

Australian
Human Rights
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2009

Native Title
Report



Aboriginal and Torres Strait Islander
Social Justice Commissioner



Aboriginal & Torres Strait Islander
Social Justice Commissioner

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Native Title Report

ISSN 1325-6017 (Print) and ISSN 1837-6495 (Online)

Acknowledgements

The Aboriginal and Torres Strait Islander Social Justice Commissioner acknowledges the work of Australian Human Rights Commission staff, consultants and Aurora Project interns in producing this report (staff: Cecelia Burgman, Nicholas Burrage, Jackie Hartley, Katie Kiss, Priya Panchalingam; interns: Na'ama Carlin, James Malar, Tammy Wong; consultants: Sean Brennan, Leon Terrill).

Thank you to Peter Bowen, Manager Geospatial Services, National Native Title Tribunal for assistance in preparing Map 1.1 and Map 3.1.

Thank you also to the Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu), Gabrielle O'Loughlin, and all those who assisted with the production of this Report.

This publication can be found in electronic format on the Australian Human Rights Commission's website at http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/.

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Design and layout

Jo Clark

Printing

Paragon Australasia Group

Cover photography

Fabienne Balsamo, 2009

The cover photograph depicts the Meekin Valley on Maniligarr country, which is situated within Kakadu National Park in the Northern Territory. Permission to use the photograph was granted by Jacob Nayinggul, the senior traditional owner of Maniligarr country.

Please be aware that this publication may contain the names or images of Aboriginal and Torres Strait Islander people who may now be deceased.



Native Title Report 2009



Aboriginal and Torres Strait Islander Social Justice Commissioner

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



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**Aboriginal & Torres Strait
Islander Social Justice
Commissioner**

Aboriginal and Torres Strait Islander Social Justice Commissioner

The position of the Aboriginal and Torres Strait Islander Social Justice Commissioner was established within the Australian Human Rights Commission in 1993 to carry out the following functions:

- (1) Report annually on the enjoyment and exercise of human rights by Aboriginal peoples and Torres Strait Islanders, and recommend where necessary on the action that should be taken to ensure these rights are observed.
- (2) Promote awareness and discussion of human rights in relation to Aboriginal peoples and Torres Strait Islanders.
- (3) Undertake research and educational programs for the purposes of promoting respect for, and enjoyment and exercise of, human rights by Aboriginal peoples and Torres Strait Islanders.
- (4) Examine and report on enactments and proposed enactments to ascertain whether or not they recognise and protect the human rights of Aboriginal peoples and Torres Strait Islanders

The Commissioner is also required, under section 209 of the *Native Title Act 1993* (Cth), to report annually on the operation of the Act and its effect on the exercise and enjoyment of human rights by Aboriginal peoples and Torres Strait Islanders.

Office holders

- Mr Tom Calma: 2004 – present
- Dr William Jonas AM: 1999 – 2004
- Ms Zita Antonios: 1998 – 1999 (Acting)
- Mr Mick Dodson: 1993 – 1998



About the Social Justice Commissioner's logo

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

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

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23 December 2009

The Hon Robert McClelland MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney

I am pleased to present to you the *Native Title Report 2009* in accordance with section 209 of the *Native Title Act 1993* (Cth).

I have also used this opportunity to examine the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples in light of other changes to policy and legislation made between 1 July 2008 and 30 June 2009 in accordance with section 46C(1)(a) of the *Australian Human Rights Commission Act 1986* (Cth).

The Report is focused on three main topics. First, I give an overview of changes to native title law and policy, and summarise key cases that were decided during the reporting period. Secondly, I consider principles that should underpin a new approach to native title law and policy. I also highlight aspects of the native title system that require reform. Finally, I review developments in Indigenous land tenure reform.

I look forward to discussing the Report with you.

Yours sincerely

Tom Calma
Aboriginal and Torres Strait Islander
Social Justice Commissioner

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

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

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

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

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

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

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

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

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

¹ United Nations High Commissioner for Human Rights, *The Rights of Indigenous Peoples*, Fact Sheet No 9 (Rev 1) (1997). At <http://www.ohchr.org/Documents/Publications/FactSheet9rev.1en.pdf> (viewed 24 November 2009).

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Report overview:

The challenges ahead

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This is my sixth and final *Native Title Report* as the Aboriginal and Torres Strait Islander Social Justice Commissioner. This Report covers the period 1 July 2008 – 30 June 2009.

In this Report, I:

- review developments in native title law and policy over the reporting period
- consider principles and standards that should underpin cultural change in the native title system
- highlight several aspects of the native title system in need of reform and provide options for further discussion
- provide an update on developments in Indigenous land tenure reform.

Looking back

It is with great pride, gratitude and a touch of sadness that I present my last *Native Title Report*. My time as the Aboriginal and Torres Strait Islander Social Justice Commissioner has been rewarding and challenging. I feel privileged to have served my people in this way.

My term has coincided with one of the most tumultuous periods in Indigenous affairs in recent years.

Just before I took up the position of Social Justice Commissioner, the Howard Government announced the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC). This led to a raft of ‘new arrangements’ and an absence of national representation for Aboriginal and Torres Strait Islander peoples.

The dismantling of ATSIC resulted in a major policy vacuum. ATSIC had played a role domestically and internationally as an advocate of the human rights of native title holders. After the abolition of ATSIC, the ability of Aboriginal and Torres Strait Islander peoples to be fully engaged in the development of native title policy and law was limited.

Much of my early work as Social Justice Commissioner focused on monitoring the impact of the post-ATSIC new arrangements. I have consistently argued for greater government accountability and for governments to listen to the voices of Aboriginal and Torres Strait Islander peoples.

I have also advocated for the active participation of Aboriginal and Torres Strait Islander peoples in decisions that affect us – especially decisions about our lands, resources and waters.

In addition, I have called for reforms to native title law and policy that promote the achievement of the social, economic and cultural development aspirations of Aboriginal and Torres Strait Islander peoples.

My reports have addressed a range of issues, including:

- promoting sustainable economic and social development through native title
- ensuring that economic development on Indigenous land respects and upholds Australia's human rights obligations
- Indigenous peoples and climate change
- Indigenous peoples and water
- the protection of Indigenous knowledge
- changes to Indigenous land tenure, for purposes including home ownership and leasing
- the Northern Territory intervention
- improving agreement-making processes
- reforms to the *Native Title Act 1993* (Cth) and related policies and legislation
- significant decisions in native title and land rights law.

Looking forward

The policy landscape seemed to shift with the election of the Rudd Government. On 13 February 2008, Prime Minister Rudd made a historic and long overdue National Apology to the Stolen Generations on behalf of the Australian Parliament.

I consider the National Apology to be a 'line in the sand that marks the beginning of a new relationship and era of respect'.¹

To truly realise the promise of the Apology, governments across Australia need to respect the rights of traditional owners and their responsibilities to their country and their people.

Significant improvements must be made to the native title system if we are to close the gap between Indigenous and non-Indigenous Australians and to achieve reconciliation.

As the Victorian Attorney-General humbly stated to a room of traditional owners:

Just as the dispossession of this land's first peoples is this nation's greatest tragedy; their survival its greatest act of heroism; reconciliation, in all its forms, is our greatest opportunity for redemption. *This* is the story that most defines our nation. This, then, is the story on which we must make good.

Business will only be finished, however, when the legacies of dispossession and assimilation, of racism and disadvantage, are dismantled on every front. The possibility of genuine land justice is one such front, as is the capacity to participate as equal parties to a dispute, and as equal parties to its resolution. ...

There's business to be finished that speaks of hope and possibility, of deliverance and grace, of a time that is long overdue. Let's get to it, then – let's get back to basics and prove that Australia has come of age, that it *is* a place that values 'Spirit of country – land, water and life'.²

1 T Calma (Aboriginal and Torres Strait Islander Social Justice Commissioner), *Essentials for Social Justice: The Future* (Speech delivered at the University of South Australia, Adelaide, 12 November 2008). At http://www.humanrights.gov.au/about/media/speeches/social_justice/2008/20081112_future.html (viewed 26 November 2009).

2 R Hulls (Attorney-General of Victoria), *AIATSIS Native Title Conference 2009* (Speech delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009). At <http://ntru.aiatsis.gov.au/conf2009/papers/TheHon.RobertHulls.pdf> (viewed 26 November 2009).

These words echo those of Justices Deane and Gaudron in the High Court's decision in *Mabo v Queensland (No 2) (Mabo)*³:

The acts and events by which ... dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and a retreat from, those past injustices.⁴

In the years since the *Mabo* decision, the retreat from injustice has been slow.

There have been some successes – mining companies are sitting at the table with traditional owners; state governments have made some 'concessions'; determinations of native title cover 11.9% of the land mass of Australia and Indigenous Land Use Agreements cover 14.4% of the land mass, as well as other areas of sea.⁵

But there remains a long way to go. The pace of a native title claim is slow – too slow for many of our elders. Changes to the system must be made to hasten Australia's retreat from injustice.

During this year, we have witnessed reforms that could prove to be the first steps in transforming the native title system.

For example, the Victorian Attorney-General announced an impressive settlement framework.⁶ This framework has the potential to go a long way towards achieving land justice in Victoria.

Meanwhile, the Australian Government has begun a process of native title reform. The federal Attorney-General is receptive to suggestions for improving the native title system.

The Chief Justice of the High Court, Justices of the Federal Court, the National Native Title Council and Native Title Representative Bodies⁷ are among those who have developed proposals for change. I warmly encourage them to continue these essential discussions.

Contents of the 2009 Report

I am hopeful that this spirit of reform will translate into real and lasting benefits for Aboriginal and Torres Strait Islander peoples.

I have approached the writing of this year's Report with this new sense of hope. However, I am acutely aware that there is much unfinished business to attend to.

I begin this Report by 'setting the scene' and providing an overview of events that have occurred during the reporting period.

In Chapter 1, I summarise the former Australian Government's legacy of native title and land rights policy. I then review developments during the reporting period, including relevant changes to law and policy, significant court decisions and developments in international human rights law.

3 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

4 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 109 (Deane and Gaudron JJ).

5 National Native Title Tribunal, *Annual Report 2008–2009* (2009), p 23. At <http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Annual%20Reports/Annual%20Report%202008-2009.pdf> (viewed 26 November 2009).

6 See Chapter 1 of this Report for a review of developments in Victoria.

7 For ease of reference, I will use the term 'NTRB' throughout this Report to include both Native Title Representative Bodies and Native Title Service Providers where applicable. NTRBs are bodies recognised by the Minister to perform all the functions listed in the *Native Title Act 1993* (Cth), pt 11, div 3. Native Title Service Providers are bodies that are funded by government to perform some or all of the functions of a representative body: see *Native Title Act 1993* (Cth), s 203FE.

In the next two Chapters, I seek to build upon the new momentum for change.

In Chapter 2, I outline principles and standards that should guide a new approach to native title. I also consider that the native title system ought to be viewed in the context of broader reforms to promote and protect the rights of Aboriginal and Torres Strait Islander peoples.

In Chapter 3, I focus on several key areas for reform that have attracted attention during the reporting period. I propose legislative and policy options for improving the native title system, with the objective of promoting further discussion and debate.

The final Chapter of this Report serves as a reminder that, even though governments have come a long way since *Mabo*, we have a hard road to travel before the rights of Indigenous peoples can be fully respected in this country.

In Chapter 4, I provide an update on developments in Indigenous land tenure reform. I am concerned that these reforms have been focused on enabling governments to obtain secure tenure, rather than on assisting Indigenous people to make use of their land. I also set out principles that should be considered prior to the introduction of land tenure reforms.

A new beginning

As I observed above, my term as Social Justice Commissioner began just after the abolition of ATSIC. It ends with the Australian Government announcing its support for the new National Congress of Australia's First Peoples.⁸

To borrow from the United Nations General Assembly, I am firmly convinced that:

control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.⁹

In this, my final *Native Title Report*, I urge governments to listen to us. Work with us. Respect our voices, our rights, our lands, our resources and our waters. Only then will this country truly be able to retreat from injustice.

8 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Australian Government response to "Our Future in Our Hands"' (Media Release, 22 November 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/new_rep_body_22nov2009.htm (viewed 26 November 2009). See also Australian Human Rights Commission, 'New National Congress of Australia's First Peoples announced' (Media Release, 22 November 2009). At http://www.humanrights.gov.au/about/media/media_releases/2009/116_09.html (viewed 26 November 2009).

9 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), preambular para 10. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 23 November 2009).

Recommendations

Recommendations: Chapter 2

- 2.1 That the Australian Government ensure that reforms to the native title system are consistent with the rights affirmed by the Declaration on the Rights of Indigenous Peoples.
- 2.2 That the Australian Government adopt and promote the recommendations of the Expert Meeting on Extractive Industries through the processes of the Council of Australian Governments. For example, the recommendations could form the basis of best practice guidelines for extractive industries.
- 2.3 That the Australian Government work with Aboriginal and Torres Strait Islander peoples to develop a social justice package that complements the native title system and significantly contributes to real reconciliation between Indigenous and non-Indigenous Australians.

Recommendations: Chapter 3

- 3.1 That the Australian Government adopt measures to improve mechanisms for recognising traditional ownership.
- 3.2 That the Native Title Act be amended to provide for a shift in the burden of proof to the respondent once the applicant has met the relevant threshold requirements.
- 3.3 That the Native Title Act provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgement and observance of traditional law and custom and of the relevant society.
- 3.4 That the Native Title Act be amended to define 'traditional' more broadly than the meaning given at common law, such as to encompass laws, customs and practices that remain identifiable over time.
- 3.5 That section 223 of the Native Title Act be amended to clarify that claimants do not need to establish a physical connection with the relevant land or waters.
- 3.6 That the Native Title Act be amended to empower Courts to disregard an interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.
- 3.7 That the Australian Government fund a register of experts to help NTRBs and native title parties access qualified, independent and professional advice and assistance.

- 3.8 That the Australian Government consider introducing amendments to sections 87 and 87A of the Native Title Act to either remove the requirement that the Court must be satisfied that it is 'appropriate' to make the order sought or to provide greater guidance as to when it will be 'appropriate' to grant the order.
- 3.9 That the Australian Government work with state and territory governments to encourage more flexible approaches to connection evidence requirements.
- 3.10 That the Australian Government facilitate native title claimants having the earliest possible access to relevant land tenure history information.
- 3.11 That the Australian, state and territory governments actively support the creation of a comprehensive national database of land tenure information.
- 3.12 That the Australian Government consider options to amend the Native Title Act to include stricter criteria on who can become a respondent to native title proceedings.
- 3.13 That section 84 of the Native Title Act be amended to require the Court to regularly review the party list for all active native title proceedings and, where appropriate, to require a party to show cause for its continued involvement.
- 3.14 That the Australian Government review section 213A of the Native Title Act and the Attorney-General's *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* to provide greater transparency in the respondent funding process.
- 3.15 That the Australian Government consider measures to strengthen procedural rights and the future acts regime, including by:
 - repealing section 26(3) of the Native Title Act
 - amending section 24MD(2)(c) of the Native Title Act to revert to the wording of the original section 23(3)
 - reviewing time limits under the right to negotiate
 - amending section 31 to require parties to have reached a certain stage before they may apply for an arbitral body determination
 - shifting the onus of proof onto the proponents of development to show their good faith
 - allowing arbitral bodies to impose royalty conditions.
- 3.16 That section 223 of the Native Title Act be amended to clarify that native title can include rights and interests of a commercial nature.
- 3.17 That the Australian Government explore options, in consultation with state and territory governments, Indigenous peoples and other interested persons, to enable native title holders to exercise native title rights for a commercial purpose.
- 3.18 That the Australian Government explore alternatives to the current approach to extinguishment, such as allowing extinguishment to be disregarded in a greater number of circumstances.

- 3.19 That section 86F of the Native Title Act be amended to clarify that an adjournment should ordinarily be granted where an application is made jointly by the claimant and the primary respondent unless the interests of justice otherwise require, having regard to such factors as:
- the prospect of a negotiated outcome being reached
 - the resources of the parties
 - the interests of the other parties to the proceeding.
- 3.20 That the Australian Government:
- consider options for increasing access to agreements (while respecting confidentiality, privacy obligations and the commercial in confidence content of agreements)
 - support further research into ‘best practice’ or ‘model’ agreements
 - support further research into best practice negotiating processes.
- 3.21 That, where appropriate and traditional owners agree, the Australian Government promote a regional approach to agreement-making.
- 3.22 That the Australian Government work with native title parties to identify and develop criteria to guide the evaluation and monitoring of agreements.
- 3.23 That the Australian Government ensure that NTRBs are sufficiently resourced to access expert advice.
- 3.24 That the Australian Government provide further support to initiatives to provide training and development opportunities for experts involved in the native title system.

Recommendations: Chapter 4

- 4.1 That the Australian Government amend the *Northern Territory National Emergency Response Act 2007* (Cth) to end the compulsory five-year leases, and instead commit to obtaining the free, prior and informed consent of traditional owners to voluntary lease arrangements.
- 4.2 That the statutory rights provisions, set out in Part IIB of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), be removed.
- 4.3 That the Australian Government meet with the Aboriginal land councils to discuss other ways of introducing broad scale leasing to communities on Aboriginal land in the Northern Territory, which do not require communities to hand over decision-making to a government entity.

Chapter 1:

The state of land rights and native title policy in Australia in 2009

.....

1.1 Introduction

The reporting period for this Report is 1 July 2008 to 30 June 2009. Throughout this period, there was significantly more activity in native title law and policy than I witnessed in the first five years of my term as the Aboriginal and Torres Strait Islander Social Justice Commissioner.

Throughout the reporting period, the Government pursued its commitment to improving the operation of the native title system. While no momentous improvements were made, many of the changes over the year will impact on the human rights of Aboriginal and Torres Strait Islander peoples.

In this Chapter, I examine changes and other decisions affecting native title which were made throughout the reporting period. I also summarise my view on how these developments impact on the human rights of Aboriginal and Torres Strait Islander people.

I begin this Chapter with a reflection on the previous Government's approach to land rights and native title, including its 1998 amendments to the *Native Title Act 1993* (Cth) (Native Title Act); the 2006 amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) and the 2007 compulsory acquisition of lands for the purposes of the Northern Territory Emergency Response. These significant policies have lingering effects on the operation of native title and land rights regimes today, and provide the starting point for discussion on what changes are now necessary.

Next, I consider the Rudd Government's response, including its new promises and whether a fresh approach to native title was seen in 2008-09. I look at the native title system in numbers, including the native title determinations which were made over the reporting period and the Government's budget allocation for native title. I then consider the legislative and policy changes including the:

- Native Title Amendment Bill 2009 (Cth)
- *Evidence Amendment Act 2008* (Cth)
- Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008 (Cth)
- Australian Government's discussion paper on optimising benefits from native title agreements.¹

1 Australian Government, *Australian Government Discussion Paper* (undated). At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)-Discussion+paper+-+final+version.DOC/\\$file/Discussion+paper+-+final+version.DOC](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)-Discussion+paper+-+final+version.DOC/$file/Discussion+paper+-+final+version.DOC) (viewed 12 October 2009).

I have also identified policy areas in which the Government initiated action but where momentum now appears to be waning. These include financial assistance to the states and territories for compensation, the Joint Working Group on Indigenous Land Settlements, the Indigenous Economic Development Strategy, and regulation and funding of Prescribed Bodies Corporate (PBCs).

I then examine three significant decisions on native title and land rights. I summarise *Wurridjal v Commonwealth (Wurridjal)*² in which the High Court examined the constitutional validity of compulsory acquisition under the Northern Territory intervention. In *FMG Pilbara Pty Ltd v Cox (FMG Pilbara)*,³ the Federal Court gave greater guidance on what it means to negotiate in good faith under the Native Title Act. The National Native Title Tribunal (NNTT) gave its first decision that a mining lease must not be granted in *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd (Holocene)*.⁴

This Chapter also considers a number of international developments, directly relevant to Australia. In this reporting period, the Government signalled its support for the *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration on the Rights of Indigenous Peoples);⁵ two United Nations treaty monitoring committees delivered concluding observations on Australia; a complaint against Australia was made to the United Nations Committee on the Elimination of Racial Discrimination; and once again, a delegation of Aboriginal and Torres Strait Islander people attended the annual session of the United Nations Permanent Forum on Indigenous Issues.

Finally, no examination of native title would be complete without a consideration of the policies of the states and territories. Therefore, I briefly look at significant developments at the state and territory level, particularly the development of an alternative settlement framework in Victoria.

1.2 Policy approaches to land rights and native title – the legacy of the Howard Government

John Howard served as the Australian Prime Minister for four consecutive terms over eleven years. It is misguided to consider current policies on Indigenous land rights and native title without reflecting on the lingering effects of the Howard Government's policies and the response of the current Australian Government.

The Howard Government's overarching policy on Indigenous affairs was to integrate Indigenous Australians into 'mainstream society', and ignore Indigenous peoples' distinct political, social and cultural identity and our status as the traditional owners of the country.

This policy extended to all areas. The Howard Government was unwilling to support the Declaration on the Rights of Indigenous Peoples and considered that endorsing the Declaration 'would lead to division in our country'.⁶ In 2005, it dismantled the Aboriginal and Torres Strait Islander Commission (ATSIC), mainstreaming the delivery of services to Aboriginal and Torres Strait Islander people across all federal departments.

2 *Wurridjal v Commonwealth* (2009) 237 CLR 309.

3 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49.

4 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49.

5 GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007). At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 17 November 2009).

6 Gáldu Resource Centre for the Rights of Indigenous Peoples, AUSTRALIA: *Govt Consistent in Opposing Indigenous Rights*, <http://www.galdu.org/web/index.php?odas=2327&giella1=eng> (viewed 15 July 2009).

And yet, as my friend Peter Yu has said:

We are not white people in the making, nor are we simply another ethnic minority group. We are, at a fundamental level part of the modern Australian nation. But, within this nation, we have a very particular position. We are Australia's Indigenous people, the first people of this land, and we continue to have – as we have always had – our own system of law, culture, land tenure, authority and leadership. It follows then, that treating us the same as everybody else will not deliver equality, but is in fact discriminatory.⁷

The Howard Government's approach to Indigenous peoples was easily identifiable in its policies on land rights and native title. Over its 11-year term, it made changes to native title and land rights policies to 'normalise' Indigenous peoples' interests in the land, and in doing so, reduced the recognition of Indigenous peoples' human rights.

Significant changes made to native title and land rights during the Howard Government's term included the:

- 1998 amendments to the Native Title Act
- 2006 amendments to the ALRA
- 2007 compulsory acquisition of lands for the purposes of the Northern Territory Emergency Response (the Northern Territory intervention).

The Howard Government accompanied these changes with words that misled the broader public on the law. For example, in 2006, after the Federal Court's first instance decision in the Noongar case (which determined that some native title rights existed over Perth), the Howard Government was reported as saying that Australia's beloved beaches were no longer 'protected' from native title.⁸ Philip Ruddock, then the Attorney-General, stated:

It is not possible to guarantee that continued public access to all such areas in major capital cities in Australia would be protected from a claim to exclusive native title.⁹

This is clearly not an accurate reflection of the law.¹⁰

7 P Yu, *Forging a New Relationship Between Indigenous and non-Indigenous Australians* (Keynote Address delivered at the Australians for Native Title and Reconciliation Seminar, Sydney, 2 June 1999).

8 D Knight, 'The native title scaremongers are restless again', *The Sydney Morning Herald*, 22 September 2006. At http://blogs.smh.com.au/newsblog/archives/dom_knight/014011.html (viewed 15 July 2009). See also S Peatling, 'Fear of native title land grab in cities', *The Sydney Morning Herald*, 22 September 2006. At <http://www.smh.com.au/news/national/fear-of-native-title-land-grab-in-cities/2006/09/21/1158431843986.html> (viewed 15 July 2009).

9 S Peatling, 'Fear of native title land grab in cities', *The Sydney Morning Herald*, 22 September 2006, citing Philip Ruddock, the then Attorney-General. At <http://www.smh.com.au/news/national/fear-of-native-title-land-grab-in-cities/2006/09/21/1158431843986.html> (viewed 15 July 2009).

10 The Federal Court's decision of *Bennell v Western Australia* (2006) 230 ALR 603 was summarised in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 146–150. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 12 October 2009). The Full Federal Court's appeal decision of *Bodney v Bennell* [2008] FCAFC 63 was summarised in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission (2009), pp 53–58. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/index.html (viewed 12 October 2009). The Full Federal Court found that Justice Wilcox had erred in his judgment in the decision at first instance. Consequently, the Full Federal Court did not determine whether native title rights existed or not, but sent the case back to a new judge to determine how the claim should proceed. The parties agreed to negotiate, and are still in that process. Neither decision of the Court impacted on the extinguishment provisions of the Native Title Act, which protect existing interests in the land.

Despite all this, the Howard Government told the United Nations that '[s]uccessive Australian Governments have implemented a range of initiatives in support or recognition of Aboriginal and Torres Strait Islander land rights'.¹¹

It is necessary to reflect on the impact of past policies of the past decade when considering the status of the native title system today and how it could be improved tomorrow.

(a) The 1998 Wik Amendments

The most significant changes made to native title during the Howard Government's term was the *Native Title Amendment Act 1998* (Cth) (the Wik amendments), a legislative response to the High Court's decision in *Wik Peoples v Queensland* (*Wik*).¹² In *Wik*, the High Court held that native title could survive on a pastoral lease if there was no clear intention to extinguish it when the lease was granted.

In the *Native Title Report 1998*, the Social Justice Commissioner said that the High Court of Australia had laid the foundation in *Wik* for the coexistence and reconciliation of shared interests in the land and that '[i]n many ways the decision presented Australia with a microcosm of the wider process of reconciliation'.¹³

But the opportunity for reconciliation provided by *Wik* was lost. The reactions sparked by the decision were intense and deeply divisive, and the consequent amendments to the Native Title Act were a devastating blow to Indigenous peoples' rights.

Although there was discussion on amending the Native Title Act prior to the *Wik* decision, the earlier discussions focused on improving the 'workability' of the Act. However, after the *Wik* decision, the focus changed.

Legislative amendments became a vehicle for 'bucketloads' of extinguishment.¹⁴ 'Certainty' for non-Indigenous land holders became the new catchcry for legislative change.¹⁵

The Howard Government responded with a ten-point plan,¹⁶ and amendments were passed in 1998. The Wik amendments, which added 400 pages of law, drastically increased the complexity of the Native Title Act and changed the system markedly.

11 United Nations International Human Rights Instruments, *Core document forming part of the reports of States parties: Australia*, UN Doc HRI/CORE/AUS/2007 (2007), p 31. At <http://www2.ohchr.org/english/bodies/cescr/docs/cescrwg40/HRI.CORE.AUS.2007.pdf> (viewed 16 November 2009).

12 *Wik Peoples v Queensland* (1996) 187 CLR 1.

13 Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Human Rights and Equal Opportunity Commission (1999), p 2. At http://humanrights.gov.au/social_justice/nt_report/index.html#1998 (viewed 17 November 2009).

14 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996-1997*, Human Rights and Equal Opportunity Commission (1997), p 37. At http://humanrights.gov.au/social_justice/nt_report/index.html#1997 (viewed 17 November 2009). See also Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Human Rights and Equal Opportunity Commission (1999). At http://humanrights.gov.au/social_justice/nt_report/index.html#1998 (viewed 17 November 2009).

15 See Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Human Rights and Equal Opportunity Commission (1999). At http://humanrights.gov.au/social_justice/nt_report/index.html#1998 (viewed 17 November 2009).

16 For more information on the Wik 10 point plan, see the archived Aboriginal and Torres Strait Islander Commission website, *Issues: Land - native title*, http://pandora.nla.gov.au/pan/41033/20060106-0000/ATSIIC/issues/land/native_title/10_point_WIK_plan.html (viewed 1 September 2009).

