me that FaHCSIA:

> …declared to all that there would be 'business as usual' at land councils affected by the boundary changes in Queensland. This is clearly nonsense as both organisations normal activities were interrupted leading up to the realignment on the 1st July 2008.64

Queensland South Native Title Services, which is the body that now represents an area previously covered by three NTRBs, relayed similar concerns about how the amalgamations were undertaken and the impact that it will have on claims:

> ...it is a very large area with entrenched issues, different issues, large land mass, lots of underlying interests, lots of overlaps, to think that within a very short time frame you could actually effectively amalgamate or expand the Queensland South boundaries and just flick the switch on the 1st July and everything would be hunky dorey is an exercise in naivety… FaHCSIA knew what their program was, but they didn't engage change agents on the ground… it was very difficult to do with limited money and resources. The actual change process, the timing, and the resources weren't really thought through.[65]

FaHCSIA provided some additional funding for one financial year to assist with the transition, but there has been no general increase in the annual budget. Yet both organisations had to perform significant additional activities, which have impacted directly on the Indigenous people they represent. For example, the bodies have to get across all the claims, from regions they previously didn't cover, quickly enough to address court orders and ensure the claims aren't struck out by the Court for a failure to comply with the orders.

In addition, the bodies have had to undertake consultations with members of all the claims about future arrangements requiring extensive, and expensive, community consultations and meetings, which the additional funding was hardly sufficient to cover.[66]

Consequently, the amalgamations have consumed a significant proportion of the already scant resources available to representative bodies and that is impacting, and will continue to impact, upon the native title system across Queensland. In the end, the people who will bear the cost of the amalgamations are native title claimants, whose claims have potentially been jeopardised or put on hold, once again delaying recognition of their rights in the land.

I recommend the Attorney-General closely monitor the impact of the amalgamations on the operation of the relevant NTRBs, and ensure that FaHCSIA is providing the direction, assistance and resources they need to transition to larger bodies.

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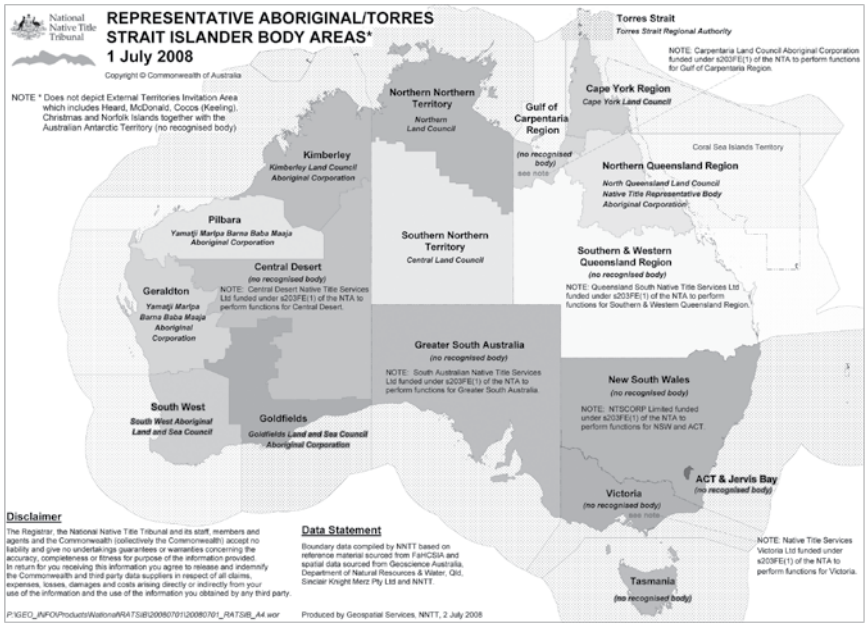
64 I Kuch, Transition Manager, North Queensland Land Council, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 25 August 2008.

65 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008.

66 I Kuch, Transition Manager, North Queensland Land Council, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 25 August 2008.

Map 1: Representative Aboriginal/Torres Strait Islander Body Areas 1 July 2008



4. Changes to respondent funding

In 2007, changes were made to the respondent funding scheme. Under this scheme, the Attorney-General can grant legal or financial assistance to certain non-claimant parties to enable them to participate in native title proceedings.

The number of parties to any legal proceeding will necessarily increase the complexity, length, and expense of proceedings for all parties involved. However in native title proceedings, various parties who do not have a legal interest at risk in the proceeding can have standing to participate. The numbers of this type of respondent can reach over one hundred for one claim, seriously hampering its progress. Sometimes, the parties' participation is funded by the Attorney-General under the respondent funding scheme.