The key changes included:

- *Extinguishment of native title.* The ‘validation and confirmation provisions’ of the amendments validated certain acts which took place on or after 1 January 1994 (the day the Native Title Act commenced) and before the 23 December 1996 (the day the High Court handed down its decision in *Wik*), and which may have not been valid at the time because the government had not complied with the Native Title Act. The amendments made these acts – which are called *intermediate period acts* – valid, and said that they were always valid. The amendments also deemed certain tenures granted before the *Wik* decision to have either extinguished or impaired native title. Where the interests were granted by the state governments, the amendments authorised the states to introduce complementary legislation to the same effect. Schedule 1 of the amended Native Title Act lists interests which are deemed to permanently extinguish native title. This list is 50 pages long.¹⁷
- *Changed the right to negotiate provisions.* The right to negotiate was included in the original Native Title Act in recognition of the ‘special attachment of Aboriginal and Torres Strait Islander people to their land’.¹⁸ The 1998 amendments authorised states and territories to introduce legislation that diminished the right to negotiate by introducing schemes which provide for exceptions to the right. The amendments also changed the right to negotiate in the Native Title Act itself, generally replacing it with the lesser rights to comment or be notified.
- *Changed the registration test.* The amendments established a higher threshold for the registration test and required that the Registrar be satisfied that certain procedures had been undertaken by the claimants, and that they had fulfilled certain merits.
- *Provided for Indigenous Land Use Agreements (ILUAs).* The ILUA provisions were a positive feature of the amendments, offering the foundation for parties to negotiate voluntary and binding agreements about the use of the land, the intersection of various rights and interests, and how the relationship would proceed in the future.
- *Changed the functions of Native Title Representative Bodies (NTRBs).* The amendments redrew the boundaries of representative body areas (reducing the number of NTRBs), reassessed the existing bodies’ eligibility, increased the Minister’s control over the bodies, removed the requirement that representative bodies be representative and increased their responsibilities and functions. Despite increasing the load on NTRBs, the changes were not accompanied by an increase in funding.

17 See M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996–1997*, Human Rights and Equal Opportunity Commission (1997), at http://humanrights.gov.au/social_justice/nt_report/index.html#1997 (viewed 17 November 2009); Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Human Rights and Equal Opportunity Commission (1999), at http://humanrights.gov.au/social_justice/nt_report/index.html#1998 (viewed 17 November 2009); W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1999*, Human Rights and Equal Opportunity Commission (1999), at http://humanrights.gov.au/social_justice/nt_report/index.html#1999 (viewed 17 November 2009).

18 Commonwealth of Australia, *Mabo – The High Court Decision on Native Title: Discussion Paper* (1993), p 102.

Many of these amendments were justified on the basis of pursuing formal equality.¹⁹ Yet it is now widely accepted that the amendments seriously undermined the protection and recognition of the native title rights of Aboriginal and Torres Strait Islander people.

Nonetheless, the Howard Government considered that the *Wik* decision had simply accentuated the shortcomings of the original Native Title Act and that:

The 1998 amendments addressed these difficulties, and followed an open and participatory consultation process with all interested parties. The amended Act clarifies the relationship between native title and other rights and gives the States and Territories the capacity to better integrate native title into their existing regimes. The amendments also established a framework for consensual and binding agreements about future activity known as Indigenous Land Use Agreements or ILUAs.²⁰

That outlook was not shared by all. In 1998, Indigenous representatives rejected both the substance of the amendments and the process by which it was arrived at. The National Indigenous Working Group prepared a statement, which was read into the parliamentary record on the day before the amendments were debated:

We, the members of the National Indigenous Working Group, reject entirely the Native Title Amendment Bill as currently presented before the Australian Parliament.

We confirm that we have not been consulted in relation to the contents of the Bill... and that we have not given consent to the Bill in any form which might be construed as sanction to its passage into Australian law.

We have endeavoured to contribute during the past two years to the public deliberations of Native Title entitlements in Australian law.

Our participation has not been given the legitimacy by the Australian Government that we expected...

We are of the opinion that the Bill will amend the Native Title Act 1993 to the effect that the Native Title Act can no longer be regarded as a fair law or a law which is of benefit to the Aboriginal and Torres Strait Islander Peoples...

The National Indigenous Working Group is extremely disappointed that the Australian Government has failed to confront issues of discrimination in the Native Title laws and implicitly provoked the Aboriginal and Torres Strait Islander Peoples to pursue concerns through costly and time consuming litigation, rather than through negotiation...

The National Indigenous Working Group on Native Title absolutely opposes the Native Title Amendment Bill, calls upon all parliamentarians to cast their vote against this legislation, and invites the Australian Government to open up immediate negotiations with the Aboriginal and Torres Strait Islander Peoples for coexistence between the Indigenous Peoples and all Australians.²¹

19 See Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Human Rights and Equal Opportunity Commission (1999), pp 13–14. At http://humanrights.gov.au/social_justice/nt_report/index.html#1998 (viewed 17 November 2009). The Commissioner further states, at pp 4–5, that '[f]ormal equality asserts that all people should be treated in precisely the same way as each other: to recognise different rights is inherently unfair and discriminatory. ... Within this construction, any distinctive right accorded to native titleholders or native title applicants is seen as inherently racially discriminatory'. This is compared to substantive equality, which recognises that different treatment is permitted and may be required to achieve real fairness in outcome.

20 United Nations, *Core document forming part of the reports of States parties: Australia*, UN Doc HRI/CORE/AUS/2007 (2007), para 131. At <http://www2.ohchr.org/english/bodies/cescr/docs/cescrwg40/HRI.CORE.AUS.2007.pdf> (viewed 17 June 2009).

21 Commonwealth, *Parliamentary Debates*, Senate, 7 July 1998, pp 5180–5182. At <http://www.aph.gov.au/hansard/senate/dailys/ds070798.pdf> (viewed 12 October 2009). See also Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Human Rights and Equal Opportunity Commission (1999), ch 1. At http://humanrights.gov.au/social_justice/nt_report/index.html#1998 (viewed 17 November 2009).

Although the 1998 amendments severely damaged the relationship between Indigenous peoples and the Government, the strength and resilience of Aboriginal and Torres Strait Islander people has meant that we have endeavoured to make the most out of the weakened system.

This Government has not made any commitment to reviewing the impact of the 1998 amendments nor identifying where they may be wound back. Although the original Act was also not perfect, the impact of the 1998 amendments and the operation of the original Native Title Act should be used to inform current debate over what amendments are necessary to ensure the native title system operates in a just, equitable and effective way.²²

(b) The 2006 ALRA amendments

The Australian Government is only directly responsible for land rights policy in the territories. During its term, the Howard Government's policy toward land rights resulted in considerable changes to the Northern Territory's land rights regime. This shift in policy has become relevant across the country as it is now being applied to state land rights regimes via partnerships and funding arrangements between the federal and state governments. I discuss this further in Chapter 4 of this Report.

The Howard Government amended the ALRA in 2006.²³ The amendments covered a number of measures, one of which sought to 'promote individual property rights' on Aboriginal land by enabling a Northern Territory entity (such as the Northern Territory Government or a statutory authority established by it) to be granted a 99-year lease from the traditional owners over an entire township. Long-term subleases could then be granted to Aboriginal people and others without each sublease having to be negotiated with the relevant Land Council.²⁴

Again, the intention was to 'normalise' Indigenous communities through the mainstreaming of service delivery and the creation of market economies. Mal Brough, the Howard Government Minister for Indigenous Affairs, said '[w]e are talking about creating an environment for the sort of employment and business opportunities that exist in other Australian towns'.²⁵

At the time, I raised a number of concerns with the policy, including that it could lead to significant loss of control of land by Indigenous peoples; create complex succession problems; create smaller and smaller blocks as the land is divided amongst each successive generation; and cause tension between communal cultural values with the rights granted under individual titles. I was also concerned about the ability of

22 Criticisms of certain core, structural principles of the legislation were made in the first Aboriginal and Torres Strait Islander Social Justice Commissioner's Native Title Report. See M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report: January – June 1994*, Human Rights and Equal Opportunity Commission (1995). At <http://www.austlii.edu.au/au/other/IndigLRes/1995/3/NATIVE.RTF> (viewed 12 October 2009).

23 The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the ALRA) was the first law of an Australian Government to recognise the Aboriginal system of land ownership. The ALRA was enacted on the recommendation of the Woodward Aboriginal Land Rights Commission, which introduced into Australian law the concept of inalienable freehold title 'meaning [land] could not be acquired, sold, mortgaged or disposed of in any way – and title should be held communally'. The Act allowed Aboriginal people, for the first time, to claim rights to their land based on traditional occupation. See Northern Land Council, *Land and Sea Rights*, http://www.nlc.org.au/html/land_act_wood.html (viewed 12 October 2009).

24 See Parliamentary Library, Parliament of Australia, *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, Bills Digest (2006). At <http://www.aph.gov.au/library/pubs/bd/2005-06/06bd158.pdf> (viewed 16 July 2009).

25 M Brough (Minister for Families, Community Services and Indigenous Affairs), *Blueprint for Action in Indigenous Affairs* (Address to the National Institute of Governance: Indigenous Affairs Governance Series, Canberra, 5 December 2006).

traditional owners to confront these issues and give their free, prior and informed consent to long-term and large area leases while their capacity is inhibited.²⁶

Another significant concern I voiced is that the amendments allow the government to use the Aboriginals Benefit Account (ABA) to pay for the 99-year head leases. The fund, which was set up to provide benefits to Indigenous people in the Northern Territory above and beyond basic government services, can now be used by the government to acquire, administer leases or pay the rent. For example, rents payable to traditional owners who agree to lease their land under the ALRA will come, at Ministerial direction, not from the lessee (eg the Northern Territory Government) but from the ABA.

In August 2007, the Howard Government told the United Nations that:

Under the proposed reforms, traditional owners will be able to grant a 99 year head-lease over a township area. Granting a head lease will be entirely voluntary. Traditional owners and the Land Council will negotiate the other terms and conditions of the head-lease, including any conditions on sub-leasing. Sub-leases may be issued to individual tenants, home purchasers, and business and government service providers. The underlying inalienable title will not be affected.²⁷

I do not believe this to be the case.

On 12 June 2007, the then Shadow Minister for Families, Community Services, Indigenous Affairs and Reconciliation, Jenny Macklin, spoke against the amendments.²⁸ However, as the current Minister for Indigenous Affairs, Jenny Macklin now supports the leasing scheme and is working with the states to have it applied across the nation.

Some traditional owners have expressed their dismay at this:

When John Howard and Mal Brough lost their seats, we were happy. But now you are doing the same thing to us, piggybacking Howard and Brough's policies, and we feel upset, betrayed and disappointed. ...

This is our land. We want the Government to give it back to us. We want the Government to stop blackmailing us. We want houses, but we will not sign any leases over our land, because we want to keep control of our country, our houses, and our property.²⁹

In a statement given by a Warlpiri delegation from Yuendumu when Parliament was opened in 2009, it is clear that there are very strong feelings that leases are not necessarily being entered into on voluntary and informed grounds.

Land for Housing... We are just being blackmailed. If we don't hand over our land we can't get houses maintained, or any new houses built. ...

We got some land back under the NT Land Rights Act. Now they want to take the land our houses are on, so they can control us. They are talking about 60 or 80 year leases, but we know that we won't ever get it back.

26 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), ch 2. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 12 October 2009).

27 United Nations International Human Rights Instruments, *Core document forming part of the reports of States parties: Australia*, UN Doc HRI/CORE/AUS/2007 (2007), p 31. At <http://www2.ohchr.org/english/bodies/cescr/docs/cescrwg40/HRI.CORE.AUS.2007.pdf> (viewed 17 June 2009).

28 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 June 2007, pp 91–95 (The Hon Jenny Macklin MP, Shadow Minister for Indigenous Affairs). At <http://www.aph.gov.au/hansard/rep/dailys/dr120607.pdf> (viewed 6 September 2009).

29 Yuendumu Statement, given to the Minister for Indigenous Affairs, Jenny Macklin, by H Nelson, representing the Yuendumu community, 27 October 2008, available at Rollback the intervention, *Statements*, <http://rollbacktheintervention.wordpress.com/> (viewed 12 October 2009).

We have cultural ties to our land. Our land is not for sale. Without the land we are nothing. Our spirit is in the land where we belong. If we give up our land we are betraying our ancestors. Every bit of our land is precious. ...

Every time Government officials come to Yuendumu to 'consult' with us, they don't listen to us. They just tell us what their plans are. When any of us speak up about our concerns, it's as if they have deaf ears. They just go on with their plans as if we had said nothing. There is no communication. They treat us like kids.

We are proud Warlpiri people. It is a great insult to be treated like this.³⁰

I am still concerned with various aspects of this policy, including how Indigenous people are being involved in the decision making process and what the long-term impacts on cultural, economic, political and social rights will be. I discuss these concerns in more detail in Chapter 4 of this Report.

(c) The 2007 compulsory acquisition of land for the purposes of the Northern Territory Emergency Response legislation

On 21 June 2007 the Howard Government announced the Northern Territory Emergency Response,³¹ also known as the intervention. The intervention was originally a response to a report on child sexual abuse called *Little Children are Sacred*.³² The current Government states that the intervention 'has a wide range of measures designed to protect children and make communities safe' and to 'create a better future for Aboriginal people in the Northern Territory'.³³

The various measures which make up the intervention have significant implications for Aboriginal owned and controlled land.

The Government considered it necessary to control the land for aspects of the intervention to be done quickly.³⁴ Consequently, the Government compulsorily acquired five-year leases over Aboriginal owned land in the Northern Territory. It took over the control of town camps; allowed for the suspension of the permit system which ensures traditional owners can control who enters their land; and suspended the future acts regime in the Native Title Act. The Government introduced these measures with the intent that they would assist in building new houses, upgrading existing houses and bringing in new arrangements for the management of public housing in communities.³⁵

30 Statement by Warlpiri Delegation from Yuendumu on the occasion of the opening of Parliament 2009, available at Rollback the intervention, *Rollback the intervention*, <http://rollbacktheintervention.wordpress.com/> (viewed 12 October 2009).

31 The legislation giving effect to the Northern Territory Emergency Response received Royal Assent on 17 August 2007. It consisted of a suite of legislation. The main provisions dealing with the Australian Government's acquisition of rights, titles and interests in land are contained in Part 4 of the *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER Act).

32 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle: 'Little Children are Sacred': Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007). At <http://www.inquirysaac.nt.gov.au/> (viewed 23 November 2009).

33 Department of Families, Housing, Community Services and Indigenous Affairs, *About the Northern Territory Emergency Response*, http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/overview/Pages/about_nter.aspx (viewed 23 July 2009).

34 See *Wurridjal v the Commonwealth* (2009) 237 CLR 309, 333 (French CJ).

35 Department of Families, Housing, Community Services and Indigenous Affairs, *About the Northern Territory Emergency Response*, http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/overview/Pages/about_nter.aspx (viewed 23 July 2009).

In the *Native Title Report 2007*, I raised my concerns with these aspects of the intervention. Particularly:

- the use of compulsory acquisition and the lack of consultation or discussion with the Aboriginal land owners
- the possibility of a significant interruption to community living
- the breadth of the Minister's discretion over what happens on the lands subject to compulsory acquisition and the lack of accountability of those decisions to Parliament
- the apparent displacement of traditional rights of use and occupation (under Section 71 of the ALRA) in compulsorily leased Aboriginal lands³⁶
- the ability of the Australian Government to remove the rights of an Indigenous person to even reside on compulsorily leased Aboriginal lands
- the uncertain relationship between the leases and other laws such as the Native Title Act.³⁷

At the date of writing this Report, two years after the intervention was imposed in the Northern Territory, not a single house had been built.³⁸ No rent or compensation has been paid to the land owners.³⁹

All the leases which were compulsorily acquired under the intervention will expire on 18 August 2012. However, I am concerned that the Government will then seek long-term leases from the traditional owners, which triggers the significant concerns I have already raised with the long-term leasing policy.⁴⁰

1.3 The Rudd Government's response – new promises, a fresh approach in 2008–09?

In order to gain a full appreciation of the native title system and land rights today, the remnants of the Howard Government's policy approaches must be contemplated. Many aspects of these policies have continued under this Government. The concerns that I and previous Social Justice Commissioners have raised over that time remain disregarded.

36 Since the Native Title Report 2007 was published, the High Court has delivered its decision in *Wurridjal v Commonwealth* (2009) 237 CLR 309 (see later in this Chapter). In the case, the High Court held that s 71 of the ALRA was not displaced by the intervention legislation.

37 The intervention legislation says that the non-extinguishment principle applies to any of the acts done by or in accordance with the intervention legislation, or any act that is related. It also says that the future acts provisions of the Native Title Act do not apply. However, the long-term impact of acts done for the purposes of the intervention on native title rights and interests is unclear. This is of particular concern when the rights are effectively extinguished or impaired, a circumstance which should trigger the compensation provisions of the Native Title Act. See *Northern Territory National Emergency Response Act 2007* (Cth), s 51.

38 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *ABC Radio AM* (23 July 2009). At <http://www.abc.net.au/am/content/2009/s2633912.htm> (viewed 23 July 2009).

39 See later in this Chapter for the discussion of the High Court's decision in *Wurridjal v Commonwealth* (2009) 237 CLR 309, and Chapter 4 of this Report for further information on land tenure reform.

40 The intervention legislation provides for this explicitly. Despite the compulsory five-year lease of Aboriginal land, an Aboriginal Land Trust may grant a head lease of a township in accordance with s 19A of the ALRA (under s 37(6) of the NTNER Act). If this occurs the five-year lease is terminated or varied to the extent of area covered by the township lease. This takes place at the time the township lease takes effect.

Nonetheless, since the Government delivered the National Apology to the Stolen Generations,⁴¹ it has introduced a number of reforms that will contribute to creating a new partnership between Indigenous and non-Indigenous Australians. This includes reviewing aspects of native title. As the Prime Minister has acknowledged, '[t]o speak fine words and then forget them, would be worse than doing nothing at all'.⁴²

Eighteen months after becoming the Attorney-General, Robert McClelland stated native title reform is among his top priorities.⁴³ In December 2008, he admitted that he was 'hoping to have made more progress in the first year' to streamline native title processes.⁴⁴ In furtherance of the commitment to a more flexible and speedier native title system, he has stated that 'Governments – including the Commonwealth – need to take a less technical and more collaborative and innovative approach to issues like connection'.⁴⁵

To kick-start this process, the Attorney-General released two discussion papers throughout the year.⁴⁶ The Native Title Amendment Bill 2009 was introduced into Parliament, and inquired into by a Senate Committee.⁴⁷

It is also apparent that further reform of the system is being contemplated.

For the first time in my five years as Aboriginal and Torres Strait Islander Social Justice Commissioner, the Attorney-General has stated that his 'mind is open' to some more significant changes to the Native Title Act, such as shifting the burden of proof and providing for a presumption in favour of native title.⁴⁸ He has said that he is interested in 'any constructive suggestions, especially those aimed at further encouraging agreement making'.⁴⁹

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- 41 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, p 167 (The Hon Kevin Rudd MP, Prime Minister). At <http://www.aph.gov.au/hansard/rep/dailys/dr130208.pdf> (viewed 12 October 2009).
- 42 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 February 2009, p 2026 (The Hon Kevin Rudd, Prime Minister). At <http://www.aph.gov.au/hansard/rep/dailys/dr260209.pdf> (viewed 12 October 2009).
- 43 A Boswell, 'Mixed half-term reform report card', *The Australian Financial Review*, 5 June 2009, p 42.
- 44 C Merritt, 'McClelland promises clean state for national regulation', *The Australian*, 5 December 2008. At <http://www.theaustralian.com.au/business/legal-affairs/mcclelland-promises-clean-slate/story-e6frg97x-1111118227370> (viewed 16 November 2009).
- 45 R McClelland (Attorney-General), *Remarks at the Nyangumarta native title on-country consent determination hearing* (Remarks delivered at Federal Court consent determination, Nyiyamarri Purkurl, Western Australia, 11 June 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_SecondQuarter_11June2009-RemarksattheNyangumartaNativeTitleOn-CountryConsentDeterminationHearing (viewed 12 October 2009).
- 46 Australian Government, *Australian Government Discussion Paper* (undated). At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Discussion+paper+-+final+version.DOC/\\$file/Discussion+paper+-+final+version.DOC](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Discussion+paper+-+final+version.DOC/$file/Discussion+paper+-+final+version.DOC) (viewed 12 October 2009). Attorney-General, *Discussion Paper: Proposed minor native title amendments* (2008). At [http://www.ag.gov.au/www/agd/rwpattach.nsf/PublicbySrc/Native+Title+Amendment+Bill+2009+-+Discussion+paper.DOC/\\$file/Native+Title+Amendment+Bill+2009+-+Discussion+paper.DOC](http://www.ag.gov.au/www/agd/rwpattach.nsf/PublicbySrc/Native+Title+Amendment+Bill+2009+-+Discussion+paper.DOC/$file/Native+Title+Amendment+Bill+2009+-+Discussion+paper.DOC) (viewed 13 October 2009).
- 47 The *Native Title Amendment Act 2009* (Cth) commenced on 18 September 2009.
- 48 R McClelland (Attorney-General), *ABC Radio National* (9 April 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Transcripts_2009_SecondQuarter_9April2009-ABCRadioNationalBreakfastwithFrankKelly (viewed 17 November 2009).
- 49 R McClelland (Attorney-General), *Native Title Consultative Forum* (Speech delivered at the Native Title Consultative Forum, Canberra, 4 December 2008). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FourthQuarter_4December2008-NativeTitleConsultativeForum (viewed 16 November 2009).

In June 2009, he stated:

I believe there is real merit in exploring ways to build on reforms implemented to date to further simplify the native title system, to make resolving claims more efficient and timely, and to reinforce the principle that negotiation rather than litigation should be the primary mechanism for resolving native title claims. While legislative change is not a panacea, I am willing to explore ideas proposed... However, the Government will not rush into such changes without first consulting stakeholders... I am determined to ensure that the way we consult, and the relationships we forge along the way, distinguish this Government's approach to native title.⁵⁰

(a) The native title system in numbers

(i) *Determinations between 1 July 2008 – 30 June 2009*

Despite developments at a federal and state level, the native title system continued to operate at its usual pace: slowly. The NNTT confirmed that the timeframe within which matters are being finalised is not reducing,⁵¹ and it expects that only 50 out of 473 native title matters will be determined within the next two years.⁵²

During the 2008–09 reporting period, 12 determinations of native title were made by the Federal Court, bringing the total number of determinations since the Native Title Act began to 121. The determinations made in 2008–09 are detailed at Appendix 1.

This year's determinations included the largest native title determination in South Australia, granting native title rights and interests over 41 000km² of land in the Flinders and Gammon Ranges. The Adnyamathanha Aboriginal people lodged their claim in 1994. In 2009, they reached a consent determination with the state which recognises their rights to hunt, use natural resources, camp and conduct traditional ceremonies recognised over the majority of the area.⁵³

The Nyangumarta People from Western Australia's Pilbara region also had their native title rights and interests recognised over more than 33 843 km² through two consent determinations. The claim was lodged in 1998. The mediation of this claim was considered by the NNTT to be 'conflict-free', during which '[n]o single issue turned into a tug-of-war'. Nonetheless, 'the mediation still took two-and-half years

50 R McClelland (Attorney-General), *Australian Institute of Aboriginal and Torres Strait Islander Studies* (Speech delivered at the 10th Annual Native Title Conference, Melbourne, 5 June 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_SecondQuarter_5June2009-AustralianInstituteofAboriginalandTorresStraitIslanderStudies (viewed 16 November 2009).

51 National Native Title Tribunal, *National Report: Native Title* (March 2009), p 2. At <http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Corporate%20publications/National%20Report%20Card%20-%20March%202009.pdf> (viewed 12 October 2009).

52 Evidence to the Senate Legal and Constitutional Affairs Committee, Canberra, 23 February 2009, p 61 (Stephanie Fryer-Smith, Registrar of the National Native Title Tribunal). At <http://www.aph.gov.au/hansard/senate/commtee/S11639.pdf> (viewed 12 October 2009). The Registrar said that there were 50 native title matters on the substantive list. The substantive list is the NNTT's case management scheme in which it identifies applications that it thinks will be resolved through determination, dismissal or discontinuance within the next two years.

53 M Rann (Premier of South Australia), R McClelland (Attorney-General) and J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Historic native title determination today' (Media Release, 30 March 2009). At <http://www.ministers.sa.gov.au/news.php?id=4566> (viewed 12 October 2009).

to conclude after parties reached an in-principle agreement on the existence of the Nyangumarta native title rights and interests'.⁵⁴

The NNTT member noted:

This relatively straightforward claim over unallocated crown land and pastoral leases has taken 11 years to reach an outcome, with some of the claim group no longer alive to see a result. The clear message is that more effort is needed to speed up the native title claims process.⁵⁵

Another significant determination which was made was the Lardil, Yangkaal, Gangalidda and Kaiadilt Peoples who reached a consent determination, recognising their native title rights over 23 islands in Queensland's Gulf of Carpentaria. The determination, which was made over the land, followed on from the 2004 determination that recognised the peoples' native title rights to the sea.⁵⁶

(ii) *Resourcing the native title system*

In previous native title reports I have raised serious concerns about the sufficiency and distribution of resources to bodies operating in the native title system. I have been particularly concerned about the impact that poor resourcing has had on the ability of NTRBs to adequately represent the interests of the Indigenous groups who are claiming native title. The Government has also acknowledged that NTRBs are significantly under-resourced.

On 12 May 2009, the Australian Government released its 2009–10 Budget. It committed an additional \$50.1 million over four years to the native title system. This will be broken down to \$45.8 million for NTRBs, and \$4.3 million for the Government to look at ways to improve the system. This additional funding is welcome, and should go some way to lessen the pressure on NTRBs.

54 See National Native Title Tribunal, 'Nyangumarta native title resolved at 80 mile beach' (Media Release, 11 June 2009). At http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/Nyangumarta_native_title_resolved_at_80_Mile_Beach.aspx (viewed 17 June 2009). See also R McClelland (Attorney-General), *Remarks at the Nyangumarta native title on-country consent determination hearing* (Remarks delivered at Federal Court consent determination, Nyiyamarri Purkurl, Western Australia, 11 June 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_SecondQuarter_11June2009-RemarksattheNyangumartaNativeTitleOn-CountryConsentDeterminationHearing (viewed 16 November 2009).

55 National Native Title Tribunal, 'Nyangumarta native title resolved at 80 mile beach' (Media Release, 11 June 2009). At http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/Nyangumarta_native_title_resolved_at_80_Mile_Beach.aspx (viewed 17 June 2009). See also R McClelland (Attorney-General), *Remarks at the Nyangumarta native title on-country consent determination hearing* (Remarks delivered at Federal Court consent determination, Nyiyamarri Purkurl, Western Australia, 11 June 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_SecondQuarter_11June2009-RemarksattheNyangumartaNativeTitleOn-CountryConsentDeterminationHearing (viewed 16 November 2009).

56 National Native Title Tribunal, 'Native title recognized on 23 islands in Gulf of Carpentaria' (Media Release, 9 December 2008). At http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/Lardil_determination.aspx (viewed 12 October 2009).

I was pleased to see \$4.3 million set aside for examining ways to improve and streamline the operation of the system. As part of this, the Government has said it will look at:⁵⁷

- more flexible connection evidence
- streamlining participation of non-government respondents
- improving access to land tenure information
- promoting broader and more flexible native title settlement packages
- initiatives to increase the quality and quantity of anthropologists and other experts working in the system
- partnerships with state and territory governments to develop new approaches to the settlement of claims through negotiated agreements.

Recognising that there are many lessons to be learnt from the first 16 years of native title, it is positive that the Government has allocated a pool of money to look at ways to address these serious shortcomings.

However, I have concerns with the adequacy of the allocation for NTRBs and PBCs.

Although the funding increase was given in response to a 2008 Native Title Coordination Committee's review of funding of the native title system, the results of that review have not been made public. The Government has stated that the review 'found that NTRBs were substantially under-resourced for the task they were expected to perform in the system',⁵⁸ but the extent of that dearth in resourcing is not known. The Attorney-General has informed me that:

As the Native Title Coordination Committee's 2008 review of funding of the native title system is confidential to Government, it is not possible to publicly release the recommendations. However, I can assure you that the Government did consider the recommendations in the context of the 2009-10 Budget process. The recommendations informed the decision to continue non-ongoing funding otherwise due to lapse in 2008-09, and to provide an additional \$50.1 million over four years to improve the operation of the native title system.⁵⁹

Having made submissions into the under-resourcing of NTRBs in the past, and knowing the results of previous reviews of NTRB resourcing, I would speculate that the 2008 review would have recommended a much greater funding increase than was provided in the 2009-10 Budget. I do not agree with the Attorney-General that this funding is sufficient to ensure that NTRBs are adequately resourced to participate in negotiations on behalf of Indigenous people.⁶⁰ This is particularly so given that the additional \$50.1 million which has been allocated for a four year period, to be divided

57 Attorney-General's Department, *Closing the Gap – Funding for the Native Title System (additional funding and lapsing)*, Budget 2009-10 Fact Sheet. At [http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingForTheNativeTitleSystem\(AdditionalFundingandLapsing\)](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingForTheNativeTitleSystem(AdditionalFundingandLapsing)) (viewed 12 October 2009).

58 Attorney-General's Department, *Closing the Gap – Funding for the Native Title System (additional funding and lapsing)*, Budget 2009-10 Fact Sheet. At [http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingForTheNativeTitleSystem\(AdditionalFundingandLapsing\)](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingForTheNativeTitleSystem(AdditionalFundingandLapsing)) (viewed 12 October 2009).

59 R McClelland, Attorney-General, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 27 July 2009.

60 R McClelland (Attorney-General), *Australian Institute of Aboriginal and Torres Strait Islander Studies* (Speech delivered at the 10th Annual Native Title Conference, Melbourne, 5 June 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_SecondQuarter_5June2009-AustralianInstituteofAboriginalandTorresStraitIslanderStudies (viewed 16 November 2009).

between all NTRBs across the country,⁶¹ includes money for PBCs, and comes after a reduction of NTRB funding in the previous year's 2008–09 Budget.

In fact, the provisional funding allocation for NTRBs for 2009–10 was over \$5 million less than the funding provided to NTRBs for the 2008–09 financial year.⁶²

In addition, despite my recommendation and calls for secured funding from across the country, the Budget did not provide a specific allocation for PBCs. Once again, PBC funding will come from the allocation for NTRBs, or from specific project funding from other agencies. I have been informed that in 2009–10, \$1 million of the money allocated for NTRBs has been tentatively put aside for 'crisis funding support for PBCs ... in recognition of the critical unmet needs that can arise in this area'.⁶³

There are some sources of PBC project funding from other agencies. One such source is the Working on Country program run by the Department of Environment, Water, Heritage and the Arts. The 2009–10 Budget allocated \$69 million to the Working on Country program to create 210 new Indigenous ranger jobs in remote and regional Australia over the next five years.⁶⁴

There are various economic, cultural, social and environmental benefits that flow from enabling Aboriginal people and Torres Strait Islanders to manage and care for their country. The new commitment of funds is welcomed.

Unfortunately project funds such as these rarely cover the operational costs of running a PBC or are inaccessible by PBCs due to an initial lack of funding and capacity. And so, despite running very successful programs, PBCs can struggle to find resources for telephones, offices and internet connections, seriously inhibiting their success. I comment further on the precarious positions of PBCs across the country later in this Chapter.

(b) Changes to native title over the year – the direction of the Australian Government

The Australian Government's main message on native title this year is that it is dedicated to creating a native title system which encourages the parties to negotiate rather than litigate their claims. This policy would primarily be pursued through encouraging all parties to have a flexible and open minded attitude to settling native title claims.

I am supportive of this approach, and I am hopeful that it will lead to improved outcomes for Indigenous claimants. However, there are some serious barriers to change.⁶⁵

61 The Attorney-General estimates that the native title system cost approximately \$120 million in the 2007–08 financial year. See R McClelland (Attorney-General), *Launch of the Australian Law Reform Commission's Reform journal on Native Title and the Reconciliation Action Plan* (Speech delivered at the launch of the Australian Law Reform Commission's journal and its Reconciliation Action Plan, Sydney, 8 April 2009). At <http://www.alrc.gov.au/about/rap/AGspeech.html> (viewed 12 October 2009).

62 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 12 August 2009.

63 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 12 August 2009.

64 P Garrett (Minister for the Environment, Heritage and the Arts), 'Over \$69 million for new Indigenous rangers working on country' (Media Release, 12 May 2009). At <http://www.environment.gov.au/minister/garrett/2009/budmr20090512e.html> (viewed 12 October 2009).

65 See further T Calma, 'Native title in Australia: Good intentions, a failing framework?' (2009) 93 *Reform* 6.

Firstly, there are considerable constraints in the Native Title Act that will prevent parties making progress in improving native title outcomes. In Chapter 3 of this Report I consider some of these restrictions and possible amendments. Many of the restrictions originate from the initial scope of the Act. However the 1998 amendments made the situation significantly worse.

Secondly, 'attitudes' to policy are discretionary and depend on the elected government of each jurisdiction, creating uncertainty, unpredictability and inequity in native title outcomes across Australia. If a government changes, there is no guarantee that the flexible approach will be maintained. The different outcomes that result after a change in government or a change in a government's approach have been seen many times.

Finally, 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.⁶⁶ Subsequently, they all naturally support the Australian Government's approach, but it begs the question, how much more flexible will these governments feel they can be within the existing framework?

The NNTT considers that while the Australian Government's call for behavioural change is positive, it warns that even when parties support mediated rather than litigated outcomes, the support 'has not always resulted in outcomes at a broadly acceptable rate'.⁶⁷ Nor has it always resulted in good outcomes.

These limitations are evident in the Torres Strait Regional Sea Claim, Part A of which was heard by the Federal Court throughout the year.⁶⁸ In that claim, the federal Attorney-General's stated preference for flexible and less technical approaches to native title was not reflected in the Australian Government Solicitor's approach to the claim, nor did the Queensland Government Solicitor act in a way that reflects the Queensland Government's support for the federal Attorney-General's flexible approach to native title.

In the view of the Torres Strait Regional Authority (TSRA), the Queensland and Commonwealth Governments' attitudes in the claim were inconsistent with their policies and their commitments to act as model litigants.

...the Government lawyers continue to oppose the claim putting the Applicant to proof of its case. In the case of the Sea Claim the government parties' position is captured by, among other things:

- A failure to make any significant concessions;

66 Information received in correspondence to me, in response to requests for information for the preparation of the Native Title Report 2008, including: M Scrymgeour, Minister for Indigenous Policy, Northern Territory Government, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008; Queensland Government 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, Government of South Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008; T Kelly, Minister for Lands, New South Wales Government, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 1 September 2008; R Hulls, Attorney-General, Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

67 National Native Title Tribunal, *National Report: Native Title* (March 2009), p 3. At <http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Corporate%20publications/National%20Report%20Card%20-%20March%202009.pdf> (viewed 12 October 2009).

68 At the time of writing, the parties were waiting for Justice Finn to hand down his decision on the case.

- Technical arguments regarding the nature and content of the native title rights and interests;
- Challenging the exercise, existence and extent of native title rights and interests in the whole of the claim area; and
- Pressing technical legal arguments that relate to questions of society and authorisation of the claim.

The position taken by the Queensland and Commonwealth Governments' are disappointingly inconsistent with a commitment to 'improve the operation of the native title system by encouraging more negotiated settlements of native title claims'. The position has caused TSRA to commit significant financial resources, time and other resources to prosecute the claim.⁶⁹

This is a pertinent example of why relying on a change in attitude will not alone be sufficient to address the difficulties of the native title system. I recommend that the Australian Government pursue its policy through a combination of legislative and non-legislative options which together provide unambiguous and enforceable measures that all parties to native title must adhere to. Many of my ideas for change are identified in Chapter 3 of this Report.

Some measures initiated or completed by the Australian Government in 2008–09 are considered below.

(i) *Native Title Amendment Bill 2009 (Cth)*

After consulting on a discussion paper on minor native title amendments, the Attorney-General introduced the Native Title Amendment Bill 2009 (Cth) (the Bill) on 19 March 2009. The *Native Title Amendment Act 2009 (Cth)* (the Native Title Amendment Act) commenced on 18 September 2009.

The Amendment Act amends the Native Title Act to allow for, and encourage, broader negotiated agreements between native title claimants and other parties. The key changes include:

- giving the Federal Court full control over the management of native title claims
- giving the Federal Court the power to make consent orders about matters beyond native title. It is expected that this will assist with the negotiation of broader agreements
- giving the Federal Court the power to rely on an agreed statement of facts between the parties
- applying recent amendments to the Evidence Act broadly to native title proceedings⁷⁰
- changing the provisions for recognition of NTRBs; and extension, variation and reduction of NTRB areas.⁷¹

69 Torres Strait Regional Authority, *Supplementary submission to the Senate Committee on Legal and Constitutional Affairs inquiry into the Native Title Amendment Bill 2009* (24 April 2009), p 2.

70 See below for a summary of these amendments.

71 See Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2009, p 3250 (The Hon Robert McClelland MP, Attorney-General). For a summary of the amendments, see Attorney-General's Department, *Native Title Amendment Act 2009: Information Sheet* (2009). At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)-Native+Title+Amendment+Act+2009+-+Information+Sheet.DOC/\\$file/Native+Title+Amendment+Act+2009+-+Information+Sheet.DOC](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)-Native+Title+Amendment+Act+2009+-+Information+Sheet.DOC/$file/Native+Title+Amendment+Act+2009+-+Information+Sheet.DOC) (viewed 12 October 2009).

I made submissions to the discussion paper and the Senate Inquiry, generally supporting the passage of the Bill.⁷² I also recommended a number of improvements that could be made to the Bill and identified areas where further clarification of the law could be beneficial. In addition, I responded to the Attorney-General's calls to provide additional concrete recommendations for reform of the native title system, and outlined in my submissions a number of other matters that require consideration in future reforms.

(ii) *The Evidence Amendment Act 2008 (Cth)*

In December 2008, the *Evidence Amendment Act 2008* (Cth) was passed. The Act amends the *Evidence Act 1995* (Cth) (the Evidence Act), allowing for evidence of the existence or content of traditional law and custom to be exempt from the hearsay and opinion evidence rules. The amendments also changed the rules for narrative evidence, giving the court the power to direct a witness to give evidence wholly or partly in narrative form, rather than the standard question and answer format. This form of giving evidence is relevant for native title hearings where Aboriginal and Torres Strait Islander people might be more comfortable giving evidence through narrative or in the traditional practice of 'storytelling'. These amendments commenced on 1 January 2009.

I summarised these changes in my *Native Title Report 2008*.⁷³ I am pleased that changes introduced in the Native Title Amendment Act mean that the new evidence rules can apply to native title cases that began before 1 January 2009, if the parties consent or the Court orders that it is in the interests of justice to do so.⁷⁴

However, I would like to reiterate the comments that I made in my *Native Title Report 2008*; that although the amendments to the rules of evidence may go some way to addressing the difficulties of evidence in native title proceedings, they will not provide a complete or adequate solution. For this reason I continue to advocate that the Evidence Act 1995 should not apply to native title proceedings.⁷⁵

(iii) *The Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008 (Cth)*

The Attorney-General introduced the Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008 (Cth) into Parliament in December 2008. If passed, the Bill will allow the Federal Court to refer a proceeding, or one or more questions arising in a proceeding, to a referee for report.⁷⁶

72 For a copy of my submissions see http://www.humanrights.gov.au/legal/submissions/sj_submissions/submissions.html (viewed 30 November 2009).

73 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission (2009), pp 19–20. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/index.html (viewed 12 October 2009).

74 *Native Title Act 1993* (Cth), s 214.

75 See Australian Human Rights Commission, *Submission to the Senate Committee on Legal and Constitutional Affairs inquiry into the Native Title Amendment Bill 2009* (24 April 2009); Australian Human Rights Commission, *Submission to the Attorney-General's discussion paper on minor amendments to the Native Title Act* (19 February 2009). At http://www.humanrights.gov.au/legal/submissions/sj_submissions/submissions.html#nt (viewed 12 October 2009).

76 Explanatory Memorandum, Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008 (Cth). At <http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/frameodgmentattachments/46A1A36C581ECB47CA2575140020744B> (viewed 12 October 2009). At the time of writing, the Bill was still before the Senate. It had been referred to the Senate Committee on Legal and Constitutional Affairs in December 2008. The Committee reported in February 2009.

The Explanatory Memorandum to the Bill states that this power could be useful where technical expertise is required, but it is not efficient for the judge to gain the necessary expertise in that area. Therefore, the Bill gives the Court the power to refer a matter out to a referee, which is intended to provide the Court with greater flexibility, and save on resources and time.

The Attorney-General considers that the Federal Court could use this power in native title cases, contributing to the Court's ability to manage claims in such a way that the parties avoid protracted litigation and can negotiate outcomes. The new referral powers contained in the Bill may go some way to reducing the negative impacts that the adversarial setting has on native title claimants and the outcomes reached.

(iv) Optimising Benefits from Native Title Agreement-Making – Discussion Paper

The Attorney-General and the Minister of Families, Housing, Community Services and Indigenous Affairs convened the Native Title Payments Working Group in July 2008 to 'advise on how to promote better use of native title payments to improve economic development outcomes for Indigenous Australians'.⁷⁷ The Working Group on Native Title Payments reported to the Australian Government in late 2008.⁷⁸ The Attorney-General and the Minister for Indigenous Affairs then released a Discussion Paper that built on the working group's report. The Discussion Paper considered legislative and non-legislative options that would 'make better use of payments to Aboriginal communities under mining and infrastructure agreements'.⁷⁹ The proposals covered a range of topics, including transparency, taxation, minimum benefits, and other ways to promote good practice.

I agreed with aspects of the Discussion Paper, including the need to improve the application of the tax law to Indigenous corporations holding native title rights, or who receive benefits by virtue of a native title agreement.⁸⁰ However, I also recommended that the government focus on providing the Indigenous party to the negotiation with sufficient resources and access to the skills necessary to negotiate on an even playing field with the resource company. I would also like to see the underlying procedural rights on which negotiations are based, that is, the right to negotiate, expanded and strengthened to guarantee that even playing field.

Indigenous parties are on an unequal footing in negotiations with resource companies and governments. I have suggested changes to shift that power to create a more equal bargaining position for the Indigenous party. In turn, this will create better agreements. Communities know their own priorities. Once they have more power, they will be in a better position to pursue the outcomes they want to see achieved.

77 Australian Government, *Australian Government Discussion Paper* (undated). At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Discussion+paper++final+version.DOC/\\$file/Discussion+paper++final+version.DOC](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Discussion+paper++final+version.DOC/$file/Discussion+paper++final+version.DOC) (viewed 12 October 2009). The working group comprised of Professor Marcia Langton, Gina Castelain, Chris Cottier, James Fitzgerald, David Ross, Philip Hunter, Bill Hart, Glen Kelly, Melanie Stutsel and Brian Wyatt.

78 Native Title Payments Working Group, *Report* (undated). At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Working+Group+report++final+version.DOC/\\$file/Working+Group+report++final+version.DOC](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report++final+version.DOC/$file/Working+Group+report++final+version.DOC) (viewed 12 October 2009).

79 R McClelland (Attorney-General) and J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Native title discussion paper released' (Media Release, 8 December 2008). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2008_FourthQuarter_8December2008-NativeTitleDiscussionPaparReleased (viewed 16 November 2009).

80 See Australian Human Rights Commission, *Submission to the Government's native title payments discussion paper – Optimising benefits from native title agreements* (4 March 2009). At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20090304_ntpayments.html (viewed 12 October 2009).

(v) *Where momentum is waning*

So far, I have considered areas where the Australian Government has made or considered changes to native title. However, there are areas of native title policy in which there has been a distinct lack of action and momentum. I consider examples of few such areas below.

Financial assistance to the states and territories for compensation

At the Native Title Ministers' Meeting in 2008, state and territory Ministers agreed to negotiate in good faith on the content of an agreement between the Australian Government and themselves for financial assistance to deal with native title compensation.

The agreement was intended to be drafted by 30 June 2009.⁸¹ At the date of writing, a copy of the agreement was not publicly available, nor had there been any comment by governments on its status.

In last year's *Native Title Report*, I suggested that the Australian Government tie this funding to the behaviour of the state and territory governments in negotiating native title agreements, giving them incentive to act in the flexible manner that the Australian Government is advocating.

Joint Working Group on Indigenous Land Settlements – an alternative land settlement scheme

Another outcome of the Native Title Ministers' Meeting in 2008 was the establishment of a Joint Working Group on Indigenous Land Settlements. The group is to:

- develop innovative policy options for progressing broader regional land settlements
- seek to complement, not override existing processes in place for the negotiation of flexible native title settlements.

The Government is pursuing these broader land settlements on the understanding that:

Broader settlement packages provide land and social justice outcomes beyond answering the question of whether native title exists. Examples of benefits under such settlements include training and employment opportunities, land transfers and co-management of land.⁸²

Over the last year, the Joint Working Group has not produced any publicly available material. However, it is expected that the Working Group will report back to the next Native Title Ministers' meeting in August 2009.

81 Native Title Ministers' Meeting, *Communiqué* (18 July 2008). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2008_ThirdQuarter_18July-Communique-NativeTitleMinistersMeeting (viewed 16 November 2009).

82 UN Human Rights Committee, *Replies to the list of issues (CCPR/C/AUS/Q/5) to be taken up in connection with the consideration of the Fifth Periodic Report of the Government of Australia (CCPR/C/AUS/5)*, UN Doc CCPR/C/AUS/Q/5/Add.1 (5 February 2009), para 41.

Indigenous Economic Development Strategy

Since it was elected, the Australian Government has talked about its impending Indigenous Economic Development Strategy. The Labor Party committed to developing an Indigenous Economic Development Strategy (IEDS) in their 2007 election campaign, highlighting economic development as a key feature of improving the lives of Indigenous Australians.⁸³ The Labor Party referred to the need for government to work in partnership with Indigenous people to achieve economic self-reliance for individuals and communities, and promoted links between Indigenous people and the private sector. Part of the IEDS would focus on housing, land and sea management and carbon trading.

When the Government was elected, the Minister for Indigenous Affairs, Jenny Macklin, regularly promoted the IEDS as the Government's key policy platform for Indigenous affairs. In May 2008, Minister Macklin stated that the IEDS would be developed within six months.⁸⁴

Again, in May 2009, Minister Macklin announced that the Government would soon release a public discussion paper outlining an approach to Indigenous economic development with an aim to incorporate that feedback into the IEDS, which would be launched later this year.⁸⁵ At the date of writing this Report, the Government had not released a discussion paper or a draft IEDS.

Prescribed Bodies Corporate – funding

All levels of government have failed to confront the problems concerning the viability of PBCs.

There are now over 60 registered PBCs in Australia.⁸⁶ The areas covered by PBCs are set out in Map 1.1. Under the Native Title Act, PBCs are established to hold native title once a determination has been made. However, they perform a wide range of ever-expanding functions. Given that the native title rights and interests held by PBCs are not able to be used for commercial gain, PBCs often struggle to fund their basic administrative and organisational costs. This undermines their capacity to comply with complex regulatory and project reporting requirements. This, in turn, threatens their ability to protect the native title rights they were established to maintain.⁸⁷

83 Australian Labor Party, *Indigenous economic development – election 2007* (2007). At http://www.alp.org.au/download/now/indig_econ_dev_statement.pdf (viewed 1 October 2009).

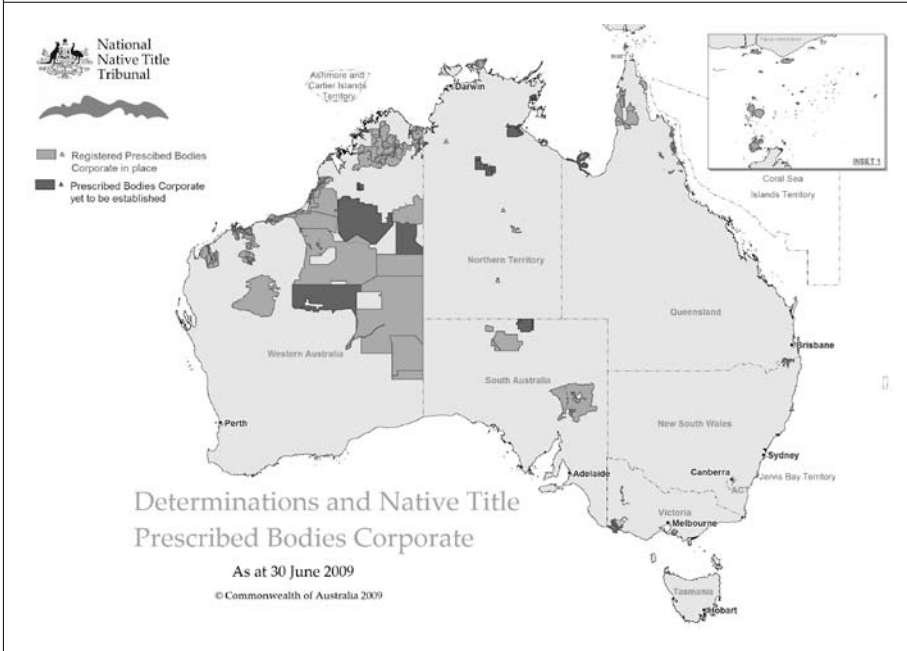
84 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Beyond Mabo: Native title and closing the gap* (Speech delivered as the 2008 Mabo Lecture, James Cook University, Townsville, 21 May 2008). At <http://www.nswbar.asn.au/circulars/macklin.pdf> (viewed 12 October 2009).

85 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Budget: Closing the gap between Indigenous and non-Indigenous Australians* (12 May 2009). At http://www.fahcsia.gov.au/about/publications/articles/corp/BudgetPAES/budget09_10/indigenous/Documents/ClosingTheGap/closingthegap.pdf (viewed 13 October 2009).

86 As at 14 July 2009, there were 63 registered Prescribed Bodies Corporate: L Bunyan, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 6 August 2009.

87 These concerns were outlined in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission (2009), pp 36–42. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/index.html (viewed 12 October 2009).

Map 1.1: Determinations and Native Title Prescribed Bodies Corporate



The chair of a PBC in Western Australia describes the difficult position that PBCs are placed in:

The PBC is the foundation to look after our land, our culture, socially and economically... In the last couple of years our committee has been struggling a little. Our [Annual General Meeting] has been failing a bit. I have got to look at every little avenue to manage our country. How can we manage our country without government funding? We set up lots of Karajarri projects with project funding... The government says 'we will give you money for the project, but we won't give you money for the PBC'. ... The downfall of our PBC is trying to administrate and manage our country. We have no fax, no phone, and no place where people can come.⁸⁸

Yet, as I mentioned earlier in this Chapter, no federal funding has been allocated specifically for PBCs. The 2007 changes to the native title system did provide that NTRBs could use some of their limited funding to assist PBCs with their day-to-day operations. Through this mechanism, approximately \$1 million of NTRB funding has been set aside for PBCs across the country in 2009–10.⁸⁹ The 2007 changes also allowed for the Department of Families, Housing, Community Services and

88 M Mulardy, interviewed by J Weir, 'Traditional Owner Comment' (September/October 2008) No 5/2008 *Native Title Newsletter* 2, p 3.

89 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 12 August 2009.

Indigenous Affairs (FaHCSIA) to consider direct funding requests from PBCs. To date, FaHCSIA has not directly funded a single PBC.⁹⁰

The 2007 amendments to the Native Title Act also provided for another potential funding source for PBCs. PBCs are now able to charge fees for the costs that they incur in respect of a number of matters that are specifically listed in subsection 60AB(1) of the Native Title Act. These include costs incurred when negotiating agreements under s 31(1)(b) of the Native Title Act and negotiating Indigenous Land Use Agreements.⁹¹

Regulations can be made to allow PBCs to charge a fee for costs they incur when performing other functions.⁹² However, two years after these amendments were finalised, these regulations are yet to be drafted.

Overall, the Australian Government has acted contrary to the Australian Labor Party's National Platform and Constitution 2007, which commits to ensuring adequate resourcing for the *core responsibilities* of PBCs.⁹³

In the meantime, pressure is building on PBCs to perform a myriad of tasks on behalf of every level of government. This takes advantage of the traditional owners' sense of responsibility to their country.

For example, amendments were made in 2008 to the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld). Previously, lands granted by the Queensland Government to Indigenous communities were administered by a trustee for the benefit of Aboriginal people or Torres Strait Islanders particularly concerned with the land.

The 2008 amendments made a number of significant changes to the Queensland land rights Acts, including allowing Registered PBCs to hold the land for the native title holders of that land. The Acts now allow the Minister to appoint a PBC as the grantee of the land if there is a determination over all or part of the land, and the PBC approves. These amendments were intended to assist the Queensland Government to include Indigenous land as part of native title negotiations and to help align the Queensland Acts with the Native Title Act.⁹⁴

Despite this significant additional responsibility, the Queensland Government has not committed to providing additional resources to enable PBCs to undertake this responsibility. The Government has only committed to providing guidance to new grantees as to how to enter into leases. I have been told that the Queensland Government considers that PBCs are the funding responsibility of the Australian Government, as a federal law (the Native Title Act) requires PBCs to be established.

90 Department of Families, Housing, Community Services and Indigenous Affairs, Email to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 24 August 2009. I have been informed that whether PBC funding applications are received directly by the Department or not, they are routed through the relevant NTRB, which is then requested to provide comments on each application. Any PBC that wishes to apply for funding direct from the Department must first seek the Department's agreement to make an application for direct funding, explaining why they consider support through their NTRB is not acceptable. For more information on funding of PBCs and the 2007 changes, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), pp 97–99. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 13 October 2009).

91 However, PBCs cannot charge fees for their costs of being a party to an inquiry about whether a future act can occur or not under s 35 of the Native Title Act, nor for their costs as a party to any court proceeding.

92 *Native Title Act 1993* (Cth), s 60AB(2).

93 Australian Labor Party, *Australian Labor Party National Platform and Constitution* (2007), ch 13, para 104 (emphasis added).

94 Explanatory Note, Aboriginal and Torres Strait Islander Land Amendment Bill 2008 (Qld), p 6. For further discussion, see Chapter 4 of this Report.

I do not agree with this approach. PBCs are established to hold and protect native title rights and interests under the Native Title Act. However, that does not mean that they should be asked to shoulder additional responsibilities, programs and costs by other governments, without appropriate resources to undertake those additional responsibilities.

As I have stated, many PBC members would be loathe to not accept the responsibilities to deal and manage their land. This is exactly what they have worked toward in pursuing their native title claim. Yet they must be funded to undertake this role. Otherwise, they are being set up to fail yet again.

Given these pressures, PBC members are banding together and demanding practical recognition of their status as the traditional owners of an area.

One aspect of this is that they would like to form a national peak body in order to form a direct line of communication with governments about land and sea matters and the management of their native title rights and interests. At a meeting of over 50 PBC representatives, PBCs called for a peak body which would be the voice for PBCs, coordinate information, mentor new PBCs, lobby and influence policy and sit with other national bodies.⁹⁵

I support this call. I recommend that such a body should be supported by existing bodies and projects that play a similar role. This could include the Aurora Project, the PBC project at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), the Office of the Registrar of Indigenous Corporations (ORIC) and the National Native Title Council (NNTC).

I also consider that further attention needs to be paid to the development of sources of funding support for PBCs. Funding models already exist whereby a percentage of income derived from state land tax or mining activity has funded the statutory land rights regime. Some land rights regimes across the country are now self-funding due to state government investment. The examples featured in Text Box 1.1 should be further reviewed to determine what aspects may be appropriate for the native title system to create financial sustainability for land holding and management organisations once a determination has been made.

Text Box 1.1: Examples of funding arrangements for land rights regimes

New South Wales Land Rights Regime⁹⁶

Under the *Aboriginal Land Rights Act 1983* (NSW), an account was established, whereby for fifteen years, the state paid an amount equivalent to 7.5% of NSW Land Tax (on non-residential land) into statutory accounts administered by the New South Wales Aboriginal Land Council (NSWALC), as compensation for land lost by the Aboriginal people of NSW.

That annual payment ceased in 1998 when a clause in the Act, known as the Sunset Clause, took effect. Since then, the NSW Aboriginal Land Council has been self-sufficient, funding its activities and supporting Local Aboriginal Land Councils with the money made from its investments.

95 Native Title Services Victoria and the Australian Institute of Aboriginal and Torres Strait Islander Studies, 'Native Title holders call for national peak body' (Media Release, 2 June 2009).

96 New South Wales Aboriginal Land Council, *NSWALC Funding*. At <http://www.alc.org.au/about/Funding/funding.htm> (viewed 19 September 2009).

The capital, or compensation, accumulated over the first 15 years of the Council's existence remains in trust for the Aboriginal people of NSW and cannot be touched. Interest from NSWALC's investments fund the organisation's head office in Parramatta, which oversees and funds the network of Local Aboriginal Land Councils.

NSWALC also funds land claims, related test-case litigation and supports the establishment of commercial enterprises which create an economic base for Aboriginal communities.