The 2007 changes were welcome, and have consequently been well received by various stakeholders. Both NTRBs and some governments have indicated that one of the major benefits of the 2007 changes were those made to the respondent funding scheme:[67]

> …[T]he provisions there were to allow a bit more rigour, and that's a good thing. When you have a plethora of respondent parties, if you're going to get a consent determination, then you have to get the consent of everyone. If there's a proliferation of parties because of a relaxed Federal Court Rule allowing anyone with an interest to become a respondent, and then there's eligibility to respondent funding, it behoves an organisation not to actually mediate a negotiated outcome, it almost perpetuates itself

67 South Australia Native Title Services, *Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008*, 18 July 2008.

> to ensure there is no mediated outcome. So I think that was a good thing, but again, has there been an overall reduction in respondent funding, has it reduced the number of parties, has it made it a disincentive to be a party, I don't know.[68]

The expenditure on the scheme has indeed been reduced, implying that the Attorney-General is considering the impact of these parties on native title claimants and proceedings. Expenditure for the respondent funding scheme fell from $5.01 million in 2006-07 to $4.25 million in 2007-08. This reduction in spending has been attributed to the 2007 changes which encourage agreement making and 'considerably limit assistance available to non-government respondents for court proceedings'.[69]

However, many of the concerns I raised in the *Native Title Report 2007* have not been addressed or responded to by the Attorney-General. In summary, I am concerned that there is no information about how the scheme has been evaluated and no specific effort by the Attorney-General to determine how the funded parties impact on the proceedings or the native title rights and interests of Indigenous peoples. The Attorney-General has indicated to me that his assessment of the conduct of parties who are funded under this scheme, 'to a large degree' follows the lead of the Federal Court, NNTT and other parties.[70] In other words, the impact of these parties on the proceedings is not known. Perpetuating my concern is the fact that the details of which parties are being funded is confidential. Consequently, no one is able to hold the government accountable for how these public funds are being spent.

I encourage the Attorney-General to consider the recommendations I made in chapter 4 of the *Native Title Report 2007* to further improve the respondent funding scheme.

5. Changes to prescribed bodies corporate

Prescribed Bodies Corporate (PBCs) are essential to native title. They are the bodies that are established to hold native title on trust or as an agent for the native title holders. Their primary role is to protect and manage determined native title in accordance with the native title holders' wishes and provide a legal entity through which the native title holders can conduct business with others who are interested in accessing their land or waters. They are integral to the system and to achieving the broader outcomes from native title that communities and governments want to see:

> PBCs are critical organisations that are going to have to deliver during outcomes from the native title process for native title holders and the wider Australian community, and the Government needs to fully understand and properly support this.[71]

Some of the changes made to the native title system in 2007 were intended to address a number of the problems PBCs face in order to operate. However, the changes are not sufficient to support the effective operation of PBCs. It is positive that the government has acknowledged the significance of these bodies and has

68 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008.

69 T Koch, Principal Legal Officer, Attorney-General's Department, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 28 October 2008.

70 R McClelland, Attorney-General, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.

71 A Sweeney, *Practical and Strategic Considerations for PBCs* (Conference Paper for Native Title Conference, Perth, 3-5 June 2008). At: http://ntru.aiatsis.gov.au/conf2008/ntc08papers/SweeneyA.pdf (viewed September 2008).

committed to funding them appropriately on many occasions.[72] I look forward to seeing how PBCs will be funded as an outcome from the government's review of funding of the native title system that will feed into the next federal Budget.

However, in the meantime, the role of PBCs is in jeopardy because of the poor level of support available for them and the role that they are expected to play in the community. Pila Nguru, a PBC based in the Tjuntjuntjara Community in Western Australia, highlights the difficult role that PBCs play:

> Walking the line between upholding traditional responsibilities and making moves to secure a future for remote community can be tricky…I cannot see it is in anybody's interests to have PBCs collapse but I cannot equally see how they can continue without at least a skeletal funding base.[73]

5.1 Financial support

As I have indicated, one of the most pressing concerns of PBCs is support for their operation; both financial and non-financial. The necessity of federal support for PBCs is strongly endorsed by state and territory governments.[74]

The 2007 changes allowed for some additional mechanisms through which PBCs could gain support from the federal government, either directly through FaHCSIA or through NTRBs.[75] However, FaHCSIA have stated that:

> In terms of the 2007 policy change to permit the provision of funding support for PBCs beyond their initial establishment phase, we have been limited to the extent to which we have been able to assist PBCs by the level of resources available to the program. The high level of demand for resources by NTRBs has made it difficult to secure funds for PBC support within existing funding…[76]

At the end of June 2008, there were 57 Registered PBCs (known as Registered Native Title Bodies Corporate) on the National Native Title Register. A further 12 determinations of native title are awaiting a determination of a Prescribed Body Corporate to become the Registered Native Title Body Corporate.[77] Of these, only ten received funding from the federal government, to a cumulative total of $380,000 which was sourced from funds allocated to NTRBs.[78]

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72 See Attorney-General, *Speech,* (Speech delivered at the Negotiating Native Title Forum Brisbane, 29 February 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_29February2008-NegotiatingNativeTitleForum (viewed March 2008); Minister for Families, Housing, Community Services and Indigenous Affairs, *Beyond Mabo: Native title and closing the gap,* (2008 Mabo Lecture, Townsville, 21 May 2008). At: http://www.facs.gov.au/internet/jennymacklin.nsf/print/beyond_mabo_21may08.htm (viewed May 2008); Australian Labor Party, *Australian Labor Party National Platform and Constitution,* 2007 At: http://www.alp.org.au/platform/ (viewed May 2008).

73 P Twigg, Pila Nguru Aboriginal Corporation, *Email to the Native Title Unit at the Australian Human Rights Commission for the Native Title Report 2008*, 9 August 2008.