Aboriginals Benefit Account – Northern Territory⁹⁷

The Aboriginals Benefit Account (ABA) is a Special Account (for the purposes of the *Financial Management and Accountability Act 1997* (Cth)) established for the receipt of statutory royalty equivalent monies generated from mining on Aboriginal land in the Northern Territory (NT), and the distribution of these monies.

The ABA is administered by the Department of Families, Housing, Community Services and Indigenous Affairs in accordance with the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

The ABA funds are used to meet the operational costs of the Land Councils in the NT and to pay compensation to traditional owners and other Aboriginals living in the NT that have been affected by mining. The ABA can also make grants for the benefit of Aboriginal people in the NT and in exercising this function, the Commonwealth Minister receives advice from an Account Advisory Committee with Aboriginal majority membership.

Government support at all levels is crucial to the success of the system overall and to meeting the goal of closing the gap.

Prescribed Bodies Corporate – regulation

Since its commencement in 2007, I have raised concerns about the application of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (the CATSI Act).⁹⁸ I have previously:

- called for a review of the impact of the CATSI Act on Indigenous corporations, in particular on the ability of Registered Native Title Bodies Corporate (also known as PBCs)⁹⁹ to protect and utilise their native title rights and interests
- recommended that the Government ensure that funding provided to registered PBCs is consistent with the aim of building the capacity of PBCs to operate.

Those recommendations have not been addressed.

97 Department of Families, Housing, Community Services and Indigenous Affairs, *Aboriginals Benefit Account (NT only)*. At http://www.fahcsia.gov.au/sa/indigenous/progserv/money/Pages/aboriginals_benefit_account.aspx (viewed 19 September 2009).

98 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 6; T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission (2009), ch 2.

99 Under the CATSI Act, Prescribed Bodies Corporate are referred to as Registered Native Title Bodies Corporate. I will continue to refer to them as PBCs in this Report.

FaHCSIA has advised that \$545 750 was provided to NTRBs during the 2008–09 financial year for allocation to specific PBCs. In addition, FaHCSIA advised that the ORIC also expended \$1.5 million in training to Indigenous corporations, some of which was provided to PBCs. ORIC organised and funded five workshops for PBCs, which were attended by 15 groups during the 2008–09 financial year.¹⁰⁰

While I acknowledge and support the critical work of the ORIC in developing the governance capacity of Indigenous organisations (including PBCs), I am concerned that at least two registered PBCs have been placed under administration during this reporting period.¹⁰¹ This emphasises the need for a review of the impact of the CATSI Act on Indigenous corporations.

1.4 Significant cases affecting native title and land rights

(a) The constitutional validity of compulsory acquisitions under the Northern Territory intervention: *Wurridjal v Commonwealth*

(i) Background

In February 2009, the High Court handed down its decision in *Wurridjal*.¹⁰² In the case, the Court considered the constitutional validity of certain provisions of the legislation which supported the Northern Territory intervention.¹⁰³

Two senior members of the Dhukurrdji people (traditional owners of an area including the town of Maningrida) and a business in Maningrida (the Bawinanga Aboriginal Corporation) argued that three aspects of the intervention were acquisitions of property under the Constitution:

- the compulsory acquisition of five-year leases over township land in Aboriginal communities across the Northern Territory¹⁰⁴

100 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2009.

101 Office of the Registrar of Aboriginal Corporations, 'Two QLD native title corporations placed under special administration' (Media Release, 24 September 2008). At http://www.oric.gov.au/Content.aspx?content=publications/mediaReleases/ORICMR0809-09_Two-QLD-native-title.htm&menu=publications&class=publications&selected=Media%20releases (viewed 17 November 2009).

102 *Wurridjal v Commonwealth* (2009) 237 CLR 309.

103 See *Wurridjal v Commonwealth* (2009) 237 CLR 309, 335 (French CJ). The challenged provisions appeared in the *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER) and the *Families, Community Services and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth). I discussed the Northern Territory intervention, the compulsory acquisition of five-year leases and changes to the permit system in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 9. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 4 October 2009). Other aspects of the intervention were discussed in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 3. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html (viewed 4 October 2009). Developments in land tenure reform are further discussed in Chapter 4 of this Report.

104 Five-year leases over township land in 64 communities were compulsorily acquired, that is, involuntarily created by force of law. Freehold title to the land had earlier been granted to the traditional owners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA). The compulsory leases give the Commonwealth exclusive possession and quiet enjoyment of the land and allow the Commonwealth to grant subleases and licences over the land.

- changes to the permit system, which stated that permits were no longer required to enter common areas of community land nor the roads connecting them¹⁰⁵
- the alleged subordination of Aboriginal people's rights to enter upon and use or occupy the land in accordance with Aboriginal tradition.¹⁰⁶

More than a year after the intervention began no rent or compensation for the changes had been discussed with traditional owners or the Land Councils.¹⁰⁷

(ii) *Arguments of the parties*

In the High Court, the plaintiffs claimed that the Commonwealth had acquired Aboriginal property rights on other than just terms, in breach of the guarantee offered to property-holders in s 51(xxxi) of the Constitution.¹⁰⁸ They sought a declaration that, to this extent, the intervention legislation was invalid.

The Commonwealth claimed that because the intervention legislation was made under the Territories power of the Constitution (s 122),¹⁰⁹ the safeguard of just terms for the acquisition of property in s 51(xxxi) of the Constitution did not apply.

In the alternative, the Commonwealth claimed that no property was acquired because the Land Trust's fee simple interest in the land was a mere statutory entitlement (created under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the ALRA)) and therefore it was defeasible and could be changed by another Commonwealth law. They argued that the changes that were made for the intervention were less than an 'acquisition', because under the ALRA the Commonwealth continued to have a significant level of control over Aboriginal land.

Finally, in the event that the Court held that there was an 'acquisition of property' in the constitutional sense, the Commonwealth argued that the provisions in the intervention legislation which allowed court action to recover reasonable compensation, satisfied the requirement for 'just terms'.

(iii) *Decision of the High Court*

Therefore, the High Court considered three issues:

1. Whether the requirement for just terms compensation in s 51(xxxi) of the Constitution applies to laws made for the territories under s 122 of the Constitution.
2. Whether there had been an acquisition of property.
3. Whether the relevant laws provided just terms.

105 A law of the Northern Territory, the *Aboriginal Land Act* (NT) (ALA), establishes the 'permit system' which provides that people are not allowed on Aboriginal land without permission from the traditional owners or the Land Council.

106 Section 71 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) affirms that Aboriginal people have the right to enter and occupy or use the land in accordance with Aboriginal tradition.

107 As I mentioned in the *Native Title Report 2007*, the legislation under which the Australian Government acquired the land did not explicitly provide that rent would be paid in all circumstances. The legislation simply provided for the payment of 'reasonable' compensation if the Minister had requested a valuation of the land from the Valuer-General. See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 9. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 19 October 2009).

108 Section 51(xxxi) of the Constitution provides that the 'Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ...the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'.

109 The relevant part of section 122 of the Constitution states that the 'Parliament may make laws for the government of any territory'.

A majority of the Court answered 'yes' to all three.¹¹⁰ The majority overruled *Teori Tau v Commonwealth (Teori Tau)*,¹¹¹ in which the Court had held that s 122 is not limited or qualified by s 51(xxxi). They found that there had been an acquisition of property to which s 51(xxxi) of the Constitution applied.

However, the majority also found that the intervention legislation provided just terms, by allowing recovery of 'reasonable compensation', if necessary by court action. Although the plaintiffs 'won' on two of the three questions argued before the Court, the Court required them to pay the Commonwealth's legal costs.

(iv) *Justice Kirby's dissent*

Justice Kirby dissented on the overall result in *Wurridjal*. He found that the applicants should not be knocked out in a preliminary hearing of the kind adopted by the High Court (a 'demurrer'), which addressed legal questions divorced from a full trial involving witnesses and other evidence. He was satisfied that the plaintiffs had an arguable case (particularly with a majority over-ruling *Teori Tau*) and should have the opportunity, after amending and clarifying their claim if necessary, to pursue the matter in a full hearing. As Kirby J stated:

My purpose in these reasons is to demonstrate that the claims for relief before this Court are far from unarguable. To the contrary, the major constitutional obstacle urged by the Commonwealth is expressly rejected by a majority, with whom on this point I concur. The proper response is to overrule the demurrer. We should commit the proceedings to trial to facilitate the normal curial process and to permit a transparent, public examination of the plaintiffs' evidence and legal argument... The law of Australia owes the Aboriginal claimants nothing less. ...

If any other Australians, selected by reference to their race, suffered the imposition on their pre-existing property interests of non-consensual five-year statutory leases, designed to authorise intensive intrusions into their lives and legal interests, it is difficult to believe that a challenge to such a law would fail as legally unarguable on the ground that no "property" had been "acquired". Or that "just terms" had been afforded, although those affected were not consulted about the process and although rights cherished by them might be adversely affected. The Aboriginal parties are entitled to have their trial and day in court. We should not slam the doors of the courts in their face. This is a case in which a transparent, public trial of the proceedings has its own justification.¹¹²

Justice Kirby attributed legal significance to the indigeneity of the traditional owners. By contrast Justices Hayne and Gummow stated:

No different or special principle is to be applied to the determination of the demurrer to the plaintiffs' pleading of invalidity of provisions of the Emergency Response Act and the FCSIA Act because the plaintiffs are Aboriginals. No party to this litigation sought to rely upon any such principle, whether the suggested principle be described as a rule of 'heightened' or 'strict' scrutiny or in some other way. There was therefore no examination of the content of any such principle. But we would agree that such a principle 'seems artificial when describing a common interpretative function'. In any event, to adopt such a principle would have departed from the fundamental principle of 'the equality of all Australian citizens before the law'...¹¹³

110 Regarding question 1, French CJ, Gummow & Hayne JJ and Kirby J all answered in the affirmative. In doing so, they overruled *Teori Tau v Commonwealth* (1969) 119 CLR 564, applying the safeguard of 'just terms' compensation for the acquisition of property across Australia, to territories as well as states. Justice Kiefel arrived at the same result but on narrower constitutional grounds. Regarding question 2, French CJ, Gummow & Hayne JJ, Kiefel J and Kirby J all answered in the affirmative. Regarding question 3, French CJ, Gummow & Hayne JJ, Heydon J and Kiefel J all answered in the affirmative.

111 (1969) 119 CLR 564.

112 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 391, 394 (Kirby J).

113 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 369 (Gummow and Hayne JJ).

Recognising another consequence of the special status of traditional owners compared to other land owners in Australia, Justice Kirby reiterated his comments in the *Griffiths*¹¹⁴ case in which he emphasised that Indigenous peoples' rights deserve special protection and that any law purporting to extinguish or diminish Indigenous peoples' land rights can only do so by 'specific legislation' which expressly states this intention.¹¹⁵

He supported this principle with a discussion of relevant international law which 'recognises the entitlement of indigenous peoples, living as a minority in hitherto hostile legal environments, to enjoy respect for, and protection of, their particular property rights'.¹¹⁶

Justice Kirby concluded:

In these proceedings a growing body of international law concerning indigenous peoples exists that confirms the rules that are already now emerging in Australian domestic law. Laws that appear to deprive or diminish the pre-existing property rights of indigenous peoples must be strictly interpreted. This is especially so where such laws were not made with the effective participation of indigenous peoples themselves. Moreover, where (as in Australia) there is a constitutional guarantee providing protection against 'acquisition of property' unless 'just terms' are accorded, development of international law will encourage the national judge to give that guarantee the fullest possible protective operation.¹¹⁷

The plaintiffs' status as traditional owners also influenced Justice Kirby's consideration of what actually constitutes just terms. He referred to case law and the differences between the Australian Constitution and the drafting of the Constitution of the United States of America to support his view that '[a]t least arguably, "just terms" imports a wider inquiry into fairness than the provision of "just compensation" alone'.¹¹⁸

Justice Kirby considered the implications of this view for the acquisition of traditional owners' land. He stated that:

This might oblige a much more careful consultation and participation procedure, far beyond what appears to have occurred here. ...

Given the background of sustained governmental intrusion into the lives of Aboriginal people intended and envisaged by the National Emergency Response legislation, 'just terms' in this context could well require consultation before action; special care in the execution of the laws; and active participation in performance in order to satisfy the constitutional obligation in these special factual circumstances ...¹¹⁹

(v) *Significance of the decision*

The decision of the High Court in *Wurridjal* is significant for several reasons. A majority of judges over-ruled *Teori Tau* and said effectively that the just terms guarantee applies in the territories in the same way that it does in the states. This is important for everyone who lives in a territory and is therefore subject to Commonwealth laws passed under s 122 of the Constitution. I am particularly pleased that a majority

114 *Griffiths v Minister for Lands, Planning and Environment (Northern Territory)* [2008] HCA 20.

115 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 406 (Kirby J).

116 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 411 (Kirby J).

117 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 413 (Kirby J).

118 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 425 (Kirby J). Justice Kirby also said that s 51(xxxi) of the Australian Constitution was inspired by the United States Constitution, which provides for 'just compensation'. However, the drafters of the Australian Constitution deliberately inserted the words 'just terms' rather than 'just compensation', suggesting the Australian phrase should be given a distinct interpretation that transcended compensation. See *Wurridjal v Commonwealth* (2009) 237 CLR 309, 425 (Kirby J).

119 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 425, 426 (Kirby J).

recognised the unfairness of the rule in *Teori Tau*, because Aboriginal people make up almost 30% of the population in the Northern Territory and they hold fee simple (or freehold) title to almost 50% of the land there. These property rights were vulnerable to second-class treatment by the Commonwealth under the old law.

As I noted earlier, in *Wurridjal* the Commonwealth argued that it retained such a strong controlling interest over Aboriginal land in the Northern Territory that it could impose a five-year lease against the wishes of traditional owners (with apparently no obligation to pay rent) and yet not trigger the obligation to provide just terms. Another welcome feature of the case is that a majority of the Court rejected this argument. The decision reaffirmed the legal strength of Aboriginal property rights under the ALRA and the independent degree of control over land enjoyed by traditional owners.

On the other hand, the case has left some important questions unanswered about the 'valuation' of Aboriginal property rights and the legitimacy or otherwise of applying normal 'real estate' principles regarding compulsory acquisition and compensation to these unique property interests. Because of the way the case was dealt with, the plaintiffs' arguments that special procedures for acquisition and non-monetary compensation might be required to meet the constitutional standard of just terms remain unresolved.

It is also unclear from the Court's decision whether the changes to the permit scheme, on their own, effect an acquisition of property. This remains important for the future, particularly if further unilateral changes are made by Parliament to the rules for entering on Aboriginal land or the permit changes remain in place after expiry of the five-year leases.¹²⁰

The Government is accountable for the arguments that its legal representatives put before courts. The Commonwealth's arguments in this case raise a number of concerns about the Government's approach to Indigenous peoples' land rights.¹²¹

The Government disputed whether any compensation needed to be paid simply because the acquisitions were in the Northern Territory.

Perhaps even more concerning was the Government's alternative argument that five-year leases were a statutory readjustment and not an acquisition of property. This can be seen as an attempt by the Commonwealth to treat Aboriginal land as an inferior form of title.

A further concern remains about the Commonwealth Government's conduct – the failure to pay rent and compensation for the leases in a timely manner.

In October 2008, well after proceedings in this case had commenced, the Government requested the Northern Territory Valuer-General to determine the rents that should be paid for the compulsory five-year leases.

On 27 February 2009, about a month after the *Wurridjal* decision was handed down, the Government announced that it had finalised boundaries for all 64 five-year leases that were acquired by the Government as part of the Northern Territory Emergency Response. The review of the lease boundaries resulted in changes to the leases to reduce the area leased and allowed for the Government to accurately determine the

120 For discussion of this and other aspects of the case, see S Brennan, 'The Northern Territory Intervention and Just Terms for the Acquisition of Property: *Wurridjal v Commonwealth*' (*Melbourne University Law Review*, forthcoming).

121 See S Brennan, 'The Northern Territory Intervention and Just Terms for the Acquisition of Property: *Wurridjal v Commonwealth*' (*Melbourne University Law Review*, forthcoming).

area for which they would pay rent. The Minister for Indigenous Affairs, stated that the Government recognised 'that reasonable rent must be paid to landowners'.¹²²

In August 2009, the Minister advised me that:

In October 2008, in response to the recommendation of the Northern Territory Emergency Response Review Board, I wrote to the Northern Territory Valuer-General requesting that he determine reasonable amounts of rent to be paid to owners of land subject to five-year leases under the NTER. In March of this year, I made an additional request of the Valuer-General to also determine rent to be paid under the reduced lease boundaries that came into effect on 1 April 2009. The Valuer-General was asked to give these requests his prompt attention. I am advised that the Valuer-General is currently finalising his draft report, a copy of which will be provided to FaHCSIA as well as the relevant land councils for comment. I expect to receive the Valuer-General's final report containing both sets of determinations in late August 2009. The payment of rent will commence shortly after.¹²³

At the time of writing this Report, the Government had still not paid rent or compensation for the leases.

I further consider the Government's approach regarding the payment of rent and the assessment of compensation in Chapter 4 of this Report.

I am also concerned that the Commonwealth drafted compensation provisions which required a full-scale constitutional case to establish entitlements and yet, when the Aboriginal parties defeated the Commonwealth on two out of three constitutional arguments, they were nonetheless ordered to pay the Commonwealth's legal costs.

Only Kirby J considered that the costs order was unjust:

They brought proceedings which, in the result, have established an important constitutional principle affecting the relationship between ss 51(xxxi) and 122 of the Constitution for which the plaintiffs have consistently argued. It was in the interests of the Commonwealth, the Territories and the nation to settle that point. This the Court has now done. In my respectful opinion, to require the plaintiffs to pay the entire costs simply adds needless injustice to the Aboriginal claimants and compounds the legal error of the majority's conclusion in this case.¹²⁴

The end result is inequitable. Between the calculated drafting strategy of the Commonwealth and the costs order of the Court, the law seems to have operated unfairly.

(b) The requirement to negotiate in good faith: *FMG Pilbara Pty Ltd v Cox*

(i) The future act regime

The future act regime deals with proposed development on native title country. Particular forms of development likely to have a substantial native title impact attract additional procedural protections for native title parties. These protections are known as the 'right to negotiate' and they apply to the grant of some mining tenements (leases and licences) and certain compulsory acquisitions. The Act places emphasis on negotiation as the means for addressing the native title issues at stake in such future acts, by preventing resort to an arbitral body (usually the NNTT) for a period

122 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Government finalises five-year lease boundaries in NT Indigenous communities' (Media Release, 27 February 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/lease_boundaries_27feb09.htm (viewed 19 October 2009).

123 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 12 August 2009.

124 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 426 (Kirby J).

of six months. Time runs from the issue of a notice that the government intends to grant a mining tenement (s 29 notice). During this negotiation window, s 31 of the Native Title Act obliges the parties involved to negotiate in good faith. The main negotiating parties are the mining company (grantee) and a registered native title claimant group or the recognised native title holders for the area, with the state or territory government playing a passive or sometimes more active role as well.

In *FMG Pilbara*¹²⁵ (decided in April 2009), the Full Federal Court considered what is required for parties to fulfil the obligation in s 31 to ‘negotiate in good faith with a view to obtaining the agreement of each of the native title parties to the doing of the act or the doing of the act subject to conditions’.¹²⁶

(ii) *Background to the appeal*

The Western Australian Government gave notice of its intention to grant Fortescue Metal Group (FMG) a lease to mine an area in the Pilbara region. The proposed lease overlapped a registered native title claim and an area where native title had been determined.

As required by the Native Title Act, FMG negotiated with both native title parties – the Puutu Kunti Kurrama and Pinikura People (PKKP), a registered native title claimant group for part of the area, and the Wintiwari Guruma Aboriginal Corporation (WGAC), the registered native title body corporate for the balance of the area.¹²⁷ Six months after the notice, none of the parties had reached an agreement. FMG applied to the NNTT for a determination whether the future act could proceed, with or without conditions. Both the native title parties alleged that FMG had not fulfilled its obligation to negotiate in good faith.

FMG had approached the negotiations on a ‘whole of claim’ basis. That is, the miner sought a comprehensive Land Access Agreement (LAA) that bundled together not only the specific grant of the mining lease in question, but all the other future activities it might wish to undertake on the native title land in question, in pursuit of exploration and mining projects. This included obtaining tenure for mining as well as for railway and port infrastructure, and the authority to extract water.

Most of the discussions between PKKP and FMG had concerned the finalisation of a negotiation protocol, an agreed process for dealing with these comprehensive negotiations. PKKP claimed there had only been one meeting following the conclusion of the negotiation protocol about the substance of FMG’s proposed activities.

The native title parties drew attention to a number of aspects of FMG’s behaviour, raising two questions in particular about the obligation to negotiate in good faith:

- If negotiations have reached only a preliminary stage at the expiry of six months, does it show an absence of good faith for a miner to ‘bail out’ of those negotiations and seek an arbitral determination? One set of negotiations were said to have involved only one meeting about the substance of FMG’s proposed activities.

125 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49. It has also been reported at (2009) 175 FCR 141. For a case note, see National Native Title Tribunal, *Native Title Hot Spots* (2009) (Issue 30), pp 17–23.

126 The High Court refused special leave to appeal the decision of the Full Federal Court on 14 October 2009. See *Cox v FMG Pilbara Pty Ltd* [2009] HCATrans 277 (14 October 2009). At <http://www.austlii.edu.au/au/other/HCATrans/2009/277.html> (viewed 23 October 2009).

127 WGAC was established following the approved determination of native title made in *Hughes v Western Australia* [2007] FCA 365.

- If discussions over a particular mining grant are incorporated into a broader negotiation over future activities on the land, what happens if those broader negotiations falter? Did the good faith requirement oblige FMG to return to the table and seek agreement to the particular grant, once the wider LAA talks stalled? Or was the company free to seek arbitration at that point?

The NNTT found in favour of the native title party on both issues. The NNTT said that ‘although FMG had approached negotiations with PKKP in relation to the LAA in a manner which was reasonable and honest, it had not advanced those negotiations to a stage where it could be said that it had discharged its duty to negotiate in good faith’.¹²⁸ Also, FMG should have reverted to more specific negotiations when broader talks stalled. The absence of good faith negotiation meant that the NNTT had ‘no jurisdiction’ to determine whether the future act could be done or not.¹²⁹

(iii) Decision of the Federal Court

FMG appealed the NNTT’s decision to the Federal Court and was successful on both issues. The Court found that, regardless of the stage reached in negotiations, all that the Act requires is that the parties negotiate in good faith about the doing of the future act during the six month period. Once that time expires, a future act determination can be sought. The Court also considered that in this case, the broader negotiations the parties had embarked on were sufficient to discharge the obligation to negotiate in good faith in relation to the particular future act in question.¹³⁰ There was no need to revert to negotiations about the specific mining grant itself before seeking arbitration.

The Court found that, as FMG had acted in good faith during the six month period, the NNTT had the power to make a determination as to whether the act could be done.¹³¹

In its decision, the Court made a number of observations:

- The expression in s 31 of the Native Title Act that the parties must ‘negotiate in good faith’ should be given its natural and ordinary meaning.¹³² The provision is intended to be beneficial to native title parties and should not be given a narrow interpretation.
- The Act does not compel parties to negotiate over specified matters or in a particular way and, here, neither native title party had objected to negotiations being conducted on a whole of claim or project wide basis.¹³³
- ‘Good faith’ requires consideration of the party’s conduct – what it has done, and what it has not done – as an indication of the party’s state of mind during the negotiations.¹³⁴
- Merely to ‘go through the motions’, with a rigid and pre-determined position may show a lack of good faith. But in this case, the NNTT had found that FMG had a genuine desire to reach agreement in its negotiations and there was no evidence that FMG had engaged in deliberately misleading

128 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 15.

129 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 1.

130 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 38.

131 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 28.

132 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 19.

133 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, paras 36, 38.

134 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 21.

behaviour. These and other factual findings showed ‘there had been conscientious and bona fide negotiation for a six-month period’.¹³⁵

- The requirement to negotiate in good faith in s 31 does not mean that the parties have to reach a certain stage in their negotiations by the end of the six month period.¹³⁶ Instead, the Court stated that:

[T]here could only be a conclusion of lack of good faith within the meaning of [s 31]...where the fact that the negotiations had not passed an ‘embryonic’ stage was, in turn, caused by some breach of or absence of good faith such as deliberate delay, sharp practice, misleading negotiating or other unsatisfactory or unconscionable conduct.¹³⁷

(iv) *Policy implications of the decision*

One of the main virtues of agreement-making is that it provides much greater flexibility for the parties. There are limits to what the Act can prescribe, particularly in substantive terms, when it comes to mining negotiations. Similar constraints apply to courts and tribunals.

However, the obligation on miners to negotiate in good faith, before any other option arises to proceed with their development, is one of the few legal safeguards that native title parties have under the future act regime. The Full Federal Court decision in *FMG Pilbara* shows that the Act provides insufficient legal protections and that, even under the existing law, the Courts could legitimately enforce the good faith requirement more vigorously.

I am concerned that in *FMG Pilbara* the Act was interpreted in ways which unnecessarily strengthened the position of mining companies over native title interests. For example, s 31(1)(b) requires good faith negotiation towards agreement about ‘the doing of the act’ and the act here was the grant of the specific tenement. The Court would have been well justified in finding that negotiations addressing a much broader range of issues lacked the specificity required by the precisely chosen language in the Act.

The Court also applied only a loose form of judicial scrutiny to the decision by FMG to ‘bail out’ of substantive negotiations at a very early stage. Whereas the NNTT in the *FMG Pilbara* litigation had emphasised the ‘reasonable person’ test employed in earlier future act decisions to assess the behaviour of the mining company,¹³⁸ the Full Federal Court seemed to rely on a much looser standard of behaviour. The embryonic stage of negotiations had to be attributable to ‘sharp practice’ or ‘unconscionable conduct’ or the like,¹³⁹ before the withdrawal from negotiations at that early stage could justify a conclusion of lack of good faith. This narrow interpretation ‘raises the bar even further for native title parties who seek to oppose applications [for arbitration] under s 35’.¹⁴⁰ Native title lawyer Sarah Burnside has suggested that ‘only an unusually careless proponent risks being found to have failed to meet the threshold’.¹⁴¹

135 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 29.

136 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 23.

137 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 27.

138 *Cox v Western Australia* [2008] NNTTA 90, also reported at (2008) 219 FLR 72, paras 40, 70.

139 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 27.

140 S Burnside, ‘Take it or leave it’: *how not to negotiate in good faith* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 3 June 2009). At <http://ntru.aiatsis.gov.au/conf2009/papers/SarahBurnside.pdf> (viewed 24 June 2009).

141 S Burnside, ‘Take it or leave it’: *how not to negotiate in good faith* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 3 June 2009). At <http://ntru.aiatsis.gov.au/conf2009/papers/SarahBurnside.pdf> (viewed 24 June 2009).

This is supported by research conducted by Tony Corbett and Ciaran O’Faircheallaigh in 2006:

We identified 13 cases where the Tribunal made determinations about ‘good faith’ in negotiations related to the grant of mining leases, and 17 determinations ... over whether the grant of a mining lease might proceed. In only one case was a decision made that ‘good faith’ negotiation had not occurred, and this involved a situation where the grantee had made little attempt to engage with the native title party and had made clear that it was participating in the RTN process only so that it could proceed to arbitration by the Tribunal ... these findings strongly suggest that grantee parties have little to fear from the arbitration process...Unless they engage in behaviour that patently demonstrates the absence of an intention to engage in negotiation, they appear unlikely to be required to re-commence the RTN process with a consequent delay in project development.¹⁴²

In short, courts and tribunals should employ appropriate rigour and standards of reasonableness when applying the good faith requirement.

I also consider the right to negotiate provisions need to be amended so that they provide much stronger incentives for the negotiation of agreements that are fair to native title parties and their legitimate concerns when mining is proposed on their land. I consider potential options for reform in Chapter 3 of this Report.

(c) The first decision that a mining lease must not be granted: *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd*

In May 2009, the NNTT handed down its first decision that a mining lease must not be granted because of its impact on the native title holders.¹⁴³ It was a landmark decision, although its broader significance beyond this case will remain unclear for some time.

(i) Decision of the NNTT

In *Holocene*,¹⁴⁴ the NNTT considered whether the Western Australian Government could grant a mining lease to a company (the grantee party, Holocene Ltd)¹⁴⁵ on land over which native title has already been determined to exist.