74 See below.

75 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Australian Human Rights Commission (2008), chapter 5 for more information on the changes and my concerns.

76 G Roche, Manager, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.

77 A Gordon, Principal Registry, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 30 June 2008.

78 G Roche, Manager, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.

Although the establishment of a PBC is a requirement of the Native Title Act once a determination is made, the federal government has stated that it should 'not necessarily be considered a first stop for funding. Funding should also be sought as appropriate from state and territory governments and agencies, industry and other relevant Australian Government departments and agencies.'[79]

With limited government money available, funding is becoming an increasingly urgent concern. In addition, as the native title system progresses, the number of PBCs in the country is rising, and the focus of native title policy is to some extent moving from interpretation of the Native Title Act to implementation of the rights granted. However, implementation and realisation of native title rights are stifled, and can even be extinguished and lost when the PBC cannot operate effectively.

So where can PBCs obtain funding? Because of the nature of native title rights and interests, PBCs can very rarely use native title to make a profit which would support their sustainability. However, where a claim group has managed to negotiate monetary or other benefits through an Indigenous Land Use Agreement or broader settlement, this may include provision for funding the PBC. But this funding typically comes from private interests, which is not consistent across Australia, or is an optional extra from state or territory governments.[80] As a result, there is nothing at all in the system which guarantees PBCs' viability, and therefore there is nothing in the system which guarantees that hard won recognition of native title rights will be effective into the future.

I recommend that the Attorney-General significantly increase financial support for PBCs as a separate funding base from that allocated for NTRBs. At a minimum, PBCs should be allocated a specific funding grant for the first year of the PBC's operation, to ensure it is established in accordance with the significant regulations that apply to them.

A related issue that has been raised with me is that some native title claimants are forming corporations through which they utilise the procedural rights afforded under the Native Title Act, and carry out other dealings with the land before a native title determination has been made. As these bodies are not yet PBCs under the law (as there is no determination of native title), there is no funding available through the Commonwealth for these corporations at all. Yet they are also essential to the system's operation and the protection of native title rights and interests prior to a determination. A determination itself will take many years if it is even sought. However, if a broader settlement is achieved (and the focus of significant stakeholders is shifting in this direction), a native title determination may never be made, and these corporations will have immense difficulty surviving and protecting their rights. Currently, many of these organisations are operating via the goodwill and pooled resources of a claim group, while the individuals who run it are stretched to their limit, simultaneously continuing with other paid employment and fulfilling their family and community commitments.

79 Australian Government, Department of Families, Community Services and Indigenous Affairs, *Native Title Program: Guidelines for Support of Prescribed Bodies Corporate (PBCs)* (2007). At: http://ntru.aiatsis.gov.au/major_projects/pbc_guidelines.PDF (viewed December 2008). PBCs can apply to FaHCSIA for funding for their administrative costs to the total of $100,000 per year.

80 AIATSIS and the NNTT have both been working to identify alternative sources of funding assistance for PBCs. See www.aiatis.gov.au.

Additionally, both the Attorney-General and the Minister for Indigenous Affairs have emphasised the need for native title agreements to result in broader outcomes for Indigenous communities. It is PBCs that will be the organisations that must implement these agreements and ensure those outcomes are attained. They are the vehicle that will be used to achieve a range of social, cultural, political and economic aspirations.[81]

When the government considers the level of support it will provide for PBCs, it should consider the broader roles that PBCs play in achieving and protecting Indigenous peoples' rights to their land, and attaining broader benefits for communities.

5.2 Fee for service

One of the 2007 changes did provide a potential funding source for PBCs by allowing them to charge a third party to a negotiation for costs and disbursements reasonably incurred in performing statutory functions. However, the provisions only commenced on 1 July 2008, and the PBCs that I received feedback from did not comment on whether they intend on using the provisions. FaHCSIA is also uncertain about whether the new power has been utilised or how much impact it will have:

> The capacity to charge fees for costs incurred in undertaking negotiation of agreements etc … is likely to have had some impact but we do not have sufficient information on the extent to which it has been applied in practice.[82]

I raised concerns about how this scheme will operate in the *Native Title Report 2007,*[83] and I encourage the Attorney-General to monitor the new powers to identify how and to what extent they assist or hinder PBCs to obtain funds.

5.3 PBC Regulations

A number of the 2007 changes affecting PBCs have not been implemented. Many of the changes that were announced require the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (the PBC regulations) to be amended before they have any effect. These amendments relate to a host of changes to PBCs that were decided on, including PBC consultation requirements, standing authorisations, default PBCs, replacement PBCs and a raft of other issues.[84]

In the *Native Title Report 2007,* I raised a number of issues that should be considered when drafting these amendments. I recommend the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs consider these while they draft the regulations, and consult widely with PBCs, NTRBs and Indigenous people once a draft is available.

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81 A Sweeney, *Practical and Strategic Considerations for PBCs* (Conference Paper for Native Title Conference, Perth, 3-5 June 2008). At: http://ntru.aiatsis.gov.au/conf2008/ntc08papers/SweeneyA.pdf (viewed August 2008).

82 G Roche, Manager, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.

83 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Australian Human Rights Commission (2008), pp 100-101.

84 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Australian Human Rights Commission (2008), chapter 5.

6. The CATSI Act 2006

The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (the CATSI Act) came into effect on 1 July 2007. It provides for the incorporation and regulation of Aboriginal and Torres Strait Islander Corporations, and significantly changes the law that previously governed Indigenous corporations. The CATSI Act affects the native title system because PBCs must be incorporated under it.[85] Once a PBC is incorporated under this Act, it is registered on the National Native Title Registrar as a Registered Native Title Body Corporate (RNTBC[86]).

In the *Native Title Report 2007*, I summarised the main changes to Indigenous corporations through the enactment of the CATSI Act, and my concerns about the impact it will have on the human rights of Indigenous Australians.[87] I raised the concern that PBCs will not receive the support and resources they need in order to comply with the CATSI Act and that, as a result, they risk losing control of their native title rights and interests, or jeopardising these interests in other ways.

Because corporations have up until 30 June 2009 to transition their constitutions to be in line with the new Act, the CATSI Act has not yet been fully implemented.

Consequently, the corporate regulator, the Office of the Registrar of Indigenous Corporations (ORIC), has not assessed the impact that the CATSI Act has had on Indigenous corporations. The Registrar has informed me that '[i]f an assessment of the impact of the CATSI Act is to be undertaken, it will be undertaken after 30 June 2009. What any assessment would include has not yet been decided'.[88]

The Registrar also noted that:

> Feedback on the CATSI Act has been far-reaching and both positive and negative. There has been no formal assessment of feedback on the CATSI Act to date and therefore I cannot comment on RNTBCs' views in this context.[89]

In the meantime, ORIC has undertaken a number of initiatives such as producing guidelines, pre-populating some of the reports that PBCs need to submit to ORIC in order to comply with the reporting requirements, and providing training.[90]

ORIC has reported that the number of registered PBCs that are not complying with the reporting and other regulatory requirements has fallen from 49 percent in October 2007, to 14.8 percent in October 2008. The Registrar considers that this is probably

85 Most Indigenous corporations can chose between incorporating under the CATSI Act or the Corporations Act 2000 (Cth). However, for a PBC to become a Registered Native Title Body Corporate, they must incorporate under the CATSI Act.

86 Although PBCs that are incorporated under the CATSI Act are then referred to as Registered Native Title Body Corporate, for ease of reference, I will continue to refer to them as PBCs in this section of this chapter.

87 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), chapter 6.

88 A Bevan, Registrar of Indigenous Corporations, Office of the Registrar of Indigenous Corporations, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 10 October 2008.

89 A Bevan, Registrar of Indigenous Corporations, Office of the Registrar of Indigenous Corporations, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 10 October 2008.

90 A Bevan, Registrar of Indigenous Corporations, Office of the Registrar of Indigenous Corporations, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 10 October 2008.

due to his office's regular contact with NTRBs, and the NTRBs' and ORIC's support for registered PBCs (including training).[91]

Encouragingly, the Registrar has also established a planning and research team which will research non-compliance and why Indigenous corporations go into administration. I look forward to reading the results and anticipate that they will be able to be utilised effectively by the Registrar and the government to benefit Indigenous corporations and assist them to operate independently and capably.

However, a number of factors remain a concern.

I have received feedback that because the CATSI Act appears to have been drafted largely with PBCs considered as just another form of corporation, many of the regulations are not consistent with or complementary to the native title system. This creates tension and confusion among PBC members:

> Certainly I've noticed a big change in the compliance aspects of registration… the CATSI rule book is very complex particularly in the context of native title… you have to try and combine the two, and then you have to – other than explain it to people who speak English as a second language – you then have to have it all amended in accordance with your existing constitution and so on, it's actually very resource intense. And there's no funding specifically earmarked for this as far as I can tell… I think administratively the transition under the CATSI Act has really increased the burden for people that don't have independent assistance. I think those groups are going to really struggle to deal with it all because it really is very complex.
>
> The whole problem with ORIC, is that the whole notion of PBCs and native title entities has been secondary, and almost an afterthought. The whole notion of contractual membership where you have to get each member to sign something requesting to become a member, and then having the Board of Directors say yes or no, seems to be completely out of kilter with the notion of native title groups; you're either a member or you're not in terms of the rules that apply under traditional law and custom. That's something that's been completely ignored or overlooked.[92]

I am also concerned that while the law is still being implemented and the initial impacts are uncertain and mixed, there is no reliable data on why registered PBCs have been non-compliant with the regulatory requirements to date, whilst at the same time there is widespread recognition that these bodies are severely under-funded. Because of this, I recommend that the Registrar and FaHCSIA together undertake a review of the impact that the CATSI Act has on Indigenous corporations once implementation of the Act is complete. In particular, the review should examine the impact of the CATSI Act on PBCs' ability to protect and utilise their native title rights and interests.

Finally, in order to be able to comply with the regulatory requirements, PBCs need to have access to funding, resources and skills. The funding available to them from the government however is, at least in part, dependent on their capacity to govern themselves. Yet this inter-dependence between funding and governance has not been sufficiently recognised by government. The Registrar of Indigenous Corporations informed me that ORIC 'does not have any role or influence in determining FaHCSIA

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91 A Bevan, Registrar of Indigenous Corporations, Office of the Registrar of Indigenous Corporations, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 10 October 2008.