The proposed lease was for 3144 hectares in the Gibson Desert in Western Australia, from which the grantee wanted to extract and process potash for sale as fertiliser. Brine from a very large body of salty water, Lake Disappointment, would be channelled by a trench many kilometres long and pumped into evaporation ponds. The potassium

142 T Corbett & C O’Faircheallaigh, ‘Unmasking the politics of native title: the National Native Title Tribunal’s application of the NTA’s arbitration provisions’ (2006) 33(1) *University of Western Australia Law Review* 153, p 161.

143 Subdivision P of the Native Title Act provides for a ‘right to negotiate’ which applies where a government proposes to do particular acts which could affect native title rights. For the government’s act to be valid, it must give notice of its intention to do the act, and allow any relevant native title group and the grantee party (the party which has requested or applied to the government for the act to be done) to negotiate in good faith with a view to coming to an agreement about the proposed act. If no agreement is reached, the proponent can ask the arbitral body (the NNTT) to make a decision on whether the proposed act can go ahead, or if it can only go ahead on certain conditions. For further information, see National Native Title Tribunal, *Procedures under the right to negotiate scheme* (2005). At <http://www.nntt.gov.au/Future-Acts/Procedures-and-Guidelines/Documents/Procedures%20under%20the%20right%20to%20negotiate.pdf> (viewed 22 June 2009).

144 [2009] NNTTA 49 (27 May 2009). For a case note, see National Native Title Tribunal, *Native Title Hot Spots* (2009) (Issue 30), pp 2–16.

145 Holocene Ltd was converted to a proprietary company in 2007 and is a wholly owned subsidiary of Reward Minerals Ltd.

salts (potash) would be harvested by trucks and other machinery and processed at an adjacent diesel-powered plant before being transported by road to market.

The relevant part of the Lake (which was 87% of the proposed mining lease area) was within the Martu People's traditional lands, over which they hold exclusive possession native title.¹⁴⁶

After the Western Australian Government gave notice of their intention to undertake the future act and grant the mining lease, the Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) (which is the PBC for the Martu People as the native title holders) negotiated with the grantee company. The parties were unable to reach agreement and the grantee party applied under s 35 of the Native Title Act to have the NNTT determine whether the lease could be granted.

The grantee company and the Western Australian Government both asked the NNTT to rule that the lease could be granted; the Martu People asked the NNTT to rule that the lease must not be granted.

Section 39 of the Native Title Act provides a list of criteria that the NNTT must take into account when determining whether the act can occur. It must consider how the act impacts on:

- The enjoyment by the native title parties of their registered native title rights and interests. For this factor, the NNTT will assess the evidence relating to the actual exercise or enjoyment of the registered native title rights in the area.¹⁴⁷
- The way of life, culture and traditions of any of those parties.¹⁴⁸
- The development of the social, cultural and economic structures of any of those parties.¹⁴⁹
- The freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions.¹⁵⁰
- Any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions.¹⁵¹ For this factor, the NNTT will consider the operation and effectiveness of any protection afforded under a state or territory heritage protection regime and the length of time the project will last.

146 The Martu People were determined to hold native title in the area on 27 September 2002. See *James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208.

147 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 64–81. The NNTT considered that there would not be a substantial impact on the ability of the Martu People to physically enjoy their native title rights if the lease was granted: para 81.

148 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 82–88. The NNTT considered that the grant of the mining lease would not detrimentally impact on the way of life, culture and traditions of the native title party in any substantial way, subject to its findings relating to Lake Disappointment itself (discussed later): para 88.

149 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 89–94.

150 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 95–98.

151 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 99–152. In the NNTT's view, the disturbance to the Lake would not be minimal, and the Lake has a high level of importance to the Martu People.

In addition, under s 39, the NNTT must consider:

- The interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act.¹⁵²
- The economic or other significance of the act to Australia, the state or territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area. For this factor, the NNTT must consider the significance of the future act itself, not its contribution to the maintenance of a viable mining industry overall. The native title party's legal entitlement to compensation is not considered an economic benefit.¹⁵³
- Any public interest in the doing of the act. The NNTT considers that there is a public interest in having a successful mining industry but it also considers that it may be in the public interest to refuse the grant of a mining tenement.¹⁵⁴
- Any other matter that the arbitral body considers relevant. The NNTT may consider a range of factors, including any environmental protection regime and the impact this will have on the restoration of the area and the native title party's rights and interests. The NNTT may also consider the native title party's initial readiness to contemplate mining and its opposition to the granting of the lease when there was a failure to agree on acceptable terms.¹⁵⁵

In this decision, the NNTT considered each of these elements and weighed up the evidence before it. In considering the evidence, the NNTT referred to the difficulty it has in giving weight to the various criteria it is required to consider:

We accept that our task involves weighing the various criteria by giving proper consideration to them on the basis of evidence before us. The weighing process gives effect to the purpose of the Act in achieving an accommodation between the desire of the community to pursue mining and the interest of the Aboriginal people concerned.

The criteria involve not just a consideration of native title but other matters relevant to Aboriginal people and to the broader community. There is no common thread running through them, and it is apparent that we are required to take into account quite diverse and what may sometimes be conflicting interests in coming to our determination. Our consideration is not limited only to the specified criteria. We are enabled by virtue of s 39(1)(f) to take into account any other matter we consider relevant.

The Act does not direct that greater weight be given to some criteria over others. The weight to be given to them will depend on the evidence.¹⁵⁶

152 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 154–163.

153 The NNTT confirmed that 'compensation cannot be seen as an economic benefit. Rather, it is a legal entitlement to be recompensed for the loss or damage suffered': *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 164–178.

154 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 179–183.

155 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 184–188.

156 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 37. The entire quote comes from *Western Australia v Thomas* [1996] NNTTA 30; (1996) 133 FLR 124, 165–166.

Consequently, the NNTT considered each factor, and referred to the preamble of the Native Title Act and the principle that a beneficial construction should be given to the provisions of the Act which are designed to protect native title rights and interests or which otherwise reflect other interests and concerns of native title parties and Aboriginal people so as to give the fullest relief which the fair meaning of the language will allow.¹⁵⁷

It recognised that ‘the Martu Elders’ affidavit evidence clearly supports the agreed concession that the native title party has made that they are not opposed to mining over parts of the Lake but only wishes mining to proceed on terms acceptable to it’.¹⁵⁸ The NNTT considered:

[The Martu People] were willing to make serious sacrifices in relation to the integrity of their culture and traditions with prospects of gaining benefits from the Project that assist them to achieve their long term goals of employment, business opportunities and economic advancement...But the tenor of their evidence is that they want this to happen in a way that pays respect to their culture and traditions as far as possible.¹⁵⁹

While recognising that the Native Title Act does not give native title parties a right of veto, the NNTT reiterated that it does have the power to determine that the act must not be done based on the evidence.¹⁶⁰

It is accepted that a native title party under the Act does not have a veto in the sense that they can say ‘no’ to a development proposal and have the [NNTT] automatically accept that view no matter what the circumstances. However, they are entitled to say ‘no’ and to have the [NNTT] give considerable weight to their view about the use of the land in the context of all the circumstances. In my view this is such a case.¹⁶¹

The NNTT found that the site in question was of particular significance to the Martu People. In addition, the NNTT referred to the fact that the Martu People’s native title was the subject of a finalised court determination and of a ‘substantial kind’ (that is, exclusive possession). These facts increased the weight that could be given to the native title holders’ interests, proposals, opinions or wishes in relation to the management, use or control of the area:

As a general proposition, there is a difference between making a future act determination over an area of exclusive possession and making a determination over an area where the right to exclusive possession has been extinguished and the capacity to exercise or enjoy other native title rights is seriously attenuated because of the exercise of non native title rights, such as pastoral interests which may have existed since the early days of European settlement.¹⁶²

157 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 40–42.

158 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 156.

159 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 212.

160 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 162.

161 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 215.

162 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 163.

Finally, the NNTT also considered whether it could determine that the future act should be allowed to occur subject to a condition that a monetary payment be made or equity granted in Reward Ltd. Considering precedents, the NNTT confirmed that it is not within its power to impose conditions of the kind sought by the native title party for the awarding of compensation or payments in the nature of compensation:

It can be accepted that the Tribunal has power to direct the payment of monies to the native title party for matters which it must attend to under conditions such as the conduct of heritage surveys or attendance at liaison committee meetings. However once a payment or benefit is properly identified as compensation the Tribunal has no power to impose provision of it by way of condition...¹⁶³

Here the Martu People would be entitled to compensation as 'owners' under the *Mining Act 1978 (WA)*, although the suggestion in the case is that this would not be a large sum. The benefit to the Martu People from the project was 'not likely to be very great'.¹⁶⁴

Overall the NNTT said that the project was of general economic significance and would not have a substantial effect on the Martu and their interests, except for the effect on Lake Disappointment, a place of special significance. But this last factor was critical, when combined with the opposition to the mine expressed by the Martu People once acceptable terms (beyond the legal entitlement to compensation and other modest benefits) could not be agreed.

Holocene applied to the Commonwealth Attorney-General under s 42 of the Native Title Act to have him overturn the decision on the basis that it was in the national interest, or in the interests of Western Australia, to do so. I am pleased to see that the Attorney-General refused to disturb the NNTT's finding in favour of the Martu People.

(ii) *Policy implications of the decision*

There are glaring deficiencies in the right to negotiate provisions. Developers can be close to certain that their projects will be approved by the NNTT if they do not reach agreement:

The Act creates a strong incentive for native title parties to negotiate agreements. If they fail to do so and the Acts arbitration provisions are applied by the National Native Title Tribunal, the native title parties lose an opportunity to obtain compensation related to the profits or income derived from a mining operation. In principle, the Act also creates incentives for grantees to reach agreement because if they fail to do so and enter arbitration the Tribunal may decline to grant the interests they seek or impose onerous conditions on any grant it makes. However, in practice, the Tribunal has applied the arbitration provisions of the NTA in a manner that renders them largely innocuous from the perspective of grantees. The result is fundamental inequality in bargaining positions. This undermines the purposes of the NTA and leads to agreements that favour grantees.¹⁶⁵

163 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 196.

164 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 178.

165 T Corbett & C O'Faircheallaigh, 'Unmasking the politics of native title: the National Native Title Tribunal's application of the NTA's arbitration provisions' (2006) 33(1) *University of Western Australia Law Review* 153.

However, this decision may shift that balance of power ever so slightly. It has been recognised that:

The decision would require miners to pay closer attention to sites of cultural significance for native title holders, and would encourage them to settle lease negotiations before any investment in projects.

... in this case the interests of the native title holders outweighed the potential economic benefit, and thus the public interest in the mining project.¹⁶⁶

As Tony Wright, CEO of the Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu), the PBC for the area said:

It's not about money. It's about a whole range of things that the traditional owners would like to have taken into account ... the significance of the lake cannot be understated.¹⁶⁷

There are important factual features in this case which have often been absent in future act arbitrations to date and which appeared to exert a significant influence on the NNTT's decision. The Martu People held exclusive possession native title rights and interests already the subject of a court determination and there was strong evidence from a range of sources establishing Lake Disappointment as a site of great significance. Due mainly to a stock exchange announcement by the company, there was clear evidence that during negotiations, in recognition of the project's impact, the company had offered cash payments, royalties and equity in Reward Ltd, benefits not available from an arbitral decision by the NNTT – such evidence would not normally be disclosed and available to inform the NNTT's decision.

The rarity, so far, of the decision in *Holocene* to refuse a mining grant reinforces the need to revisit the statutory balance of interests struck in this part of the future act regime. I return to this issue in Chapter 3 of this Report.

Text Box 1.2: Affidavit evidence of the Martu Elders

The affidavit evidence provided by the Martu Elders is an example of the kind of concerns that many traditional owners have when non-Indigenous people want to use their lands:

As a community everyone has a right to be involved in decisions affecting our community and our lands, but especially those people connected to the Lake Disappointment country. There are many other Martu people who have to be consulted about things affecting Lake Disappointment and all of Martu have to be consulted about things affecting our land and our communities. ...

But the Martu also know that we have to live in a world with white men and white men's law. We know that to protect our land, sometimes we have to give up a little bit even if it affects our culture and law. But the white man cannot have all our land. We give them a little bit but no more. We let go of a fingernail, and it hurts us, but we do this so we do not have to lose an arm. So we agreed to let *Holocene* to come onto parts of our land, but no more, so we could protect and save all the other parts of our land. This is the price we must pay to protect our culture and our Law for the future of the Martu.

166 A Boswell, 'Native title halts mining lease', *The Australian Financial Review*, 2 June 2009, p 7, quoting R Edel, DLA Phillips Fox.

167 A Boswell, 'Native title halts mining lease', *The Australian Financial Review*, 2 June 2009, p 7.

But we are only willing to give up land if we are satisfied that we know where and how the miner is working and we are able to control those activities under Martu Law. We must also be given what we think is fair compensation for giving up our land and for the effect on our culture. Otherwise we will not agree to give up the land. ...

We are angry that Holocene's lawyers have said that under the white man's law any compensation for the loss of part of our land "will be small".

The Martu fought long and hard to have the white man recognise what the Martu have always known – that the land is Martu land. The native title determination was the white man's law finally recognising this fact.

From what Holocene's lawyers are saying, the land can be taken away again against our will and for small compensation. They don't seem to respect Martu law and the effect of the Project on Martu and their culture. ...

The Martu believe that if there is trust and respect between the Martu and miners, shown by the involvement of the Martu in all decisions about the land by negotiated heritage and access protocols, the use of Martu monitors to oversee land disturbance and the like, and fair compensation is paid to the Martu for the use of Martu land, then agreements can be reached. But this is a complex process and goodwill is needed to agree all the details so that Martu can finally decide if they are willing to agree to a Project.

Holocene and Reward thought that the payment to the Martu of the money and royalties and other compensation and shares set out in the Term Sheet was fair compensation when they agreed to the Term Sheet. It was very important that we would get royalty payments and shares in Reward as we would own part of the Project and share in its success and we would keep a share of the land. This made it easier to agree to allow Holocene to build the Project on our land and to accept the effect on Martu culture.

Now Holocene and Reward are saying that they will not give us a royalty or shares in Reward and that Holocene and the Government only have to pay very small compensation because they think the land is worth so little. This is a white man's attitude and completely ignores the impact on Martu culture by the mining activities, particularly as this will happen without our approval. The Martu have rights including the right to decide who comes onto the land and who uses the land. We will lose this right and also the right to use the land to hunt and find food around the Project. Everyone but the Martu will be making money from the Martu land.

If there is no trust and respect, if there is no Martu involvement and no fair compensation paid to the Martu, then the Martu will not agree to mining on Martu land. We do not understand why Reward agreed to the compensation in the Term Sheet and now think they can go ahead without paying the compensation and against our wishes. ...

At the time that the 2008 Survey was done, as explained above, the Martu were willing to compromise their position and to allow the potash Project to proceed, but only because we thought fair compensation had been agreed and only in the areas that the Martu said could be used and only with the full involvement of the Martu during construction and operations to ensure that there was no more interference than was acceptable.

To the Martu, this is the only way to protect our culture and Law for the future. The Martu have responsibility for the Lake, we must care for the Lake and by doing so, for all Martu. We do this by practising our Law and with ceremonies and songs. The Martu think long term, for our future generations, not just the next 20 or 30 years. ...

The Martu will work with Holocene and Reward about jobs for the Martu.

The Martu know which parts of the Lake are safe and which are not. We will not work on those areas that are not safe.

We want jobs for our people, but more than that, we want contracts for our companies, like our trucking company, and we want contracts to build and maintain the roads and track. This will give us independence, experience and a future, so we can develop our communities and offer our young people a future on their country. We want our boys and girls to go to University and learn trades to be able to work for and help their people. We want to use any money that we get from this Project to do these things for our people. We thought all this would be discussed as part of the Stage 2 of our negotiations with Holocene and Reward and be part of our agreement.

The Martu want to do a ceremony at the Lake before any mining starts so that we can make sure the spirits understand who is coming onto the Lake and that they will respect our culture and Law. This will protect the workers on the Lake and all those who go there for the mining and for our people.

We also want Reward to make sure that there are signs near our sites telling white men that they are not to go there. We want our sites to be protected and we want to be consulted about where signs and fences should be put and how the company will carry out its operations.

The Martu need to be consulted about the Lake and the mine because the Martu are responsible for the Lake. It is part of us; it is our culture and our Law. We should be told exactly where Holocene plans to mine, the location of its plant, camp, trenches and ponds. Holocene must respect our sites and those areas that we have told them are not to be disturbed. This is all explained in the 2008 survey. In the end Martu need to be told about all aspects of the Project and operations before we can decide whether we are prepared to agree to it going ahead.¹⁶⁸

1.5 International human rights developments

The Prime Minister has commented that:

[Australians] believe in a fair go for everyone, and everywhere, and that belief in a fair go means that as a nation we seek to make a difference and support human rights and fundamental freedoms around the world and at home.¹⁶⁹

In this section, I consider developments in international human rights law that concern native title. I urge the Australian Government to implement its commitment to supporting human rights and to take heed of these developments.

(a) The Declaration on the Rights of Indigenous Peoples

In last year's *Social Justice Report* I summarised the Declaration on the Rights of Indigenous Peoples, which was adopted by the United Nations General Assembly in September 2007.¹⁷⁰ Australia voted against the Declaration in the General Assembly. I am pleased to report that the Government formally announced its support of the Declaration on 3 April 2009. It was a watershed moment in Australia's modern history.

168 Affidavit evidence of the Martu Elders, quoted in *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 155.

169 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 2008, p 12132 (The Hon Kevin Rudd MP, Prime Minister). At <http://www.aph.gov.au/hansard/reps/dailys/dr021208.pdf> (viewed 13 October 2009).

170 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2009), ch 2. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html (viewed 13 October 2009).

In supporting the Declaration, the government has committed to a framework which fully respects Indigenous peoples' rights and creates the opportunity for Indigenous and non-Indigenous Australians to be truly equal.

The Declaration includes a number of articles on the rights of indigenous peoples to our lands, territories and resources.¹⁷¹

In supporting the Declaration, the Minister for Indigenous Affairs stated:

We also respect the desire, both past and present, of Indigenous peoples to maintain and strengthen their distinctive spiritual relationship with land and waters.¹⁷²

Improving the effectiveness and operation of the Native Title Act is essential in ensuring that these rights are realised. The Attorney-General considered:

In supporting the Declaration today, the Government is also respecting the important place land and resources have in the cultural, spiritual, social and economic lives of Indigenous Australians. Recognising and acknowledging the history and connection of our Indigenous people with the land is inextricably linked to respecting their rights and freedoms. We understand that native title is an important property right that should be recognised and protected.¹⁷³

The challenge now is for government to build understanding of the Declaration among government officials and the community and, importantly, to promote and incorporate the Declaration's principles into government policy.

Indigenous peoples around the country have begun to use the principles contained in the Declaration to support the recognition and protection of their rights. For example:

- When the Government announced the compulsory acquisition of town camps in Alice Springs, the Indigenous Peoples' Organisations Network of Australia called on the Government to comply with its international obligations to respect the rights of the Indigenous Peoples of Australia by ensuring that the representatives of the Aboriginal people in the region of Alice Springs are able to make an informed decision about housing and services for the occupants.¹⁷⁴
- When negotiations were undertaken by the Kimberley Land Council for the location of the gas hub with Woodside and the Western Australian Government under the right to negotiate provisions in the Native Title Act, the land council held the other parties to the standard of free, prior and informed consent. This is a higher standard than required currently by the Native Title Act.¹⁷⁵

171 A copy of the Declaration can be found in Appendix 4 to this Report.

172 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm (viewed 2 November 2009).

173 R McClelland (Attorney-General), *Remarks in support of the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_Second_Quarter_3April2009-RemarksinSupportoftheUnitedNationsDeclarationontheRightsofIndigenousPeoples (17 November 2009).

174 The Australian Government, the Indigenous Peoples' Organisations Network of Australia, and the Australian Human Rights Commission, *Joint Statement by the Indigenous Peoples' Organisations Network of Australia, the Australian Government and the Australian Human Rights Commission attending the eighth session of the Permanent Forum on Indigenous Issues New York, 18 to 29 May 2009* (21 May 2009).

175 Kimberley Land Council, 'Traditional Owners announce shortlist for gas development hub' (Media Release, 10 September 2008). At http://www.klc.org.au/media/080910_HUB_shortlist.pdf (viewed 22 October 2009).

The true value of the Declaration will lie in using it to hold governments to the standards it affirms and building a consistent pattern of usage over time.

(b) Treaty monitoring bodies

Throughout the reporting period, three independent bodies that monitor compliance with international human rights treaties have commented upon issues relevant to the rights of Aboriginal and Torres Strait Islander peoples to their lands, territories and resources.

In April 2009, the UN Human Rights Committee (which monitors the implementation of the *International Covenant on Civil and Political Rights*¹⁷⁶) welcomed recent reforms to the native title system. However, the Committee stated that it:

notes with concern the high cost, complexity and strict rules of evidence applying to claims under the Native Title Act. It regrets the lack of sufficient steps taken by the State party to implement the Committee's recommendations adopted in 2000.¹⁷⁷

The Human Rights Committee recommended that Australia 'should continue its efforts to improve the operation of the Native Title system, in consultation with Aboriginal and Torres Strait Islander Peoples'.¹⁷⁸

Similarly, in May 2009 the United Nations Committee on Economic, Social and Cultural Rights noted with concern that:

despite the reforms to the native title system, the high cost, complexity and strict rules of evidence applying to claims under the Native Title Act, have a negative impact on the recognition and protection of the right of indigenous peoples to their ancestral lands.¹⁷⁹

The Committee on Economic, Social and Cultural Rights recommended that Australia 'increase its efforts to improve the operation of the Native Title system, in consultation with Aboriginal and Torres Strait Islander Peoples, and remove all obstacles to the realization of the right to land of indigenous peoples'.¹⁸⁰

176 *International Covenant on Civil and Political Rights*, 1966. At <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 13 October 2009).

177 UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (7 May 2009), para 16. At <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO-5.doc> (viewed 13 October 2009).

178 UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (7 May 2009), para 16. At <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO-5.doc> (viewed 13 October 2009).

179 UN Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (22 May 2009), para 32. At <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc> (viewed 13 October 2009).

180 UN Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (22 May 2009), para 32. At <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc> (viewed 13 October 2009).

In mid-2009, Australia was due to submit its member report for the period 1 July 2002 to 30 June 2008 to the UN Committee on the Elimination of Racial Discrimination. This report, which would combine Australia's 15th, 16th and 17th reports, would report on Australia's compliance with its obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (the CERD).¹⁸¹ At the time of writing, the final version of the report was not available.

The Committee on the Elimination of Racial Discrimination has requested the Australian Government to respond to a Request for Urgent Action submitted by a number of Aboriginal people residing in Prescribed Areas in the Northern Territory who are subject to the measures of the Northern Territory Intervention.¹⁸²

Noting that the Australian Government is in the process of 'redesigning key [Northern Territory Emergency Response] measures in order to guarantee their consistency with the Racial Discrimination Act', the Committee on the Elimination of Racial Discrimination requested details of the Government's progress:

- in redesigning the Northern Territory Emergency Response, in direct consultation with the communities and individuals affected
- on lifting the suspension of the *Racial Discrimination Act 1975* (Cth).¹⁸³

The Committee on the Elimination of Racial Discrimination requested that this information be submitted no later than 31 July 2009.¹⁸⁴

In relation to the recommendations of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, discussed above, the Attorney-General has informed me that:

The Committees' recommendations ... will be carefully considered ... However, the Government has a clear strategy for improving the native title system and is committed to ensuring that the native title system is flexible and produces broad benefits to Indigenous people ... the Government is progressing reforms to improve the rates of claim resolution and to encourage broader settlements that deliver social justice outcomes beyond answering the question of whether native title exists. ...

The Government is committed to genuine consultation with Indigenous people and other relevant native title stakeholders in exploring ways to improve the native title system. The Government will not rush into making significant change to the Native Title Act. History has shown that such change requires proper consideration and consultation.¹⁸⁵

181 *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965. At <http://www2.ohchr.org/english/law/cerd.htm> (viewed 13 October 2009).

182 Request for Urgent Action under the International Convention on the Elimination of All Forms of Racial Discrimination (28 January 2009). At http://www.nit.com.au/downloads/files/Download_192.pdf (viewed 1 October 2009).

183 F Victoire Dah, Chairperson of the Committee for the Elimination of Racial Discrimination, Correspondence to C Millar, Ambassador, Permanent Mission of Australia to the United Nations at Geneva, 13 March 2009. At http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Australia130309.pdf (viewed 1 October 2009).

184 The Australian Government responded to the Committee on the Elimination of Racial Discrimination's request on 30 July 2009.

185 R McClelland, Attorney-General, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 27 July 2009.

(c) United Nations Permanent Forum on Indigenous Issues

Each year, the United Nations Permanent Forum on Indigenous Issues (the Permanent Forum) meets in New York to discuss issues related to economic and social development, culture, the environment, education, health and human rights.

In 2009, a delegation of Aboriginal and Torres Strait Islander people attended the Permanent Forum's eighth session. The delegation made a number of interventions relevant to issues raised in this report. These included an intervention by the NSW Aboriginal Land Council on the Government's policy of linking the provision of housing services to land tenure reforms and a joint intervention by the Australian delegation on the Government's compulsory acquisition of Town Camps in Alice Springs.

For the first time at the Permanent Forum, a joint statement by the Indigenous Peoples' Organisations Network of Australia, the Australian Government and the Australian Human Rights Commission was presented to the Forum. The three parties to this landmark statement acknowledged that, while there is still a long way to go to significantly improve rights protection for Indigenous Australians at the domestic level, the statement signaled their common intent to:

reset the relationship between Aboriginal and Torres Strait Islander peoples, Australian Governments and the broader Australian population, premised on good faith, goodwill and mutual respect.¹⁸⁶

A number of the reports and papers presented to the Permanent Forum should be used to inform the Government's policy on native title law and policy. For example, papers were presented on:

- climate change, human rights and indigenous peoples
- the report of the International Expert Group Meeting on Extractive Industries, Indigenous Peoples' Rights and Corporate Social Responsibility
- the Anchorage Declaration (from the Indigenous Peoples' Global Summit on Climate Change).¹⁸⁷

Significantly, the session also included the presentation of a draft guide on the principles in the Declaration on the Rights of Indigenous Peoples, the *International Labour Organisation Convention No 169*¹⁸⁸ and the *International Labour Convention No 107*¹⁸⁹ that relate to indigenous land tenure and management arrangements. The guide considers:

- the right to self-determination
- full and direct consultation and participation
- free, prior and informed consent
- the rights of indigenous peoples to traditional lands, territories and natural resources

186 The Australian Government, the Indigenous Peoples' Organisations Network of Australia, and the Australian Human Rights Commission, *Joint Statement by the Indigenous Peoples' Organisations Network of Australia, the Australian Government and the Australian Human Rights Commission attending the eighth session of the Permanent Forum on Indigenous Issues New York, 18 to 29 May 2009* (21 May 2009).

187 These reports and papers are available at: United Nations Permanent Forum on Indigenous Issues, *Eighth session of the United Nations Permanent Forum on Indigenous Issues*. At http://www.un.org/esa/socdev/unpfii/en/session_eighth.html#docs (viewed 12 October 2009).

188 *International Labour Organisation Convention No 169*, 1989. At <http://www.ilo.org/ilolex/english/convdisp1.htm> (viewed 1 October 2009).

189 *International Labour Organisation Convention No 107*, 1957. At <http://www.ilo.org/ilolex/english/convdisp1.htm> (viewed 1 October 2009).

- respect for indigenous cultural practices, traditions, laws and institutions
- reparation for injury to or loss of indigenous interests
- non-discrimination against indigenous peoples' interests
- respect for the rule of law.¹⁹⁰

The draft guide elaborates on these principles, discusses developments in interpretation and provides advice on their implementation.