92 T Wooley, public officer, De Rose Hill – Ilpalka Aboriginal Corporation and Yankunytjatjara Native Title Aboriginal Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 8 September 2008.

funding for RNTBCs'[93]. This is yet another example of government departments acting in silos, and I recommend that FaHCSIA work cooperatively with ORIC to ensure the funding of registered PBCs is consistent with the aim of building the capacity of these bodies to govern themselves and operate independently, securing the future and utilising their native title rights and interests.

7. Improving native title – as simple as an attitude change?

It is evident that the 2007 changes have not yet had any significant impact on the native title system. Perhaps it is too early to tell, but a broad range of stakeholders support my concern that the changes will not deliver the substantial changes that the system needs. It is doubtful whether the changes will be of any perceptible benefit to the Traditional Owners of the land, and it is unlikely the net result will be an increased protection of the human rights of Aboriginal and Torres Strait Islander peoples.

It is disappointing that the government spent a number of years, multiple reviews and countless resources to simply tinker with a system that is in dire need of reform. I hope that this trend does not continue, and that the government now concentrates on actions that will fulfil the commitments it has made over recent months to improve the system.

As I outlined in chapter 1 of this Report, while the government has recognised some of the fundamental flaws with the outcomes of native title and has committed to finding new solutions, the government's main focus will be altering the attitude of parties involved in native title:

> I share the concerns expressed in the [*Native Title Report 2007*] about the outcomes being obtained through the native title system. The heart of the Native Title Act 1993 is the principle that the recognition of Indigenous people's ongoing connection with their land should occur through negotiation and mediation, not litigation, wherever possible. I have actively encouraged all parties to take a less technical approach to native title, and to use the opportunities presented by native title claims to facilitate the reconciliation process and to negotiate better and broader outcomes for Indigenous people.
>
> …
>
> I believe that the key to achieving better outcomes lies in all parties changing their behaviour and engaging more flexibly, to achieve and build upon recognition of the ongoing relationship of Indigenous people to the land.[94]

Although there is benefit in this, I am concerned that this will not be sufficient, and that this policy needs to be complemented by changes to the underlying system if the outcomes the government would like to see are to be attained.

Firstly, 'attitudes' to policy are discretionary and dependent on the elected government for each jurisdiction. It does not create certainty, predictability or equity in native title outcomes across Australia. If a government changes, there is no guarantee that the 'flexible' approach will be maintained. The markedly different outcome from a simple change in approach is seen in chapter 3 of this Report, where the Northern Territory government changed during a compulsory acquisition case.

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93 A Bevan, Registrar of Indigenous Corporations, Office of the Registrar of Indigenous Corporations, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 10 October 2008.

94 R McClelland, Attorney-General, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.

Improvements to the system need to be enshrined in legislation to ensure that the rights of Indigenous peoples are always protected, and not swept aside when it's convenient.

Secondly, while supporting the flexible and less technical approach to native title, the Northern Territory (NT) Government has already warned:

> [T]he Australian Government's proposal for broader settlements and regional initiatives using the native title process may be constrained by the legal requirements of the Native Title Act 1993 (Cth) and court processes.[95]

That is, stakeholders consider that there are considerable constraints within the Native Title Act that may prevent them from making significant progress in improving the native title outcomes that are agreed.[96]

Thirdly, I am concerned about the breadth of change that can be achieved when nearly all of the state and territory governments have indicated to me that they consider that they have already been acting in a flexible manner for years.[97] Consequently, they all naturally support the federal Attorney-General's approach, but this begs the question; how much more flexible will these governments be? For example South Australia's Attorney-General indicated:[98]

> South Australia supports the Commonwealth's new emphasis on achieving broader settlements through less technical and more flexible approaches and has been implementing that approach for nine years.

Because of these weaknesses, I recommend the government consider further legislative and policy changes that have been discussed in this, and previous, native title reports. In addition, the government could consider tying the announced funding to state and territory governments for native title compensation payments, to state and territory behaviour in native title agreement making and the settlement of broader agreements.[99]

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95 M Scrymgour, Northern Territory Minister for Indigenous Policy, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

96 Various native title reports, including this Report, have discussed the barriers in the native title system which may prevent broader outcomes being achieved through the system. Some of these relate to procedures in the Act, or legal interpretation of provisions. Others are related to government policy and funding. Some examples include the inability of the Act to recognise commercial rights; the pressure of court timing and processes on the parties when they are trying to reach an agreement which is broader than just a native title outcome; the funding, resourcing and capacity of PBCs and NTRBs to develop, negotiate and implement agreements.

97 J McNamara, Executive Director, Indigenous Services, QLD Department of Natural Resources and Water, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008; M Atkinson, Attorney-General of South Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008; T Kelly, NSW Minister for Lands, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 1 September 2008; R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008; J Stanhope, ACT Minister for Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 9 September 2008.

98 M Atkinson, Attorney-General of South Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

99 Attorney-General, 'Native Title Ministers' Meeting Communiqué', (Media release, 18 July 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_ThirdQuarter_18July-Communique-NativeTitleMinistersMeeting (viewed 21 July 2008). The Communiqué stated that the federal, state and territory governments will reach an agreement by 30 June 2009 on the federal funding to states and territories for native title compensation.