For example, with respect to the principle of free, prior and informed consent, the guide states that:

implicit in the principle of Indigenous peoples having a right to free, prior and informed consent is the notion of capacity; Indigenous peoples who lack the requisite capacity would be unable to consent in a free and informed manner. This principle of free, prior and informed consent, combined with the notion of good faith, may therefore be construed as incorporating a duty for States to build Indigenous capacity.¹⁹¹

Further, the Permanent Forum recently released a Draft General Comment related to article 42 of the Declaration. Article 42 provides that States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.¹⁹² The Draft General Comment clarifies that the purpose of the Declaration 'is to constitute the legal basis for all activities in the areas of indigenous issues' and should be read as a source of international law.¹⁹³

1.6 Significant developments at the state and territory level

(a) Victoria – the place to be

Some say that Victoria 'is the State with the worst record on land justice in all of Australia'.¹⁹⁴ However, as I reported last year, this could change drastically. Victoria may become the first state to achieve the sort of true land justice that was intended by the Native Title Act.

On 4 June 2009, Victoria's Attorney-General announced the adoption of a new settlement framework as the Government's preferred method for negotiating native title. It was a significant day for Aboriginal Victorians.

190 UN Permanent Forum on Indigenous Issues, *A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107 that relate to Indigenous land tenure and management arrangements*, UN Doc E/C.19/2009/CRP.7 (undated). At http://www.un.org/esa/socdev/unpfi/documents/E_C19_2009_CRP_7.doc (viewed 1 September 2009).

191 UN Permanent Forum on Indigenous Issues, *A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107 that relate to Indigenous land tenure and management arrangements*, UN Doc E/C.19/2009/CRP.7 (undated), pp 20–21. At http://www.un.org/esa/socdev/unpfi/documents/E_C19_2009_CRP_7.doc (viewed 1 September 2009).

192 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), art 42. At <http://www.un.org/esa/socdev/unpfi/en/drip.html> (viewed 30 November 2009).

193 C Smith (Member of the United Nations Permanent Forum on Indigenous Issues), *Draft General Comment No 1 (2009) Article 42 of the Declaration on the Rights of Indigenous Peoples*, UN Doc E/C.19/2009/CRP.12 (5 May 2009). At http://www.un.org/esa/socdev/unpfi/documents/E_C19_2009_CRP_12.doc (viewed 12 October 2009).

194 C Marshall (CEO of Native Title Services Victoria), *A cooperative approach for Broad Mediated Outcomes* (Speech delivered at the Negotiating Native Title Forum, Melbourne, 19 February 2009). At <http://www.ntsv.com.au/document/Negotiating-Native-Title-Forum-Feb-09.pdf> (viewed 12 October 2009).

The objectives of the framework are to:

- establish a streamlined, expedited and cost effective approach to settling native title claims by negotiation, resulting in equitable outcomes consistent with the aspirations of traditional owners and the state
- increase the proportion of Aboriginal people with access to their traditional lands in Victoria
- contribute to reconciliation in Victoria through building stronger partnerships with Aboriginal Victorians, resolving long-standing land grievances, and strengthening communities and cultural identity
- increase economic and social opportunities and deliver on key Victorian Government policies.¹⁹⁵

When announcing the framework, the Victorian Attorney-General stated:

Just as the Apology acknowledged the consequences of fracturing families; just as the preamble to the *NTA* acknowledged the 'consequences of past injustices'; so we must make these same acknowledgments in the business with which we are charged – getting back to basics ... and making land justice real.

That's why I'm delighted to announce that a partnership between the state and traditional owners has produced an out of court alternative to the conventional process – the *Victorian Native Title Settlement Framework* ...

Recognising that land aspirations are primarily about recognition, respect and opportunities that flow from joint management of land, Framework Agreements, under the new arrangements, will facilitate packages of benefits in return for permanent withdrawals of claim.¹⁹⁶

I consider that the procedure for negotiating the framework to be an example of best practice.

In 2005, Native Title Services Victoria (NTSV), a service delivery body that performs some of the functions of a NTRB for the state of Victoria, supported the establishment of the Victorian Traditional Owner Land Justice Group (LJG) 'to find a better way of doing business and achieving workable native title and land management outcomes in Victoria'.¹⁹⁷

In November 2006, the Group decided that its main purpose would be to negotiate a new policy framework with the state government so that native title could better meet the aspirations of traditional owners. In 2008, after two years of hard work, the Victorian Attorney-General announced that a Steering Committee would be formed to undertake the negotiations. That Steering Committee was tasked with recommending a new policy framework for native title and land justice.

The Steering Committee consisted of Professor Mick Dodson (as chair, facilitator and mediator), five traditional owner negotiators from the LJG, the CEO of NTSV and senior officers of the Departments of Justice, Sustainability and Environment, Planning and Community Development and Aboriginal Affairs Victoria.

195 Victorian Department of Justice, *Objectives of the Native Title Settlement Framework*. At <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Indigenous+Victorians/Native+Title/JUSTICE++Objectives+of+the+Native+Title+Settlement+Framework> (viewed 12 June 2009).

196 R Hulls (Attorney-General of Victoria), *AIATSIS Native Title Conference 2009* (Speech delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009). At <http://ntru.aiatsis.gov.au/conf2009/papers/TheHon.RobertHulls.pdf> (viewed 12 October 2009).

197 Victorian Traditional Owner Land Justice Group, 'Native Title Settlement Framework will address unfinished business for Victoria's traditional owner groups' (Media Release, 4 June 2009). At <http://www.landjustice.com.au/document/LJG-Media-release-040609.pdf> (viewed 12 October 2009).

All decisions of the Committee were made by consensus.

The negotiators chosen to represent the LJJ were nominated by the full LJJ in 2007. The negotiations did not consider specific areas of land or benefits for specific individuals, families or groups, but how native title land justice settlements could work across all of Victoria. Graham Atkinson, LJJ Co-Chair said: ‘What the individual traditional owner groups do with those principles ... is their responsibility’.¹⁹⁸

He further commented that ‘[t]he framework has come about because of the commitment by both parties to work together, to achieve greater understanding of each other’s positions, and make considerable compromises to reach agreement’.¹⁹⁹ It was a process undertaken in the true spirit of reconciliation. The parties respected each others’ positions and kept in mind the underlying reason why they were in the same room together – to come to real outcomes.

I want to thank the government for creating dialogue with the traditional owners in Victoria. My advice [to Government] is don’t be swayed by public opinion, which may be negative a lot of times. But you’ll find that most Victorians they are not really racist, they just don’t fully understand Aboriginal needs and expectations. It’s a shady area to them... So what I’m saying is urging the government not to become deterred, just stay there with us and we’ll be marching on the same highway to get some sort of justice at the end of it.²⁰⁰

The framework sets the core principles of what agreements between traditional owners and the Victorian Government would cover. It includes recognition, access to land, access to natural resources, strengthening culture and improved native title claims resolution.²⁰¹ The key areas include:

- rights and protocols for speaking for country, including how traditional owners can be involved in management of state lands and rights to be consulted on development or future use of land
- recognition of traditional owners and their boundaries through native title determinations and / or alternative settlements:
 - Land Justice is an absolute priority. Aboriginal people need to be recognised for who they are and the country they belong to.²⁰²
- access to land for traditional owner groups, ranging from management of national parks through to transferring land for economic development or cultural purposes:
 - Aboriginal people they base their future, their future generations, all on land because land is connected with their old existence. Land and people can’t be separate, they’re all one.²⁰³

198 Victorian Traditional Owner Land Justice Group, *Settlement Framework*, <http://www.landjustice.com.au/?t=3> (viewed 9 June 2009).

199 Victorian Traditional Owner Land Justice Group, ‘Native Title Settlement Framework will address unfinished business for Victoria’s traditional owner groups’ (Media Release, 4 June 2009). At <http://www.landjustice.com.au/document/LJJ-Media-release-040609.pdf> (viewed 12 October 2009).

200 Victorian Traditional Owner Land Justice Group, *Settlement Framework*, <http://www.landjustice.com.au/?t=3> (viewed 9 June 2009), quoting L Clarke, Co-Chair.

201 The following information on the content of the framework is taken from the Traditional Owner Land Justice Group’s website at <http://www.landjustice.com.au/?t=3> (viewed 9 June 2009); and the Victorian Government’s *Report of the Steering Committee for the development of a Victorian Native Title Settlement Framework* (2009), at www.justice.vic.gov.au (viewed 10 June 2009).

202 Victorian Traditional Owner Land Justice Group, *Settlement Framework*, <http://www.landjustice.com.au/?t=3> (viewed 9 June 2009), quoting S Onus.

203 Victorian Traditional Owner Land Justice Group, *Settlement Framework*, <http://www.landjustice.com.au/?t=3> (viewed 9 June 2009), quoting L Clarke, Co-Chair.

- access to natural resources including customary use of resources such as animals, plants and fisheries:

What's important is creating job opportunities for our young people's future, certainly for more people; and working in a landscape, in a natural environment, and the opportunity to benefit from that.²⁰⁴

- strengthening culture, including signage on country and cultural keeping places:

We think it's important for Government to be willing to give recognition and strengthening in lots of areas... signage on roads indicating traditional country, cultural centres and keeping places, protocol at public events, curriculum modules in schools and public monuments to Indigenous people and language preservation and restoration projects. As we are the original owners of this land and that we have been dispossessed from our traditional land.²⁰⁵

- claims resolution including reparation, funding and the terms of agreements:

We're also mindful of the importance of restorative justice through compensation or reparation because traditional owners will need resources to establish their base and to operate as viable organisations or bodies to represent their traditional owner members.²⁰⁶

The Victorian Government is beginning consultation on how to implement the framework. It will also seek financial and policy support from the Australian Government. Some legislative amendments will need to be made and information sessions will be delivered. After all this, the negotiation of Individual Framework Agreements between traditional owner groups and the state government will begin. It appears that the framework will contribute to the realisation of many of the Australian Government's aims for native title, in that it:

- encourages out of court settlement of native title claims
- is expected to speed up the process of making agreements
- implements the COAG agreement to pursue broader land settlements which are comprehensive and sustainable in to the future.

If the framework is adequately resourced, the Steering Committee predicts that native title would largely be resolved by 2020.²⁰⁷ At current estimates, this will be nearly 20 years earlier than the rest of the country. As Professor Mick Dodson said '[t]he Commonwealth has everything to gain from supporting Victoria's approach'.²⁰⁸

In addition, and most importantly for Aboriginal Victorians, this approach will provide a pathway toward justice in a way that is consistent with Australia's international human rights obligations.

204 Victorian Traditional Owner Land Justice Group, *Settlement Framework*, <http://www.landjustice.com.au/?t=3> (viewed 9 June 2009), quoting A Mullet.

205 Victorian Traditional Owner Land Justice Group, *Settlement Framework*, <http://www.landjustice.com.au/?t=3> (viewed 9 June 2009), quoting B Nicholls.

206 Victorian Traditional Owner Land Justice Group, *Settlement Framework*, <http://www.landjustice.com.au/?t=3> (viewed 9 June 2009), quoting G Atkinson, Co-Chair.

207 M Dodson, Transmittal letter, in Department of Justice, Victoria, *Report of the Steering Committee for the development of a Victorian Native Title Settlement Framework* (2009). At www.justice.vic.gov.au (viewed 10 June 2009).

208 M Dodson, Transmittal letter, in Department of Justice, Victoria, *Report of the Steering Committee for the development of a Victorian Native Title Settlement Framework* (2009). At www.justice.vic.gov.au (viewed 10 June 2009).

It is hoped that we will soon see more of this. At the announcement of the framework, the federal Attorney-General considered that it is an 'example of how, by changing behaviours and attitudes, and by resolving native title through settlements...we can make native title work better'.²⁰⁹

(b) And the others? The states and territories lingering behind

While Victoria is on the move, the behaviour of other state and territory governments throughout the reporting period has concerned me. I am particularly worried about the capacity of governments to consult and communicate effectively with Aboriginal and Torres Strait Islander communities, and their level of respect for Indigenous peoples' native title and land rights.

(i) Western Australia

Over a year into negotiations with traditional owners over the location of a proposed LNG processing plant in Western Australia, the government of that state changed. Instead of supporting and engaging productively with the negotiations, the new Premier, Colin Barnett, said that if an agreement could not be reached, he would take steps to compulsorily acquire the land:

The companies will develop their gas one way or the other, the state and federal governments will get their royalties one way or the other, but the Aboriginal people of the Kimberley will miss out, and I think that would be a tragedy.²¹⁰

As threats of compulsory acquisition loomed, the Australian Government stepped in, providing the services of Mr Bill Gray to mediate an outcome. Thanks to the perseverance of all parties and Mr Gray, an outcome was reached. In-principle approval for a site was given on 15 April 2009. Negotiations for an Indigenous Land Use Agreement are continuing and impact assessments are being undertaken.

(ii) Northern Territory

Despite taking action to prevent compulsory acquisition in Western Australia, the Australian Government announced plans to compulsorily acquire town camps in the Northern Territory after negotiations for 40-year leases reached a stalemate. Just days before the Australian Government's compulsory acquisition would have taken effect, Tangentyere Council and 16 town camps in Alice Springs accepted the 40-year lease over their lands.²¹¹

(iii) Queensland

During the reporting period, the Queensland Government continued to work with traditional owners to negotiate joint management arrangements over national parks in Cape York under the *Cape York Peninsula Heritage Act 2007* (Qld).

209 R McClelland (Attorney-General), *Australian Institute of Aboriginal and Torres Strait Islander Studies* (Speech delivered at the 10th Annual Native Title Conference, Melbourne, 5 June 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_SecondQuarter_5June2009-AustralianInstituteofAboriginalandTorresStraitIslanderStudies (viewed 16 November 2009).

210 D Guest, 'Royalties battle threatens Kimberley gas deal', *The Australian*, 14 April 2009. At <http://www.theaustralian.news.com.au/business/story/0,,25330918-36418,00.html> (viewed 21 April 2009).

211 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *ABC Central Australia*, 30 July 2009. For further information, see Chapter 4 of this Report.

Two new National Parks have been declared that will have Aboriginal land as their underlying tenure: the Lama Lama National Park²¹² (Cape York Peninsula Aboriginal Land) (35 560 hectares); and the KULLA (McIlwraith Range) National Park²¹³ (Cape York Peninsula Aboriginal land) (this covers almost 160 000 hectares). The management of the parks is to be undertaken by the Environmental Protection Agency and the Lama Lama and Kulla Land Trusts under Indigenous Management Agreements.

However, the Queensland Government has continued to pursue further amendments to the *Torres Strait Islander Land Act 1991* (Qld) and the *Aboriginal Land Act 1991* (Qld). This is despite serious concerns and criticism about the 2008 amendments that make it easier for the Queensland Government to compulsorily acquire Indigenous land.²¹⁴

Prior to these amendments, some Indigenous bodies (such as the Torres Strait Regional Authority) asked for the proposed compulsory acquisition provisions to be removed from the Aboriginal and Torres Strait Islander Land Amendment Bill 2008 (Qld) until further consultation with communities could be carried out.²¹⁵ Since the amendments were introduced, there have been calls for consultation on the compulsory acquisition provisions while the Government considers further changes. These calls have been largely ignored.

The Queensland Government created further disquiet when it declared river basins in the Cape York region as Wild Rivers despite concerns and requests for further consultation and clarity about the impact of the law.²¹⁶

These developments across the country raise an ongoing concern I have about the capacity of governments to consult and communicate effectively with Aboriginal and Torres Strait Islander communities. Throughout my term as Commissioner, I have given various speeches, submissions and reports that recommend different ways of consulting and communicating with Indigenous communities. Some of those principles have been attached at Appendix 3 to this Report.

212 C Wallace (Minister for Natural Resources and Water and Minister Assisting the Premier in North Queensland), 'Historic Land Agreement means first National Park on Aboriginal Land in Queensland' (Media Release, 10 July 2008). At <http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=59121> (viewed 30 October 2009).

213 A Bligh (Premier for Queensland), 'New National Park for Queenslanders' (Media Release, 6 August 2008). At <http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=59590> (viewed 30 October 2009).

214 For further information, see Chapter 4 of this Report.

215 Torres Strait Regional Authority, 'ATSILA Act a Blow to Indigenous Economic Development' (Media Release, 26 June 2008). At <http://www.tsra.gov.au/media-centre/press-releases/2008-press-releases/native-title-atsila-act.aspx> (viewed 4 August 2009).

216 See Australian Human Rights Commission, *Submission to the Queensland Minister for Natural Resources and Water for the proposed Archer Basin Wild River Declaration, the Lockhart Basin Wild River Declaration and the Stewart Basin Wild River Declaration* (November 2008). At http://www.humanrights.gov.au/legal/submissions/2008/200811_wild_rivers.html (viewed 12 October 2009).

1.7 Conclusion

In this reporting period, we have witnessed some important first steps towards the creation of a just and equitable native title system. I commend the Australian Government and the Victorian Government for their commitment to improving the operation of the native title system.

However, the system remains far from perfect. The following Chapters of this Report are designed to further the dialogue on native title reform.

I encourage all levels of government and all political parties to be flexible and to work with us to implement more far-reaching reforms to improve the native title system. We must not let this opportunity pass. We must not lose the momentum for change. But we must ensure the full and effective engagement of Indigenous peoples in any reform process.

Chapter 2:

Changing the culture of native title

.....

2.1 The challenge: decolonising the native title framework

It is clear that the native title system has not fulfilled the promise of *Mabo v Queensland (No 2)*.¹

Despite the High Court's landmark decision, Australian courts, governments and non-Indigenous people have struggled to accept fully the rights of Indigenous peoples to their lands, waters and territories. In successive court decisions, our cultures have been viewed through a non-Indigenous lens, with our rights separated and eliminated one by one.

The result, as former Federal Court judge Murray Wilcox observed in his response to the 2009 Mabo Oration, is that for many Aboriginal people 'native title has become a mirage'.²

The Australian Government has recently laid some of the fundamental building blocks for 'resetting' the relationship between Indigenous peoples and government. These include:

- the apology to the Stolen Generations³
- amendments to native title legislation and policy⁴
- a commitment to establishing a new national Indigenous representative body⁵
- appointing an independent committee to conduct the National Human Rights Consultation⁶
- confirming Australia's support for the *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration on the Rights of Indigenous Peoples)⁷

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

2 M Wilcox QC, Response to Oration 2009 (Speech delivered in response to the 2009 Mabo Oration, Brisbane, 5 June 2009). At http://www.adcq.qld.gov.au/ATSI/FromSelfRespect_comments.html (viewed 6 July 2009).

3 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, p 167 (Hon Kevin Rudd MP, Prime Minister). At <http://www.aph.gov.au/hansard/reps/daily/dr130208.pdf> (viewed 4 June 2009).

4 See Chapter 1 of this Report for a discussion of developments during the reporting period.

5 Department of Families, Housing, Community Services, and Indigenous Affairs, *National Indigenous Representative Body, Update August 2009* (2009). At <http://www.fahcsia.gov.au/sa/indigenous/progserv/engagement/NIRB/Pages/default.aspx#1> (viewed 30 October 2009).

6 See National Human Rights Consultation, www.humanrightsconsultation.gov.au/ (viewed 24 September 2009).

7 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007). At http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf (viewed 29 May 2009).

- confirming Australia's commitment to improving its human rights standing at the international and domestic level⁸
- hosting a visit by the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people
- a commitment to establishing a National Healing Foundation led by Indigenous peoples.⁹

The Australian Government has identified reforms to the native title system as a strategic priority¹⁰ and has recognised the potential for the native title system to contribute to closing the gap of disadvantage between Indigenous and non-Indigenous Australians.¹¹

I agree that opportunities to effectively engage in the native title system may contribute significantly to closing the gap and promoting economic development. However, that can only occur if Aboriginal and Torres Strait Islander communities have the capacity to engage in these processes. Further, we must have an honest conversation about the roles and responsibilities of government and private industry if we are to generate just and equitable outcomes through native title.

Significant attitudinal shifts will be required to ensure that principle and good process guide the legal framework and generate real change to the system.

Despite the positive developments listed above, unfinished business remains. This includes the social justice package and the Indigenous Economic Development Strategy. In addition, the Government has not developed a plan of action for the full implementation of the Declaration on the Rights of Indigenous Peoples.

In this Chapter, I briefly outline principles that should guide a new approach to native title – one based on collaborative partnerships and genuine commitments to respecting, protecting and fulfilling the rights of Aboriginal and Torres Strait Islander peoples.

I further consider the native title system within the context of the broader laws and policies that impact upon our rights, and argue for a comprehensive program of reform.

2.2 We need a level playing field

As a nation, we need to come to a place where we are truly committed to decolonising the legislative framework and removing the barriers to the realisation and recognition of the rights of Aboriginal and Torres Strait Islander peoples. We need to work toward creating a native title system that allows for the full participation and effective engagement of Indigenous peoples.

8 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 2008, p 12133 (Hon Kevin Rudd MP, Prime Minister). At <http://www.aph.gov.au/Hansard/rep/dailys/dr021208.pdf> (viewed 31 October 2009).

9 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'National Healing Foundation consultations start on National Sorry Day' (Media Release, 26 May 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/jr_m_healingfoundation_26may09.htm

10 Attorney-General's Department, *Strategic Plan 2009–2010* (2009), p 3. At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(C7C220BBE2D77410637AB17935C2BD2E\)~AGDStrategicPlan1July2009.rtf/\\$file/AGDStrategicPlan1July2009.rtf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(C7C220BBE2D77410637AB17935C2BD2E)~AGDStrategicPlan1July2009.rtf/$file/AGDStrategicPlan1July2009.rtf) (viewed 12 October 2009).

11 Attorney-General, *Closing the Gap – Funding For the Native Title System (Additional Funding and Lapsing): Budget 2009–10*, Fact Sheet (2009). At [http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingForTheNativeTitleSystem\(AdditionalFundingandLapsing\)](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingForTheNativeTitleSystem(AdditionalFundingandLapsing)) (viewed 19 September 2009).

Before we can reach this place, we need to honestly address the way the system operates in practice.

For example, one of the key elements of the Government's reform agenda is to create an environment in which parties are encouraged to negotiate rather than litigate.

It is frequently considered that agreement-making has the potential to deliver substantial benefits to Aboriginal and Torres Strait Islander communities. However, native title agreements have often failed to deliver on this promise.

Marcia Langton and Odette Mazel note that, despite the introduction of state and federal legislation relating to mining and Indigenous rights and the development of standards of corporate social responsibility, many Indigenous communities have experienced little or no improvement in their social and economic status. Indigenous communities often achieve a limited range of direct benefits from engagement and agreements with mining companies.¹²

During the reporting period, the Government has invited stakeholders to consider '[h]ow to ensure that the benefits arising from agreements are used to improve traditional owners and Indigenous communities' economic status and social well being'.¹³

The Government has identified that there are a 'number of assumptions behind this question', including that:

- direct financial contributions resulting from agreements do not necessarily translate into substantive benefits for Indigenous communities
- substantive benefits, such as employment options and community development initiatives often deliver benefits to all members of the community, not just the traditional owners
- an equitable approach to distribution is more likely to generate socio economic benefits for the whole community.¹⁴

Beneath these assumptions lie even further questions that we must address if we are to create a just and equitable native title system, which delivers substantial benefits to Indigenous communities.

For example, is it enough to simply change legislation or amend policies without building the capacity of communities or native title groups to access and engage with the system positively and proactively?

12 M Langton & O Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the "Resource Curse" and Australia's Mining Boom' (2008) 26(1) *Journal of Energy and Natural Resources Law* 31, p 38.

13 Australian Government, *Australian Government Discussion Paper* (undated), p 3 (Discussion Paper). At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)-Discussion+paper+--+final+version.DOC/\\$file/Discussion+paper+--+final+version.DOC](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)-Discussion+paper+--+final+version.DOC/$file/Discussion+paper+--+final+version.DOC) (viewed 12 October 2009). In order to improve the current framework for negotiating land agreements with Aboriginal and Torres Strait Islander peoples, the Attorney-General and the Minister for Indigenous Affairs convened a Native Title Payments Working Group, made up of experts from the Indigenous community, mining, academia and the legal profession, to provide advice to the Government on 'how to make better use of payments under mining and infrastructure agreements'. The Government released the Discussion Paper based on the report of the Working Group. See Australian Government, Attorney-General's Department, *Native Title Payments Working Group*. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_Native_title_Native_title_system_coordination_and_consultation#payments (viewed 25 June 2009); Native Title Payments Working Group, *Native Title Payments Working Group Report* (undated). At http://www.fahcsia.gov.au/sa/indigenous/progserv/land/Documents/native_title_wg_report/Native_title_working_group_report.pdf (viewed 10 August 2009).

14 Australian Government, *Australian Government Discussion Paper* (undated), p 3 (Discussion Paper). At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)-Discussion+paper+--+final+version.DOC/\\$file/Discussion+paper+--+final+version.DOC](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)-Discussion+paper+--+final+version.DOC/$file/Discussion+paper+--+final+version.DOC) (viewed 12 October 2009).

Can we arrive at beneficial agreements when the playing field is not even?

Undoubtedly, there is a relationship-building element to the negotiation of agreements. The relationship between companies and native title representatives has improved since the introduction of the *Native Title Act 1993* (Cth) (Native Title Act).¹⁵ However, it is important to acknowledge that agreement-making is a formal legal process, which can result in a contractual relationship. It does not necessarily result in positive relationships, particularly where the agreement is weighted in favour of non-Indigenous interests.

Furthermore, not all Indigenous land has the potential for resource development or infrastructure projects sufficient to generate long-term intergenerational benefits. If the community is currently living in abject poverty, an agreement may simply alleviate poverty in the short to medium term.

If the Government is serious about optimising benefits through agreement-making, we need to ensure that the playing field is level. Substantive outcomes that are just and equitable can only be achieved if there are minimum standards in place to recognise and protect our human rights. I discuss implementation of these standards in further detail below.

2.3 Principles to underpin cultural change

The Attorney-General has recognised that:

Real change in native title will only come through adjusting the behaviour and attitudes of all parties in the native title system and how they engage with the opportunities native title can present.¹⁶

The Attorney-General has also emphasised the potential for native title to ‘develop positive and enduring relationships between Indigenous and non-Indigenous Australians’ and to be ‘a vehicle for the reconciliation we all want to achieve’.¹⁷ To secure such outcomes, there needs to be major shifts in the attitudes that have traditionally been displayed by governments and the corporate sector in their engagement with Indigenous communities.

(a) Changing the approach of governments

In order to build a new approach to native title, governments must take several important steps. These include:

- developing a full understanding, recognition and respect for the rights of Indigenous peoples to our culture and our country
- ensuring that policy development is based on evidence and deals with Indigenous disadvantage from a holistic perspective
- engaging Aboriginal and Torres Strait Islander peoples as major stakeholders in the development, implementation and monitoring of policies and programs that affect us

15 National Native Title Council, *Submission – Native Title Payments Working Group* (13 February 2009), p 2.

16 R McClelland, Attorney-General, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, undated.

17 R McClelland (Attorney-General), *Native Title Consultative Forum* (Speech delivered at the Native Title Consultative Forum, Canberra, 4 December 2008), para 45. At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FourthQuarter_4December2008-NativeTitleConsultativeForum (viewed 17 November 2009).

- increasing the cross-cultural competence of bureaucracy to ensure policies and programs support the sustainability and self determination of Indigenous communities.

These steps are very broad and apply to all areas of Indigenous policy including land and resource management, cultural heritage and native title.

I consider that these steps must be underpinned by a genuine commitment to meeting Australia's human rights obligations.

Previous Social Justice Commissioners and I have consistently stated that there is an urgent need for government to apply a rights-based approach to the native title system.

Text Box 2.1: Decolonising the legislative framework through human rights principles

Major human rights standards that are particularly important to Indigenous peoples include:

- non-discrimination¹⁸
- equal protection of property interests before the law¹⁹
- the right to maintain and enjoy a distinct culture²⁰
- the right to self-determination, which can include the full, free and effective participation in decision-making that affects them, their lands, territories and resources²¹
- the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.²²

18 *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965, art 2, at <http://www2.ohchr.org/english/law/cerd.htm> (viewed 1 November 2009); *International Covenant on Civil and Political Rights*, 1966, art 26, at <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 1 November 2009); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), art 2, at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (viewed 1 November 2009).

19 *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965, art 5, at <http://www2.ohchr.org/english/law/cerd.htm> (viewed 1 November 2009); *Universal Declaration of Human Rights*, GA Resolution 217A(III), UN Doc A/810 (1948), art 17, at <http://www.un.org/en/documents/udhr/> (viewed 1 November 2009); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), art 26, at <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 17 November 2009).

20 *International Covenant on Civil and Political Rights*, art 27, at <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 17 November 2009); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), art 11, at <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 17 November 2009).

21 *International Covenant on Civil and Political Rights*, 1966, art 1, at <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 1 November 2009); *International Covenant on Economic and Social and Cultural Rights*, 1966, art 1, at <http://www2.ohchr.org/english/law/cescr.htm> (viewed 1 November 2009); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), arts 3–4, at <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 17 November 2009).

22 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), arts 32. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 17 November 2009).

I have commented elsewhere on the contents of these rights and the importance of their application in a native title context. In particular, I have provided guidance to the Australian Government about the implementation of the Declaration on the Rights of Indigenous Peoples.²³

However, I would like to specifically highlight the importance of the principle of free, prior and informed consent (FPIC) to the current discussions about native title reform.

Text Box 2.2: How is the principle of free, prior and informed consent relevant to native title?

Indigenous peoples have the right own, use, develop and control their lands, territories and resources.²⁴

The Declaration on the Rights of Indigenous Peoples affirms that States are to 'consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'.²⁵

This includes measures that may affect our rights to our lands, territories and resources, such as resource development projects.

In its 2005 Concluding Observations on Australia, the Committee on the Elimination of Racial Discrimination recommended that Australia:

refrain from adopting measures that withdraw existing guarantees of Indigenous rights and that it make every effort to seek the informed consent of Indigenous peoples before adopting decisions relating to their rights to land.²⁶

The principle of free, prior and informed consent requires that:

- no coercion or intimidation is used to gain consent
- consent is sought and freely given well in advance of authorisation of development activities
- full information is provided about the scope and impacts of the proposed development activities on their lands, resources and well-being
- that Indigenous people have the choice to give or withhold consent over developments on their lands.²⁷

23 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2009), ch 2. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html (viewed 1 November 2009).

24 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), art 26. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 17 November 2009).

25 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), art 19. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 17 November 2009).

26 UN Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005), para 16. At [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.AUS.CO.14.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CERD.C.AUS.CO.14.En?Opendocument) (viewed 1 November 2009).

27 DESA Intra-Departmental Task Force on Indigenous Issues, *Provisional Framework DESA technical cooperation programs in countries with Indigenous Peoples*, pp 4–5. At http://www.un.org/esa/socdev/unpfii/documents/desa_prov_framework_tech_coop.pdf (viewed 29 September 2009).

Governments at all levels need to change their attitudes towards engaging with Aboriginal and Torres Strait Islander peoples. In my view, government departments across all jurisdictions in Australia are not accustomed to regularly consulting with Aboriginal and Torres Strait Islander peoples. Most of them are unsure about what constitutes genuine consultation and effective engagement. We are certainly not at a point where bureaucrats value such engagement or understand its importance in terms of respect and in terms of improving the quality of decision making and policy formulation processes.²⁸

The current Government's approach to engaging with Indigenous peoples on reforms to the native title system is a welcome change from the approach of the previous government. However, I note that the capacity of communities to engage in consultative processes has been hindered by the short timeframes for responding to discussion papers and draft legislation regarding native title and associated areas. There was also a lack of consultation in centres most affected by the topics addressed by these reforms. As discussed in Chapter 1, Native Title Representative Bodies/Service Providers and Prescribed Bodies Corporate face considerable resource constraints.

It is essential that the principle of FPIC be reflected throughout the native title system. The principle is a higher standard than that currently provided in the Native Title Act.

The National Native Title Council (NNTC) has argued that one way of achieving a level playing field in native title is to enshrine the principle of FPIC in any process for agreement-making. This principle should be central to all negotiations with mining companies and others in relation to Indigenous peoples.²⁹

In Appendix 3 to this Report, I provide clear guidelines for effective engagement and consultation processes that promote FPIC. The guidelines also consider specific issues that require serious consideration when developing processes for engagement with Aboriginal peoples and Torres Strait Islander peoples.³⁰

The application of these guidelines would help ensure that policies, legislation and practices concerning native title implement a human rights-based approach to development.

(b) Building relationships between Indigenous peoples and governments

The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Special Rapporteur), James Anaya, has emphasised the importance of partnerships in implementing the rights of indigenous peoples. Following his visit to Australia in August 2009, he stressed the need to adopt a holistic approach to the development of Indigenous programs that is

28 T Calma (Aboriginal and Torres Strait Islander Social Justice Commissioner), *Essentials for Social Justice: The Future* (Speech delivered at the University of South Australia, Adelaide, 12 November 2008). At http://www.humanrights.gov.au/about/media/speeches/social_justice/2008/20081112_future.html (viewed 1 November 2009).

29 National Native Title Council, *Submission – Native Title Payments Working Group* (13 February 2009), p 3.

30 For examples of how Indigenous peoples are already applying the principle of FPIC in development negotiations, see Chapter 1 of this Report. See also Kimberley Land Council, 'Traditional Owners announce shortlist for gas development hub' (Media Release, 10 September 2008). At http://www.klc.org.au/media/080910_HUB_shortlist.pdf (viewed 22 October 2009).

compatible with the objective of the United Nations Declaration of securing for indigenous peoples, not just social and economic wellbeing, but also the integrity of indigenous communities and cultures, and their self-determination.³¹

The Special Rapporteur further stated:

This approach must involve a real partnership between the Government and the indigenous peoples of Australia, to move towards a future, as described by Prime Minister Rudd in his apology to indigenous peoples last year, that is 'based on mutual respect, mutual resolve and mutual responsibility,' and that is also fully respectful of the rights of Aboriginal and Torres Strait Islander peoples to maintain their distinct cultural identities, languages, and connections with traditional lands, and to be in control of their own destinies under conditions of equality.³²

I agree. To fully protect the rights of Aboriginal and Torres Strait Islander peoples, governments must work with us to build relationships of trust and partnership. In order to do this, governments must ensure:

- the participation of Aboriginal and Torres Strait Islander peoples in decision-making that significantly affects them, including through their representative organisations
- that governments are accountable for their progress in closing the gap in disadvantage experienced by Aboriginal and Torres Strait Islander peoples
- that programs and policies respect Aboriginal and Torres Strait Islander peoples' human rights
- that Aboriginal and Torres Strait Islander peoples' aspirations to economic independence are recognised and their ability to manage their own affairs is supported
- that Aboriginal and Torres Strait Islander peoples' culture and identity are recognised, strengthened and maintained.³³

This relationship of trust and partnership needs to be developed at all levels of government, including within local, state and territory governments.

State and territory governments are the primary respondents in the majority of native title claims. They are also parties to most of the negotiations under the Native Title Act. Further, the states and territories often work directly with Aboriginal or Torres Strait Islander communities at the local level to deliver essential services and basic human rights, and they are responsible for granting interests in lands, waters and resources to other parties.

States and territories must remember that they not only have responsibilities to protect non-Indigenous interests that may be affected by native title, but to protect the rights and interests of Aboriginal and Torres Strait Islander people.

31 United Nations High Commissioner for Human Rights, *Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia* (27 August 2009). At <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/313713727C084992C125761F00443D60?opendocument> (viewed 23 October 2009).

32 United Nations High Commissioner for Human Rights, *Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia* (27 August 2009). At <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/313713727C084992C125761F00443D60?opendocument> (viewed 23 October 2009).

33 The Australian Government, the Indigenous Peoples' Organisations Network of Australia, and the Australian Human Rights Commission, *Joint Statement by the Indigenous Peoples' Organisations Network of Australia, the Australian Government and the Australian Human Rights Commission attending the eighth session of the Permanent Forum on Indigenous Issues New York, 18 to 29 May 2009* (21 May 2009).

It is for these reasons that positive partnerships between native title holders and state and territory governments are integral to developing new approaches to the settlement of claims and the negotiation of agreements. It is in the best interests of states and territories to ensure that the native title system is working effectively.

However, the relationship between Indigenous peoples and the states and territories should be much broader than just sitting across the negotiation table. A partnership is required that considers native title holistically, and incorporates innovative approaches to the settlement of claims through negotiated outcomes and optimising those outcomes through co-ordinated efforts.

For example, closer strategic partnerships between the state and territory agencies and Indigenous communities are necessary to assess and facilitate the community development, skills and training required to effectively implement agreements. Initiative, support and forward planning to assess and meet the capacity needs of communities would help prepare communities to effectively engage in the agreement-making process and receive the full benefit of negotiated outcomes.

(c) Corporate social responsibility

To build a just and equitable native title system, a change in attitudes will also be required in the corporate sector.

The concept of corporate social responsibility (CSR) is generally understood to mean that corporations have a degree of responsibility not only for the economic consequences of their activities, but also for the social and environmental implications.³⁴

In 2001, Rhonda Kelly and Ciaran O’Faircheallaigh analysed the policies of eight major mining companies in relation to the rights and interests of Indigenous peoples. Kelly and O’Faircheallaigh found that, while most companies accept the idea of CSR in principle, they vary greatly in what they mean by that idea and in the extent to which they actually live up to their policies in practice. Some companies have, or are in the process of developing, policies, practices and resource allocations in relation to Indigenous peoples which are consistent with human rights. However, some companies publicly oppose, and/or work covertly to undermine, legislation and policy designed to protect or promote Indigenous rights and interests.³⁵

In March 2009, an International Expert Group Meeting on Extractive Industries, Indigenous Peoples’ Rights and Corporate Social Responsibility considered that while entities participating in extractive industries³⁶ have become more willing to consult with indigenous communities, efforts continue to fall short of true free, prior, and informed consent. Further, while companies were now more flexible in terms of benefit-sharing, there was no increased interest in acknowledging the sovereignty or traditional decision-making of Indigenous peoples and their rights to their territories

34 Australian Human Rights Commission, *Corporate Social Responsibility & Human Rights*, Fact Sheet (2008). At http://www.humanrights.gov.au/human_rights/corporate_social_responsibility/corporate_social_responsibility.html#1 (viewed 1 October 2009).

35 Australian Human Rights Commission, *Frameworks for Negotiation of Mining Agreements – Corporate Social Responsibility*, http://www.humanrights.gov.au/social_Justice/publications/corporate_responsibility/frameworks.html (viewed 4 September 2009).

36 The report of the Expert Meeting recognises that the term ‘extractive industries’ includes transnational corporations, States, public and privately held corporations, companies and other entities participating in the exploration and extraction of natural resources. UN Permanent Forum on Indigenous Issues, *Report of the international expert group meeting on extractive industries, Indigenous Peoples’ rights and corporate social responsibility*, UN Doc E/C.19/2009/CRP. 8 (2009), para 11. At http://www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_8.doc (viewed 30 October 2009).

or redressing past human rights violations. Some companies consider benefit-sharing or social programs as charity, rather a human rights issue.³⁷

The Expert Group recommended that extractive industries corporations:

- adopt the Declaration on the Rights of Indigenous Peoples as a minimum standard and respect the rights that it enshrines, regardless of a host government's acknowledgement of the human rights of indigenous peoples or failure to protect these through national law.
- fully integrate considerations of human rights and environmental standards in all areas of their work.
- recognise the rights of indigenous peoples over their lands as the basis for negotiations over proposed extractive industries, as well as the organisation of engagement, partnership and sharing of financial benefits. In instances where indigenous peoples consent to extractive activities on indigenous land, payments or benefit sharing arrangements should be based on annual reviews throughout the life of the activity. Incomes from any extractive activity must cover all costs associated with closure and restoration and include sufficient funds to provide for potential future liabilities.
- where benefit sharing arrangements are channelled through a foundation or other entity, corporations must ensure that these entitlements remain under the control of the indigenous people.
- develop and enforce policies on human rights.
- set insurance levels and establish insurance funds in agreement with indigenous peoples and at a level appropriate for the risks involved. The duration of the insurance program must match the duration of any impact of the extractive industry activity beyond the term of the project itself.
- be accountable to indigenous peoples for damages resulting from past extractive activities that affected indigenous lands and livelihoods and provide compensation and restitution for damages inflicted upon the lands, territories and resources of indigenous peoples, and the rehabilitation of degraded environments caused by extractive industry projects that did not obtain FPIC.
- submit themselves to the jurisdiction of indigenous courts and judicial systems in whose territories they operate.
- ensure respect for FPIC including full transparency in all aspects of their operations and stop dividing communities to obtain FPIC.
- always regard indigenous communities as having control and ownership of the land and territory, regardless of whether these rights are recognised by the relevant governments or not.³⁸

37 Permanent Forum on Indigenous Issues, *Report of the international expert group meeting on extractive industries, Indigenous Peoples' rights and corporate social responsibility*, UN Doc E/C.19/2009/CRP. 8 (2009), paras 14, 17. At http://www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_8.doc (viewed 30 October 2009).

38 Permanent Forum on Indigenous Issues, *Report of the international expert group meeting on extractive industries, Indigenous Peoples' rights and corporate social responsibility*, UN Doc E/C.19/2009/CRP. 8 (2009), paras 57–67. At http://www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_8.doc (viewed 30 October 2009).

I consider that these recommendations provide a good foundation for new relationships between the corporate sector and Indigenous communities. The Australian Government should also adopt and promote the recommendations through the processes of the Council of Australian Governments. For example, the recommendations could form the basis of best practice guidelines for extractive industries.

(d) Encouraging an interest-based approach to negotiation

To facilitate collaborative partnerships between Indigenous communities, government and industry, there is a clear need to move away from an adversarial approach to native title.

The Government has expressed a clear preference for an interest-based approach to negotiating broader land settlement agreements.³⁹

An interest-based process is a problem-solving process, with the goal of finding mutually satisfactory outcomes for all parties.⁴⁰

In relation to native title agreement-making, an interest-based approach to negotiations would focus on the interests of the parties in order to reach agreement. Interest-based processes must develop outcomes that meet the substantive, procedural and emotional needs of all parties. Tangible interests such as financial compensation or employment and training are most common, while less tangible interests such as recognition or respect for cultural protocols are harder to quantify and articulate.⁴¹

In a practical sense, this will require parties to:

- come together as early as possible to understand what each party wants to achieve
- look beyond native title issues – for example, by considering opportunities for economic development, such as employment, training, and developing skills, businesses and infrastructure in the community
- consider the non-tangible interests of parties – for example, increasing the corporate profile of industry parties, or exploring opportunities to strengthen the transfer of knowledge to younger generations through the claims and agreement-making process
- develop strategies to incorporate and implement those interests.⁴²

I consider that the adoption of an interest-based approach to negotiation is crucial to fulfilling the promise of the native title system. We can no longer adopt adversarial, win / lose positions. Rather, we should seek opportunities to understand each others' interests and to forge sustainable, mutually beneficial relationships.

39 R McClelland (Attorney-General), *3rd Negotiating Native Title Forum* (Speech delivered at the Third Negotiating Native Title Forum, Melbourne, 20 February 2009). At http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2009_20February2009-3rdNegotiatingNativeTitleForum (viewed 4 September 2009).

40 C Moore, *The Mediation Process* (2003), cited in the Australian Institute of Aboriginal and Torres Strait Islander Studies, *Indigenous Facilitation and Mediation Project*, http://ntru.aiatsis.gov.au/ifamp/terms/terms_content.html (viewed 4 September 2009).

41 D Everard, *Scoping Process Issues in Negotiating Native Title Agreements*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Research Discussion Paper No 23 (2009), pp 16–17. At <http://aiatsis.gov.au/research/docs/dp/DP23.pdf> (viewed 1 November 2009).

42 R McClelland (Attorney-General), *3rd Negotiating Native Title Forum* (Speech delivered at the Third Negotiating Native Title Forum, Melbourne, 20 February 2009). At http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2009_20February2009-3rdNegotiatingNativeTitleForum (viewed 4 September 2009).

2.4 Transforming the policy landscape

In Chapter 3, I consider specific aspects of native title law and policy that are in need of reform, with the aim of generating further discussion on how we move towards a just and equitable native title system.

However, native title is part of the wider constitutional, legislative and policy framework that impacts upon the rights of Aboriginal and Torres Strait Islander peoples in Australia. We cannot view native title as being distinct from broader debates about the enjoyment of our human rights. In order to create a just and equitable native title system, we need to ensure that a firm platform is in place across Australia to respect, protect and fulfil the human rights of Aboriginal and Torres Strait Islander peoples.

Our rights to our country are at the core of our physical and mental wellbeing. And because of this, the protection of our native title and other land and water rights is essential to other aspects of our lives, such as health. As discussed in Text Box 2.3, this has been supported by recent research.

Text Box 2.3: Closing the gap through land rights

Recent research has confirmed what Aboriginal and Torres Strait Islander peoples have known for millennia – that there is a link between their physical, mental and cultural health and their role in caring for their country.⁴³

I have said in the past that the land is our mother. It is steeped in our culture. We have a responsibility to care for it now and for generations to come. This care, in turn, sustains our lives – spiritually, physically, socially and culturally – much like the farmer who lives off the land. However, there is a lack of understanding within government of the importance of Indigenous peoples' relationship to country to the broader social and economic improvement in the lives of Indigenous people.⁴⁴

The *Healthy Country, Health People* project, which was requested by traditional owners of central Arnhem Land, researched various aspects of the relationship between caring for country and health and wellbeing.

The study found evidence 'sufficient to support the proof of concept that investment in ICNRM [Indigenous Natural and Cultural Resource Management] appears to be an important strategy for the prevention of chronic diseases and their complications'.⁴⁵

43 S T Garnett et al, 'Healthy country, healthy people: policy implications of the link between Indigenous human health and environment condition in tropical Australia' (2009) 68 *Australian Journal of Public Administration* 53.

44 T Calma (Aboriginal and Torres Strait Islander Social Justice Commissioner), *Essentials for Social Justice: Land and Culture – Economic Development* (Speech delivered at the Department of Environment, Water, Heritage and the Arts NAIDOC Week Celebrations, Parkes, 7 July 2008). At http://www.humanrights.gov.au/about/media/speeches/social_justice/2008/20080707_essentials_land_and_culture.html (viewed 31 October 2009).

45 S Garnett & B Sithole, *Sustainable Northern Landscapes and the Nexus with Indigenous Health: Healthy Country, Healthy People* (2007), p 25. At <http://lwa.gov.au/files/products/social-and-institutional-research-program/pn20681/pn20681.pdf> (viewed 30 October 2009).

The researchers found that greater participation in caring for country activities was 'associated with more frequent exercise and bush food consumption and with better health on most clinical outcomes', for example, a lower Body Mass Index, less abdominal obesity, less diabetes and lower blood pressure.⁴⁶

The researchers concluded that their results 'suggest careful reconsideration of conflicting Indigenous affairs policies that are simultaneously discouraging connections with country and promoting Indigenous natural resource management'.⁴⁷

An earlier government-initiated evaluation of the Indigenous Protected Area (IPA) program also found strong correlations between managing IPAs and broader social and cultural benefits for communities. This study found:

- 60% of IPA communities report positive outcomes for early childhood development from their IPA activities
- 85% of IPA communities report that IPA activities improve early school engagement
- 74% of IPA communities report that their IPA management activities make a positive contribution to the reduction of substance abuse
- 74% of IPA communities report that their participation in IPA work contributes to more functional families by restoring relationships and reinforcing family and community structures.⁴⁸

Further research conducted in the Northern Territory community of Utopia found that outstation living resulted in positive health outcomes including benefits associated with physical activity, diet and limited access to alcohol, as well as social factors, including connectedness to culture, family and land, and opportunities for self-determination.⁴⁹

These studies provide the evidence base for governments to make policies that enable and support the ability of Indigenous peoples to manage and undertake activities on country.⁵⁰ These studies also counter the arguments that homelands communities are cultural museums that prevent health and social gains for Aboriginal peoples.⁵¹

It also supports the common cultural belief that land is central to our wellbeing. Consequently, policy affecting Indigenous peoples cannot be made in a vacuum.

The phrase 'caring for country' can now be based on a better understanding of what this means to Indigenous peoples. 'Caring for country' is not just the title of a policy, it is our law.

The crucial link of the connection between land and water and our wellbeing is something that policy makers are only just starting to grasp.

46 C P Burgess et al, 'Healthy country, healthy people: the relationship between Indigenous health status and "caring for country"' (2009) 190(10) *Medical Journal of Australia* 567, pp 570–571.

47 C P Burgess et al, 'Healthy country, healthy people: the relationship between Indigenous health status and "caring for country"' (2009) 190(10) *Medical Journal of Australia* 567, p 572.

48 B Gilligan, *The Indigenous Protected Areas Programme; 2006 Evaluation* (2006), p 4. At <http://www.environment.gov.au/indigenous/publications/ipa-evaluation.html> (viewed 24 July 2009).

49 K Rowley et al, 'Lower than expected morbidity and mortality for an Australian Aboriginal population: 10 year follow-up in a decentralised community' (2008) 188(5) *Medical Journal of Australia* 283.

50 J Davies, M LaFlamme & D Campbell, *Health of people and land through sustainable Aboriginal livelihoods in rangeland Australia* (Presentation delivered at the XXI International Grassland Congress, Hohhot, Inner Mongolia, China, 29 June – 5 July 2008).

51 K Rowley et al, 'Lower than expected morbidity and mortality for an Australian Aboriginal population: 10 year follow-up in a decentralised community' (2008) 188(5) *Medical Journal of Australia* 283.

Current policies that impact upon Aboriginal and Torres Strait Islander peoples are isolated, disconnected and disjointed. If there is to be real change in the lives of Aboriginal and Torres Strait Islander people, governments must work collaboratively and develop policies that deal with Indigenous disadvantage from a holistic perspective.

This means that in addition to the key areas for reform discussed in Chapter 3, consideration will also need to be given to associated policies. There is a need for policy-makers to understand the intersections between native title and other policy areas.

(a) Improving the governance framework

With regard to maximising the mechanisms available at the domestic level to develop effective policy and law, the Office of the High Commissioner for Human Rights highlights four key governance themes:

- strengthening democratic institutions
- improving service delivery
- the rule of law
- combating corruption.⁵²

Text Box 2.4: Good governance and human rights⁵³

Strengthening democratic institutions

When led by human rights values, good governance reforms of democratic institutions create avenues for the public to participate in policy-making either through formal institutions or informal consultations. They also establish mechanisms for the inclusion of multiple social groups in decision-making processes, especially locally. Finally, they may encourage civil society and local communities to formulate and express their positions on issues of importance to them.

Improving service delivery

In the realm of delivering State services to the public, good governance reforms advance human rights when they improve the State's capacity to fulfil its responsibility to provide public goods which are essential for the protection of a number of human rights, such as the right to education, health and food. Reform initiatives may include mechanisms of accountability and transparency, culturally sensitive policy tools to ensure that services are accessible and acceptable to all, and paths for public participation in decision-making.

52 Office of the United Nations High Commissioner for Human Rights, *Good Governance Practices for the Protection of Human Rights* (2007), pp 2–3. At <http://www.ohchr.org/Documents/Publications/GoodGovernance.pdf> (viewed 19 August 2009).

53 Office of the United Nations High Commissioner for Human Rights, *Good Governance Practices for the Protection of Human Rights* (2007), pp 2–3. At <http://www.ohchr.org/Documents/Publications/GoodGovernance.pdf> (viewed 19 August 2009).

The rule of law

When it comes to the rule of law, human rights-sensitive good governance initiatives reform legislation and assist institutions ranging from penal systems to courts and parliaments to better implement that legislation. Good governance initiatives may include advocacy for legal reform, public awareness-raising on the national and international legal framework and capacity-building or reform of institutions.

Combating corruption

In fighting corruption, good governance efforts rely on principles such as accountability, transparency and participation to shape anti-corruption measures. Initiatives may include establishing institutions such as ethics and review committees, creating mechanisms of information sharing, and monitoring governments' use of public funds and implementation of policies.

Transparency and accountability in government decision-making is required to truly 'close the gap' on socio-economic outcomes between Indigenous and non-Indigenous Australians and to successfully reform the native the system.

In my *Social Justice Report 2008*, I considered areas where reform is needed to improve governance and the protection of human rights in Australia, including:

- government support for, and implementation of, the Declaration on the Rights of Indigenous Peoples
- constitutional reform to recognise Indigenous peoples in the preamble of the Australian Constitution, remove discriminatory constitutional provisions and to guarantee equal treatment and non-discrimination
- the enactment of a national Human Rights Act that includes the protection of Indigenous rights
- the establishment of a national Indigenous representative body and processes to ensure the full participation of Indigenous peoples in decision-making that affects our interests.
- the establishment of a framework for negotiations / agreements with Indigenous peoples to address the unfinished business of reconciliation.⁵⁴

The Australian Government confirmed its support for the Declaration on the Rights of Indigenous Peoples during the reporting period.⁵⁵ The next step will be to work with Aboriginal and Torres Strait Islander people to ensure its implementation.

Advocacy for constitutional reform, a Human Rights Act and the establishment of a national Indigenous representative body continued throughout the reporting period. I consider these three proposals, and further proposals to address the unfinished business of reconciliation, below.⁵⁶

54 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2009), p 26. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html (viewed 19 August 2009).

55 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), Statement on the *United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm (viewed 2 November 2009).

56 For further information, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2009), ch 2. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html (viewed 19 August 2009).

(i) *Constitutional recognition of the first peoples*

In his famous Redfern Speech, Paul Keating (then the Prime Minister of Australia) highlighted the importance of recognising the history of Australia and, in particular, the impact of that history on our country's first peoples. He understood that

the starting point might be to recognise that the problem starts with us non-Aboriginal Australians. It begins, I think, with that act of recognition. Recognition that it was we who did the dispossession. We took the traditional lands and smashed the traditional way of life.⁵⁷

The Australian Constitution does not acknowledge Aboriginal and Torres Strait Islander peoples as the first peoples and traditional owners of the land now known as Australia. In fact, the Constitution makes no reference to Aboriginal and Torres Strait Islander peoples at all.

On 10 December 2008, the Australian Government launched a national consultation on human rights protections in Australia. The Government appointed an independent committee, chaired by Father Frank Brennan, to conduct the National Human Rights Consultation (the Consultation).⁵⁸

As identified by the Australian Human Rights Commission (the Commission) in its submission to the Consultation:

There is enormous symbolic importance in recognising the rights and unique status of Indigenous peoples in the preamble to the Constitution. It would go some way towards redressing the historical exclusion of Indigenous peoples from Australia's foundational documents and national identity.⁵⁹

The Commission recommended that Aboriginal and Torres Strait Islander peoples should be recognised in the preamble to Australia's Constitution.⁶⁰

If we as a nation are serious about real engagement with Aboriginal and Torres Strait Islander peoples, constitutional recognition is essential.

The Commission further recommended that the Australian Government should begin a process of constitutional reform to protect the principle of equality for all people in Australia, including:

- removing section 25 of the Constitution
- amending the Constitution to guarantee racial equality and proscribe discrimination on the basis of race
- a comprehensive national inquiry to consider:
 - the exact wording of a constitutional clause to protect the right to equality

57 P Keating, *Redfern Speech* (Speech delivered at Redfern Park, 10 December 1992). At <http://www.keating.org.au/main.cfm> (viewed 1 November 2009).

58 For further information, see National Human Rights Consultation, www.humanrightsconsultation.gov.au/ (viewed 24 September 2009).

59 Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (June 2009), para 670. At http://www.humanrights.gov.au/legal/submissions/2009/200906_NHRC.html (viewed 17 November 2009).

60 Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (June 2009), para 696 (recommendation 34). At http://www.humanrights.gov.au/legal/submissions/2009/200906_NHRC.html (viewed 17 November 2009).

- the extent to which specific grounds of protection should be included
- whether the clause should include any possible limitation.⁶¹

Constitutional protection of racial equality would prevent legislative protections against racial discrimination from being overridden or suspended by Parliament. This could have an important impact on the native title system – we have seen before how easily the *Racial Discrimination Act 1975* (Cth) can be suspended and the Native Title Act amended to our detriment.⁶²

(ii) *A Human Rights Act for Australia*

In its submission to the Consultation, the Commission recommended that the Australian Parliament should introduce a Human Rights Act.⁶³

A Human Rights Act would be Parliament's commitment to a democratic system that provides transparency and accountability in all public decision-making which might impact on human rights. It could help ensure that human rights standards, such as those discussed above, are given due consideration when the Australian Government and federal public authorities make decisions that affect our rights to our lands, territories and resources.