7.1 Further suggestions for improvement

Throughout this Report, and previous native title reports, I have made a number of recommendations for improvements that can be made to the native title system. In addition to these, government agencies, NTRBs and PBCs have offered me their own suggestions about how the system could be improved. Many of these are consistent with recommendations in native title reports. I recommend that the Attorney-General consider these suggestions.

(a) Federal Court's power over native title proceedings

Both Victoria's and South Australia's Attorneys-General have indicated a strong preference for the option of 'long-term adjournments' of native title claims at the request of all parties:

> One area of reform Victoria believes is worthy of further exploration is the potential for the State and native title parties to approach the Court and obtain a 'suspension' or 'long-term adjournment' of a claim for a period of time to enable them to negotiate ancillary outcomes … The problem sometimes arises where these broader outcomes are not being realised because of pressure from the Court to resolve the native title question more quickly. This can lead to missed opportunities for traditional owners, or ancillary agreements that are difficult to implement because the policy development behind them was rushed. Preparing for regular court appearances can divert resources from making progress on negotiating broader agreements.[100]

Similarly, South Australia's Attorney-General commented:

> …there must be scope to exclude the Federal Court and the NNTT from involvement where all parties agree that they want to proceed themselves…the threat of having a trial listed by the Court can also distract parties and divert resources from negotiations. This is especially so if the parties are trying to negotiate settlements that include benefits beyond a determination of native title. Those negotiations necessarily take more time while the Court is, generally, only interested in native-title results.[101]

I see the merit in this approach, and support such a proposal if both parties consent to an adjournment.

(b) Funding and support for Native Title Representative Bodies and Prescribed Bodies Corporate

Almost every organisation in the native title system has expressed serious concern about the impact that under-resourcing of NTRBs has on native title claims. Each state and territory government expressed this concern to me.

Victoria's Attorney-General identified the need for 'more robust and secure funding for NTRBs, including native title service providers…organisational capacity, expertise and good governance of these bodies… is critical to the functioning of the native title system as a whole'. He also stated that the Victorian Government would:

> welcome a greater focus on enhancing capacity with respect to the statutory dispute resolution functions of these bodies, in relation to disputes between their constituents.[102]

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100 R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

101 M Atkinson, Attorney-General of South Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

102 R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

This is a significant problem for Indigenous peoples. Approximately half of the complaints that FaHCSIA receives about the native title system are about authorisation or intra-Indigenous disputes.[103]

Significant work has already been done on approaches to Indigenous decision-making and dispute management by the Indigenous Facilitation and Mediation Project (IFaMP).[104] The project, which was undertaken by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), made a number of findings and recommendations on agreement making through non-adversarial approaches, some of which were specific recommendations to improve the native title system. The recommendations included funding and establishing an accredited national network of Indigenous process experts including mediators, facilitators and negotiators; the incorporation of Indigenous expertise into native title mediation processes and support for the development of Indigenous expertise and the development of specific native title national standards and/ or a code of ethical conduct which addresses the roles and responsibilities of all parties.[105] I encourage the Attorney-General to consider the recommendations made in the final report of the Project.

Victoria's Attorney-General also suggested that there should be greater support for PBCs to carry out the substantial responsibilities that the Federal legislation imposes on them. He has suggested that a program similar to the Aurora program be funded for building the capacity of PBCs.[106] AIATSIS already has a project underway which is aimed at supporting PBCs to hold and manage their country 'through research and participatory planning to support capacity-building in effective decision making and conflict resolution processes, frameworks, negotiation skills, agreement making, strategic planning and governance'.[107] This project could be further supported by government.

Similarly NSW's Minister for Lands considers that the Commonwealth Government:

> …should examine further Commonwealth measures of support (both financial and non-financial) for native title representative bodies and prescribed bodies corporate.[108]

I have discussed the issue of funding in chapter 1 of this Report and earlier in this chapter.

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103 G Roche, Manager, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008; see T Bauman, *Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation*, Report No. 6 (2006). At: http://ntru.aiatsis.gov.au/ifamp/research/pdfs/ifamp_final.pdf (viewed December 2008).

104 See T Bauman, *Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation*, Report No. 6 (2006). At: http://ntru.aiatsis.gov.au/ifamp/research/pdfs/ifamp_final.pdf (viewed December 2008).

105 See T Bauman, *Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation*, Report No. 6 (2006). At: http://ntru.aiatsis.gov.au/ifamp/research/pdfs/ifamp_final.pdf (viewed December 2008).

106 R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

107 See Australian Institute of Aboriginal and Torres Strait Islander Studies, *Major Projects*, http://ntru.aiatsis.gov.au/major_projects/pbc_rntbc.html (viewed December 2008).

108 T Kelly, NSW Minister for Lands, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 1 September 2008.

(c) Extinguishment of native title

The Queensland Department of Natural Resources and Water would like the Commonwealth Attorney-General to consider the necessity of the permanency of extinguishment of native title, and whether the principle of non-extinguishment can be extended:

> The benefits of extending the operation of section 47 suite of the NTA which sees the disregarding of the extinguishment of native title occurring in certain circumstances.[109]

Justice Wilcox also thinks that the Attorney-General should re-consider the permanency of extinguishment:

> One change that could be made, and it's just a great shame that it's necessary. The current doctrine is that if there's ever been [extinguishment] by the Crown, whether a grant of freehold or a grant of lease, that terminates native title, even if the land is subsequently reverted to the Crown…Now why do we have to stick to that rule?… I think that's an area that can usefully be looked at.[110]

I agree that this approach would be beneficial, and would increase the possible recognition of native title, going some way to mitigating the impact of colonisation on Indigenous peoples' rights and interests. It would also be consistent with the Native Title Act's preamble that states: 'where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.'[111]

(d) Recognition of traditional ownership outside the native title system

The Native Title Act was intended to be just one of three complementary approaches to recognise, and provide some reparation for, the dispossession of Indigenous peoples' lands and waters on colonisation. The two other limbs were to be a social justice package and a land fund that would ensure that those Indigenous peoples who could not access native title would still be able to attain some form of justice for their lands being taken away.

It was in this context that the Native Title Act was drafted and passed by Parliament. However, the other two limbs did not eventuate in the form intended, and this abyss is one of the underlying reasons why the native title system is under the strain it is under today.

The social justice package never came to fruition. The new Rudd Government's Platform states that it will 'recognis[e] that a commitment was made to implement a package of social justice measures in response to the High Court's Mabo decision, and will honour this commitment'.[112] In an appendix to this Report I have summarised the main recommendations and proposals for a social justice package that were made at the time by the Aboriginal and Torres Strait Islander Commission and the former Aboriginal and Torres Strait Islander Social Justice Commissioner.[113]

The land fund commitment was realised through the Indigenous Land Corporation (ILC) which continues to operate today, but does not always provide an effective and accessible alternative form of land justice when native title is not available.

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109 J McNamara, Executive Director, Indigenous Services, QLD Department of Natural Resources and Water, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

110 M Wilcox, former Justice of the Federal Court of Australia, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 23 July 2008.

111 *Native Title Act 1993* (Cth), preamble.

112 Australian Labor Party, *Australian Labor Party National Platform and Constitution* (2007). At: www.alp.org.au/platform/, Chapter 13 (viewed July 2008).

113 See Appendix 3.

Consequently, it could not be said to fulfil Australia's commitments to land rights, nor fulfil the function it was intended to as was set out in the preamble to the Native Title Act, which states:

> It is also important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land.

(e) The Indigenous Land Corporation

The Native Title Act as passed in 1993 established a National Aboriginal and Torres Strait Islander Land Fund. However, a number of changes made since 1993 have meant that this fund, which is referred to now as the Land Account, is administered by the Indigenous Land Corporation (ILC).[114]

The Act which now provides the functions of the ILC is the *Aboriginal and Torres Strait Islander Act 2005* (Cth). The preamble to this Act also acknowledges the need for land justice for Australia's Indigenous peoples, but does not draw any connection to native title and the complementary role the Land Account was supposed to play:

> And whereas they have been progressively dispossessed of their lands and this dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal persons and Torres Strait Islanders concerning the use of their lands…

It is this Act which dictates the ILC's functions, which primarily relate to land acquisition and land management. The Act only mentions native title twice, but never draws on the integral relationship between the Land Account, the functions of the ILC, and native title.

Recently, I have received an increasing number of inquiries and concerns about the ILC and the role it is playing in the realisation of land rights and justice for Indigenous people. Many Aboriginal people and Torres Strait Islanders are confused about its role, its activities and the outcomes it is achieving. Indigenous people have indicated to me that they are concerned that the ILC does not focus enough on reparation for dispossession, but instead is concerned with economic gain.[115]

Perhaps the link between dispossession and the role of the fund in the achievement of land justice and the native title system should be considered further, and the link made more explicit and direct. The Queensland Department of Natural Resources and Water would support such an approach. It suggests that the Attorney-General should consider 'how to increase the role of the Indigenous Land Fund in the resolution of native title claims'.[116] I would support such a review and a consideration by government, in consultation with the community, of how the ILC's functions could better complement the native title system and contribute to the outcomes government would like to see.

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114 The ILC was established in 1995 by the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995*. This Act repealed Part 10 of the Native Title Act (which had established the National Aboriginal and Torres Strait Islander Land Fund), and amended the *Aboriginal and Torres Strait Islander Commission Act 1989* (ATSIC Act) by adding a new Part 4A, establishing the ILC as a Commonwealth Authority with land acquisition and land management functions. See the ILC website at: www.ilc.gov.au.

115 Many of these comments were informal comments made to me at the AIATSIS Native Title Conference 2008, held in Perth, June 2008.

116 J McNamara, Executive Director, Indigenous Services, QLD Department of Natural Resources and Water, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

In the meantime, the two other social justice limbs referred to in the preamble to the Native Title Act do not operate in the way originally intended. Because of these constraints, there has been unforeseen pressure on the native title system to deliver even though native title was never intended to be the panacea for dispossession in Australia:

> What we need to do is return to the preamble of the Act. The NTA was only considered to be a stepping stone to the realisation of Indigenous land aspirations. When you remove the other limbs, we all go scurrying towards the very thing that [Justice] Brennan said you're going to be in a world of pain to prove. To me, I think the preamble actually spells it out quite nicely. If you're going to be looking at these things you've got to look at it comprehensively and in that you don't need full blown connection. Right people, right country, and some mechanism to determine that.[117]

Recognising that native title is not producing land justice for the majority of Aboriginal peoples and Torres Strait Islanders, there is a discussion gathering momentum about how traditional ownership can be recognised short of a native title determination. After hearing a number of native title cases as a judge in the Federal Court, Justice Wilcox considers this:

> What [Traditional Owners] are wanting, what they're crying out for, is for the people who represent authority figures to them, and it's the government or the courts speaking on behalf of government, I suppose that's the way they would see it, to say this is who you are and we recognise who you are. Now for that reason, I would like to see added to the Native Title Act, some provision that allows the court, even if not granting native title, or recognising native title, to determine the particular group are the people whose ancestors were there at the time of settlement and that they've maintained continuity as a people even if they cant prove continuity from generation to generation of observing the law... I think until we recognise that the system that was seen in Mabo, which after all was a remote island, hardly impacted by white settlement, simply doesn't work for [most Indigenous people]. And it's going to be a source of great disappointment, even a feeling that they've been conned…Here's the government of the country and Parliament passing statutes which seem to promise so much and yet when the claim is brought they just can't get there and then they get nothing, not even recognition…[118]

Justice Wilcox has linked the difficulty of the legal hurdles required to be jumped for native title, with the gridlock the system is in today, and sees an alternative form of recognition as one way of dealing with this problem:

> What [Traditional Owners] are wanting I think more than anything is recognition and we could change that quite easily by just adding a new section to the Act… it wouldn't be as much satisfaction as actually winning a native title claim but it would go a long way to at least make an appeal that they are recognised as who they are.
>
> I just find it really difficult to live with the idea that people like the Yorta Yorta and Larrakia and Noongar people just get kicked out with just nothing, and there'll be more cases like that. One of the problems is, one of the reasons why the native title list is in such a static condition in the court is I believe that many of the claimants have been advised that the case will not succeed and go nowhere but they can't bring themselves, or persuade those whom they represent perhaps, to just say ok we give up, we abandon it, because they see that as a being a concession that they're not who they are and so we've got 500 cases waiting in the list and there's hardly any movement in the list.

117 K Smith, CEO, Qld South Native Title Services Ltd, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 19 September 2008.

118 M Wilcox, former Justice of the Federal Court of Australia, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 23 July 2008.

> I had a lot to do with the native title list and I just about went crazy trying to get cases up to the barrier and you couldn't and for a whole host of reasons, it wasn't justice but I think many of these cases they ought to be. Normally with any other litigation say, well this has been here for a long time and I'm going to set a date and it's going to go on that day. But you know that if they did that they'd probably just discontinue the claim … or you'd come to the courts and you'd force them onto the situation where the whole thing is a mess... they've probably been told, look don't bring it on, you're not going to get anywhere. And yet they can't say this is hopeless. They're wanting the court to say you are who you are.[119]

Similarly, the Queensland government would like the Attorney-General to consider:

> The establishment of a 'traditional owner' status under the NTA which could be by way of an extension of the claim registration process with the NNTT responsible for the recognition of the status. The status could carry with it a suite of benefits.[120]

These ideas are closely connected to the limitations on the ILC's operation and its consequent inability to comprehensively fulfil the objectives that a native title land fund was intended to deliver. It is essential that this void is filled, be it through review of the ILC's role or amendments to the Native Title Act to provide an alternative form of recognition when native title is not available.

Recommendations

2.1 That any further review or amendment that the Australian Government undertakes to the native title system be done with a view to how the changes could impact on the realisation of human rights of Aboriginal and Torres Strait Islander peoples.

2.2 That the Australian Government respond to the recommendations made in the *Native Title Report 2007* on the 2007 changes to the native title system.

2.3 That the Australian Government and the National Native Title Tribunal draft a comprehensive and clear guide to the registration test. The Australian Government should consider whether further guidance on the registration test should be included in the law, through regulation or through amendment to the Native Title Act.

2.4 That the Australian Government monitor the impact of the Queensland NTRB amalgamations on the bodies' operation, and provide direction, assistance and resources to those bodies which require it.

2.5 That the Australian Government create a separate funding stream specifically for Prescribed Bodies Corporate and corporations which are utilising the procedural rights afforded under the Native Title Act.

119 M Wilcox, former Justice of the Federal Court of Australia, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 23 July 2008.

120 J McNamara, Executive Director, Indigenous Services, QLD Department of Natural Resources and Water, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

2.6 That once the CATSI Act has been implemented, the Registrar of Indigenous Corporations and the Minister for Families, Housing, Community Services and Indigenous Affairs, together review the impact the law has on Indigenous corporations. In particular, the review should examine the impact of the CATSI Act on PBCs' ability to protect and utilise their native title rights and interests.

2.7 That the Registrar of Indigenous Corporations and the Minister for Families, Housing, Community Services and Indigenous Affairs, work closely to ensure that funding provided to registered PBCs is consistent with the aim of building PBCs' capacity to operate.