The model of a Human Rights Act supported by the Commission would:

- require the Australian Government to consider human rights from the earliest stages of the development of law and policy
- require parliamentary scrutiny of new legislation to ensure that it is compatible with human rights
- require legislation to be interpreted consistently with human rights
- require Parliament to be notified, and to publicly respond, if a law is found to be inconsistent with human rights
- require public authorities to act in a way that is compatible with human rights and to give proper consideration to human rights in decision-making
- provide for an effective remedy when a public authority breaches human rights.⁶⁴

As discussed in the *Social Justice Report 2008*,⁶⁵ a Human Rights Act would also be an important way of formally recognising the rights of Aboriginal and Torres Strait Islander peoples. In particular, the Commission believes that a Human Rights Act should include a preamble that specifically recognises the human rights of Aboriginal and Torres Strait Islander peoples.

61 Australian Human Rights Commission, *Submission to the National Human Rights Consultation*, (June 2009), para 696 (recommendation 35). At http://humanrights.gov.au/legal/submissions/2009/200906_NHRC.html (viewed 17 November 2009).

62 See Chapter 1 of this Report for a discussion on the *Native Title Amendment Act 1998* (Cth). See further Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998* (1998). At http://www.humanrights.gov.au/social_justice/nt_report/index.html#1998 (viewed 1 October 2009).

63 Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (2009), pt 20. At http://humanrights.gov.au/legal/submissions/2009/200906_NHRC.html (viewed 17 November 2009).

64 Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (2009), pt 20. At www.humanrights.gov.au/legal/submissions/2009/200906_NHRC_complete.pdf (viewed 24 September 2009).

65 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2009), ch 2. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html (viewed 1 November 2009).

The Commission also recommended that special effort should be made to ensure that Aboriginal and Torres Strait Islander peoples are full and effective participants in the development of a Human Rights Act. This would provide an opportunity for us to articulate how our rights should be recognised in a Human Rights Act.

(iii) A national Indigenous representative body

Since October 2007, I have worked with the Australian Government and an Indigenous Steering Committee to advance the establishment of a national Indigenous representative body. I provided a report to the Minister for Indigenous Affairs on the preferred model for the proposed representative body in August 2009.⁶⁶ The Government is expected to provide a response to this report in October 2009.

The absence of an effective, credible body in recent years has resulted in fragmented and uncoordinated policy-making at the national level. Policy has been developed without genuine engagement with Aboriginal and Torres Strait Islander peoples.

The creation of a national Indigenous representative body will provide governments with a national focal point from which they can source expert advice on a holistic, whole-of-government basis. The proposed model will provide the 'meeting space' where Aboriginal and Torres Strait Islander peoples and communities, peak bodies and interest groups will be able to focus on the bigger picture and set a longer term agenda for policy making and program delivery. It will provide the starting point for discussions and set the broad directions for policy.⁶⁷ The proposed model anticipates that the national Indigenous representative body will have the ability to access expert advice across a range of issues, including native title.⁶⁸

(b) Further unfinished business

In addition to reforms to the broader governance structure, governments must attend to significant unfinished business. They include the social justice package and the Indigenous Economic Development Strategy.

Reform to these areas will complement the native title system and contribute to levelling the playing field.

(i) The social justice package

As I have highlighted in a number of my reports, the Native Title Act was intended to be just one of three mechanisms to recognise, and provide some reparation for, the dispossession of Indigenous peoples' from their lands and waters. The Act was to be complemented by:

- a social justice package to address broader issues in the relationship between Indigenous and non-Indigenous Australians

66 Australian Human Rights Commission, *Our future in our hands: Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples*, Report of the Steering Committee for the creation of a new National Representative Body (2009). At http://www.humanrights.gov.au/social_justice/repbody/report2009/index.html (viewed 1 November 2009).

67 Australian Human Rights Commission, *Our future in our hands: Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples*, Report of the Steering Committee for the creation of a new National Representative Body (2009). At http://www.humanrights.gov.au/social_justice/repbody/report2009/index.html (viewed 1 November 2009).

68 Australian Human Rights Commission, *Our future in our hands: Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples*, Report of the Steering Committee for the creation of a new National Representative Body (2009). At http://www.humanrights.gov.au/social_justice/repbody/report2009/index.html (viewed 1 November 2009).

- an Indigenous land fund, which would ensure that those Indigenous peoples who could not access native title would still be able to attain some form of justice for loss of their lands.

While the Indigenous Land Fund was established, the social justice package has never been developed.

In preparation for the 2007 federal election, the Australian Labor Party promised to honour its commitment to implement a package of social justice measures in response to *Mabo (No 2)*.⁶⁹ The Labor Party removed reference to the social justice package in its 2009 National Platform.⁷⁰ In my view, a social justice package is integral to the effective operation of the native title system and must remain a priority for the Government.

The Aboriginal and Torres Strait Islander Commission⁷¹ as well as my predecessors undertook significant amounts of work to compile detailed recommendations and proposals for a social justice package.⁷² Some of the recommendations support proposals discussed in this Chapter, including constitutional recognition of Aboriginal and Torres Strait Islanders peoples, the protection of cultural integrity and heritage, and increasing the participation of Aboriginal and Torres Strait Islander people in the Australian economy.

Unfortunately, these recommendations have yet to be implemented.

I consider that it is time to revisit these recommendations and to consider the implementation of a comprehensive social justice package to complete the native title system.

(ii) *Indigenous Economic Development Strategy*

Economic development is an important tool in which to gain self determination and independence, but it should not come at the expense of the collective identity and responsibilities to your traditions, nor the decline in the health of your country.⁷³

As discussed in Chapter 1 of this Report, the Australian Government has committed to the development of an Indigenous Economic Development Strategy. However, the Government has not released a discussion paper or draft strategy.⁷⁴

I consider that an Indigenous Economic Development Strategy must be based upon Indigenous ownership and control of their lands and waters.

Rights to land and water are critical to Indigenous communities being able to leverage economic outcomes.

69 Australian Labor Party, *National Platform and Constitution* (2007), ch 13.

70 Australian Labor Party, *National Platform* (2009). At http://www.alp.org.au/download/how/national_platform_constitution_2009.pdf (viewed 29 September 2009).

71 Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995). Extracts reproduced in (1996) 1 *Australian Indigenous Law Reporter* 76. At <http://www.austlii.edu.au/au/journals/AILR/1996/27.html> (viewed 1 November 2009).

72 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, Human Rights and Equal Opportunity Commission (1995), pp 96–135. See also T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission (2009), app 3, at http://www.humanrights.gov.au/social_justice/repbody/report2009/index.html (viewed 1 November 2009).

73 Traditional owner from the Yorta Yorta Nation Aboriginal Corporation, quoted in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), p 22. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_1.html (viewed 12 August 2009).

74 See discussion in Chapter 1 of this Report.

The recent amendments to the Native Title Act to allow for broader settlement packages, discussed in Chapter 1, should help facilitate economic development on Indigenous lands and assist communities to take advantage of new opportunities, such as climate change mitigation activities.

However, as I consider in Chapter 3, further reforms to the native title system are necessary to facilitate economic development. This includes providing for the recognition of commercial native title rights. Without the option of the commercial use of native title rights and interests, the ability to leverage economic development from the Indigenous estate and native title and to close the gap between Indigenous and non-Indigenous peoples is severely restricted.

I am also concerned that the development approach adopted by governments is premised on gaining control over Indigenous communities, rather than building governance, capacity and promoting self-sustaining and self-governing communities.⁷⁵

The success of an Indigenous Economic Development Strategy will be maximised by linking it to other areas of Indigenous policy including land rights regimes, and emerging climate change and water policy. However, proactive policy developments must not be compromised by forcing Indigenous peoples to surrender their native title rights or their access to, or ownership of, their lands, waters and territories.

2.5 Conclusion

Changing the culture of the native title system will not be an easy task. The potential for reform will depend on the attitudes and commitment of all involved.

This Chapter has highlighted the need to ensure that the native title system is supported by a strong institutional foundation, which is based on human rights principles and incorporates processes that protect and promote the rights and interests of Aboriginal and Torres Strait Islanders peoples.

Reform to the native title system requires political will. It will also require a commitment on the part of governments and the corporate sector to enter into genuine partnerships with Aboriginal and Torres Strait Islander communities based on respect for our rights and the principle of FPIC.

We need to encourage collaborative partnerships where Indigenous people, governments and other stakeholders work together as equal partners to achieve sustainable outcomes that realise the development aspirations of Indigenous peoples.

⁷⁵ For example, see Chapter 4 of this Report concerning reforms to land tenure.

Recommendations

- 2.1 That the Australian Government ensure that reforms to the native title system are consistent with the rights affirmed by the Declaration on the Rights of Indigenous Peoples.
- 2.2 That the Australian Government adopt and promote the recommendations of the Expert Meeting on Extractive Industries through the processes of the Council of Australian Governments. For example, the recommendations could form the basis of best practice guidelines for extractive industries.
- 2.3 That the Australian Government work with Aboriginal and Torres Strait Islander peoples to develop a social justice package that complements the native title system and significantly contributes to real reconciliation between Indigenous and non-Indigenous Australians.

Chapter 3:

Towards a just and equitable native title system

.....

3.1 Improving the native title system – the time for change is now!

As I discussed in Chapter 1 of this Report, there was a new energy and a stir of activity in the native title sector during the reporting period.

In my previous two *Native Title Reports*, I have strongly argued the need to reform the native title system. Stakeholders from all sectors engaged in the native title system have also stressed the need for the Government to take significant steps to ensure that the system meets the original objectives set out in the preamble to the *Native Title Act 1993* (Cth) (Native Title Act).

The federal Attorney-General has responded to this call and has committed to improving the operation of the native title system. He has clearly identified reform to the native title system as a strategic priority.¹

The Attorney-General has advanced reforms to the native title system aimed at fostering 'broader, quicker and more flexible negotiated outcomes for native title claims'.² In particular, the *Native Title Amendment Act 2009* (Cth) commenced on 18 September 2009. I have outlined these reforms in Chapter 1 of this Report. The Minister for Families, Housing, Community Services and Indigenous Affairs has also worked with the Attorney-General and native title stakeholders to bring about positive change in the system, with a particular focus on maximising the benefits derived from native title agreements.³

However, further reform is required to realise the hopes of Aboriginal and Torres Strait Islander peoples for the system.

There are signs that the Attorney-General recognises this.

The Government has indicated that it is receptive to constructive and concrete ideas for reform. For example, the Attorney-General has stated:

I have an open mind as to how the operation of the system can be improved and am willing to explore ideas for reform such as the amendments you proposed in your 2008 Report.

1 Attorney-General's Department, *Strategic Plan 2009–2010* (2009), p 3. At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(C7C220BBE2D77410637AB17935C2BD2E\)-AGDStrategicPlan1July2009.rtf/\\$file/AGDStrategicPlan1July2009.rtf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(C7C220BBE2D77410637AB17935C2BD2E)-AGDStrategicPlan1July2009.rtf/$file/AGDStrategicPlan1July2009.rtf) (viewed 12 October 2009).

2 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 2009, p 3889 (The Hon R McClelland, Attorney-General). At <http://www.aph.gov.au/Hansard/rep/dailys/dr140509.pdf> (viewed 12 October 2009).

3 Australian Government, *Australian Government Discussion Paper* (undated). At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)-Discussion+paper+-+final+version.DOC/\\$file/Discussion+paper+-+final+version.DOC](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)-Discussion+paper+-+final+version.DOC/$file/Discussion+paper+-+final+version.DOC) (viewed 12 October 2009).

The Government is committed to genuine consultation with Indigenous people and other relevant native title stakeholders in exploring ways to improve the native title system. The Government will not rush into making significant change to the Native Title Act. History has shown that such change requires proper consideration and consultation.⁴

I am greatly encouraged by the Attorney's comments.

Over the past 16 years, millions of dollars have been spent on the native title system. There have been minimal obvious returns for Aboriginal and Torres Strait Islander peoples. Significant studies have generated proposals for improving the operation of the native title system. Yet, many reports are now gathering dust on shelves in Canberra.

I consider that reforms are urgently required to improve the system and fulfil the underlying purposes of the Native Title Act – including the rectification of 'the consequences of past injustices'.⁵

The native title system must be viewed holistically. Its deficiencies can only be addressed through a comprehensive reform process in which Aboriginal and Torres Strait Islander peoples are actively involved, every step of the way. I reiterate my firm belief that any reform to the native title system needs to respect the *Racial Discrimination Act 1975* (Cth) and international human rights standards. Reforms must not be implemented without full consultation and the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples.

We now have a historic opportunity to transform the native title system to ensure that it truly delivers justice for Aboriginal and Torres Strait Islander peoples and facilitates our social and economic development. The Attorney must seize this opportunity and succeed where other governments have failed. To do so would leave a lasting legacy of reconciliation.

It is therefore an optimal time to have an informed discussion about what changes should be made to improve native title.

In Chapter 2 of this Report, I considered principles and standards that should underpin a fresh approach to native title.

In Chapter 3, I raise a number of my concerns about the native title system as it currently operates. The purpose of this Chapter is to highlight possible options for reform and to encourage further dialogue on ways to improve the native title system.

In particular, this Chapter considers several key areas that require attention:

- recognition of traditional ownership
- shifting the burden of proof
- more flexible approaches to connection evidence
- improving access to land tenure information
- streamlining the participation of non-government respondents
- promoting broader and more flexible native title settlement packages
- initiatives to increase the quality and quantity of anthropologists and other experts working in the native title system.

4 R McClelland, Attorney-General, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, undated.

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

These issues have been specifically identified throughout the reporting period as future directions for reform.⁶

There are undoubtedly other elements of the native title system in need of improvement, many of which I have analysed in previous *Native Title Reports*. However, the range of issues raised in this Chapter indicates that governments must do more than simply tinker at the edges of the native title system to achieve social justice for Aboriginal and Torres Strait Islander peoples.

3.2 Recognition of traditional ownership

The recognition of native title can be empowering for traditional owners.

The experience of Yamatji Marlpa Aboriginal Corporation is that for claimant groups

native title is not merely about gaining (generally quite limited) rights over their traditional country. What is particularly important to many claimants is the recognition and status that comes with a positive determination – that is, that the white legal system and the Australian Government recognise the existence of the group and their status as traditional owners.⁷

Murray Wilcox, a former Federal Court judge, has also commented on the significance of formal recognition for native title claimants:

A court decision to recognise native title always unleashes a tide of joy. I believe this has nothing to do with any additional uses of the land – generally very marginal – that the determination makes available; rather, the fact that a government institution has formally recognised the claimant group's prior ownership of the subject land and the fact of its dispossession. That recognition is what Aboriginal peoples are seeking.⁸

As discussed in Chapter 2, the Australian Constitution does not recognise our traditional ownership of our lands, territories and resources. Further, the legal barriers for proving native title are often insurmountable, leaving many communities without formal recognition of their traditional ownership.

In an attempt to overcome this significant issue, Mr Wilcox has raised the idea of allowing courts to recognise traditional ownership when the claimants fall short of proving native title.

He has suggested that the Federal Court should be empowered to make a declaration about traditional ownership based on descent, and without needing to find continuous observance of laws and customs, or to make orders about particular uses of the land.⁹

6 As discussed throughout this Chapter, the first two areas have been proposed and supported by a number of native title stakeholders, judges and practitioners. Along with 'partnerships with State and Territory Governments to develop new approaches to the settlement of claims through negotiated agreements', the other areas have been specifically listed for attention by the Attorney-General: see Attorney-General's Department, *Closing the Gap – Funding For the Native Title System (Additional Funding and Lapsing): Budget 2009–10*, Fact Sheet (2009). At [http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingFortheNativeTitleSystem\(AdditionalFundingandLapsing\)](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingFortheNativeTitleSystem(AdditionalFundingandLapsing)) (viewed 19 September 2009).

7 Yamatji Marlpa Aboriginal Corporation, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 3 September 2009.

8 M Wilcox QC, *Response to Oration 2009* (Speech delivered in response to the 2009 Mabo Oration, Brisbane, 5 June 2009). At http://www.adcq.qld.gov.au/ATSI/FromSelfRespect_comments.html (viewed 6 July 2009).

9 M Wilcox QC, *Response to Oration 2009* (Speech delivered in response to the 2009 Mabo Oration, Brisbane, 5 June 2009). At http://www.adcq.qld.gov.au/ATSI/FromSelfRespect_comments.html (viewed 6 July 2009).

This proposal is worthy of further consideration. It raises some important questions. How might it work in practice? What rights would be associated with recognition of traditional ownership, if not native title rights and interests?

Creating a 'second tier' of recognition of traditional owner status could be useful in some circumstances. As the National Native Title Council (NNTC) identifies:

Such a power would enable the regional identification of the traditional country of a claimant group even where native title has been, for example, extinguished by the grant of an extinguishing tenure.¹⁰

However, in creating such a second tier, the Government should be very careful not to simply give incentives for respondent parties to 'race to the bottom' of the recognition ladder. As the NNTC further comments:

[T]he capacity for the Federal Court to make a determination of 'traditional owner status' [must] not operate to the disadvantage of native title claimants. For example, it should not operate as an incentive to respondents to reduce their willingness to participate in consent determinations.¹¹

While the idea of alternative modes of recognition is innovative, I consider that the ultimate issue is: how do we transition from the existing law to a native title system that works, and thereby allows full recognition of traditional ownership? After all, the Native Title Act was intended to do exactly that – give legal recognition to the traditional owners of this land.

The devastating reality is that native title is inaccessible and unrealistic for many traditional owners. This includes the Yorta Yorta people in Victoria, who could not clear the legal hurdles of proving native title. In my view, the answer is not necessarily to create a second tier of legal recognition of traditional ownership, but to amend the law and make native title accessible and achievable.

However, if such amendments are not made and native title determinations remain elusive to the majority of Aboriginal and Torres Strait Islander peoples, the Government should consider and consult on how other mechanisms can acknowledge traditional ownership. Some mechanisms such as consent determinations and Indigenous Land Use Agreements (ILUAs) already exist, but their use as tools for recognition could be promoted and made more attractive and accessible to the parties.

3.3 Shifting the burden of proof

(a) Background

Over the past five years, I have consistently voiced my concerns that the evidential burden of proving native title is simply too great. Similarly, Les Malezer has argued that the onus upon Aboriginal and Torres Strait Islander peoples of proving that they have a customary connection to their lands is one of the 'fundamentally discriminatory aspects' of the Native Title Act.¹²

10 National Native Title Council, *Submission to the Attorney-General's discussion paper on minor amendments to the Native Title Act* (20 February 2009), p 3.

11 National Native Title Council, *Submission to the Attorney-General's discussion paper on minor amendments to the Native Title Act* (20 February 2009), p 3.

12 L Malezer, *2009 Mabo Lecture* (Speech delivered at the 10th Annual Native Title Conference, Melbourne, 5 June 2009), p 4. At http://ntru.aiatsis.gov.au/conf2009/papers/2009_MaboLecture.pdf (viewed 12 October 2009).

This view is shared by the United Nations Committee on the Elimination of Racial Discrimination, which has expressed concern:

about information according to which proof of continuous observance and acknowledgement of the laws and customs of indigenous peoples since the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title under the Native Title Act. The high standard of proof required is reported to have the consequence that many indigenous peoples are unable to obtain recognition of their relationship with their traditional lands. ...

[The Committee] recommends that the State party review the requirement of such a high standard of proof, bearing in mind the nature of the relationship of indigenous peoples to their land.¹³

As one academic put it, ‘the question should not be how we can deal with indigenous “claims” against the state, but rather how can the colonisers legitimately settle and establish their own sovereignty’.¹⁴

One way to address this problem could be to amend the Native Title Act to provide certain presumptions in favour of native title claimants. For instance, there could be a presumption of the ‘continuity of the relevant society and the acknowledgement of its traditional laws and observance of its customs from sovereignty to the present time’.¹⁵ Once these presumptions are triggered, the burden would shift to the respondents to rebut the presumptions with proof to the contrary.

Such an approach is not inconsistent with the Native Title Act. The preamble states that the High Court has held that the common law ‘recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands’. Presumptions in favour of the native title claimants would simply recognise and give respect to this fact.

Nor would this approach be novel. As I outlined in my submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Native Title Amendment Bill 2009, there are a number of laws in Australia in which a presumption is made or certain elements must be proven, after which the burden of proof shifts to the respondent.¹⁶

In most cases the government party would presumably take on the role of adducing evidence to rebut the relevant presumptions. In my view, this is appropriate. Government parties typically hold a lot of information relevant to the claim. Governments are also better resourced than native title claimants. Significantly, governments are responsible for dispossession.

13 Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005), para 17. At [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.AUS.CO.14.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CERD.C.AUS.CO.14.En?Opendocument) (viewed 1 November 2009).

14 D Short, ‘The social construction of Indigenous “Native Title” land rights in Australia’ (2007) 55(6) *Current Sociology* 857, p 872 (original emphasis). At <http://csi.sagepub.com/cgi/reprint/55/6/857.pdf> (viewed 12 October 2009).

15 Chief Justice RS French, *Lifting the burden of native title: Some modest proposals for improvement* (Speech delivered to the Federal Court Native Title User Group, Adelaide, 9 July 2008), para 29. At http://www.fedCourt.gov.au/aboutct/judges_papers/speeches_frenchj35.rtf (viewed 9 October 2009).

16 See, for example, *Sex Discrimination Act 1984* (Cth), s 7C; *Workplace Relations Act 1996* (Cth), s 664. See further, Australian Human Rights Commission, *Inquiry into the Native Title Amendment Bill 2009 – Submission by the Aboriginal and Torres Strait Islander Commissioner to the Senate Standing Committee on Legal and Constitutional Affairs* (24 April 2009), paras 258–260. At http://www.humanrights.gov.au/legal/submissions/2009/20090424_ntab.html (viewed 1 November 2009).

As Tony McAvoy comments:

The evidence which traditional owners inevitably have to rely upon for that period which is beyond the living memory of traditional owners comes from the government. That material is often in the hands of the government or government functionaries ... The state has the resources and the capacity to look at the material itself. If it wants to challenge the continuity of particular people's connection then let them do so. Let them access their own material and do so. Instead, the onus is placed upon the traditional owners and complaints are made about the length of time it takes for claims to be settled.¹⁷

Shifting the burden of proof is intended to encourage positive outcomes in a higher proportion of native title claims, either by consent or through litigation. If the burden of disproving a claim rests more heavily on the respondents, states and territories may be more inclined to settle claims with strong prospects of success by consent. It could mean, as Justice North and Tim Goodwin argue, that for 'most cases moving towards resolution by consent determination, the timeline would be streamlined beyond recognition and the costs of such a process would be reduced out of sight'.¹⁸

However, this reform alone may not lead to better outcomes for native title claimants. A respondent would still be able to defeat a native title claim due to the operation of s 223, as currently interpreted and applied. And unless the attitudes and behaviours of states and territories change, the system will likely remain highly adversarial in nature.

In this section, I consider:

- what could trigger the presumptions in favour of native title claimants
- the benefits of a presumption of continuity
- proposals for reforms to terminology associated with the application of s 223 of the Native Title Act, including 'traditional', 'connection' and 'substantial interruption'
- the need for fundamental changes in the attitudes and behaviours of states and territories to make these reforms work.

(b) Triggering presumptions in favour of native title claimants

One option for further consideration is to amend the Native Title Act to shift the burden of proof once native title claimants meet the registration test. Section 190A of the Native Title Act requires the Native Title Registrar to assess the merits of a native title claim, requiring the native title applicants to submit evidence to:

- identify the area subject to native title
- identify the native title claim groups
- identify the native title rights and interests under claim
- provide a factual basis to the claim
- establish a prima facie case that at least some of the native title rights and interests claimed in the application can be established.¹⁹

17 Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Sydney, 16 April 2009, p 21 (T McAvoy). At <http://www.aph.gov.au/hansard/senate/commtee/S11978.pdf> (viewed 12 October 2009).

18 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 15.

19 *Native Title Act 1993* (Cth), s 190B.

Using the registration test to trigger a shift in the burden of proof could allay fears that such a change would result in opening the ‘floodgates’. The Native Title Act also includes a number of other procedural requirements related to the registration test that could act as a safeguard to address floodgate concerns.²⁰

If this proposal is adopted, it is important that the bar for meeting the registration test is not raised. This would simply shift the current problems of proof to an earlier stage in the claims process. It would also jeopardise access to the important procedural rights that are gained through registration and place the assessment of evidence outside the court system.

Alternatively, the presumption could be engaged (and the burden shift) once the native title claimants prove certain threshold matters.

Chief Justice French of the High Court of Australia has suggested that the Native Title Act could be amended to provide for a presumption in favour of native title applicants, which ‘could be applied to presume continuity of the relevant society and the acknowledgement of its traditional laws and observance of its customs from sovereignty to the present time’.²¹ A presumption could apply:

to an application for a native title determination brought under section 61 of the Act where the following circumstances exist:

- (a) the native title claim group defined in the application applies for a determination of native title rights and interests where the rights and interests are found to be possessed under laws acknowledged and customs observed by the native title claim group
- (b) members of the native title claim group reasonably believe the laws and customs so acknowledged to be traditional
- (c) the members of the native title claim group, by their laws and customs have a connection with the land or waters the subject of the application
- (d) the members of the native title claim group reasonably believe that persons from whom one or more of them was descended, acknowledged and observed traditional laws and customs at sovereignty by which those persons had a connection with the land or waters the subject of the application.²²

The Chief Justice further suggests that, once the above circumstances exist, the following could be presumed in the absence of proof to the contrary:

- (a) that the laws acknowledged and customs observed by the native title claim group are traditional laws and customs acknowledged and observed at sovereignty
- (b) that the native title claim group has a connection with the land or waters by those traditional laws and customs
- (c) if the native title rights and interests asserted are capable of recognition by the common law then the facts necessary for the recognition of those rights and interests by the common law are established.²³

20 *Native Title Act 1993* (Cth), ss 66, 190C.

21 Justice R French, *Lifting the burden of native title – some modest proposals for improvement* (Speech delivered to the Federal Court, Native Title User Group, Adelaide, 9 July 2008), para 29. At http://www.fedCourt.gov.au/aboutct/judges_papers/speeches_frenchj35.rtf (viewed 9 October 2009).

22 Justice R French, *Lifting the burden of native title – some modest proposals for improvement* (Speech delivered to the Federal Court, Native Title User Group, Adelaide, 9 July 2008), para 31. At http://www.fedCourt.gov.au/aboutct/judges_papers/speeches_frenchj35.rtf (viewed 9 October 2009).

23 Justice R French, *Lifting the burden of native title – some modest proposals for improvement* (Speech delivered to the Federal Court, Native Title User Group, Adelaide, 9 July 2008), para 31. At http://www.fedCourt.gov.au/aboutct/judges_papers/speeches_frenchj35.rtf (viewed 9 October 2009).

Justice North and Tim Goodwin have also suggested legislative amendment to establish a reverse onus of proof in native title applications. As to the circumstances that would engage such a reverse onus, they comment:

Applicants would need to show that there were Indigenous people at sovereignty occupying the land in question according to traditional laws and customs. The onus would then shift to the respondents to demonstrate that the other requirements of the *Yorta Yorta* test do not exist.²⁴

The circumstances that would trigger a presumption are worthy of further consideration. Yet, a common theme from these proposals is that once the presumptions are triggered, it should fall to the respondents to adduce evidence to rebut the presumptions and prove the contrary.

(c) A presumption of continuity

At the very least, the Native Title Act should provide for a presumption of continuity.

To prove native title, claimants are required to demonstrate continuity:

- of a society from sovereignty to the present
- in the observance of law and custom
- in the content of that law and custom.²⁵

However, as Justice North and Tim Goodwin have observed,

those who have been most dispossessed by white settlement have the least chance of establishing native title. They find it hardest, and usually impossible, to establish that they belong to a society which has led a continuous vital existence since white settlement because the policy of the settlers had the effect of destroying or dissipating members of the society. Consequently Indigenous people who were connected to areas the subject of greater white settlement are further dispossessed of their lands by the operation of native title law.²⁶

The application of the tests for continuity, derived from *Yorta Yorta v Victoria (Yorta Yorta)*²⁷ has had a devastating effect on native title claims. For example, the Larrakia people were unable to prove their native title claim over Darwin because the Federal Court found their connection to their land and their acknowledgement and observance of their traditional laws and customs had been interrupted – even though they were, at the time of the claim, a ‘strong, vibrant and dynamic society’.²⁸

Chief Justice French is of the view that a presumption:

could be applied to presume continuity of the relevant society and the acknowledgement of its traditional laws and observance of its customs from sovereignty to the present time. ... And if by those laws and customs the people have a connection with the land or waters today, in the sense explained earlier, then a continuity of that connection, since sovereignty, might also be presumed.²⁹

24 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 14.

25 For discussion on the requirement for continuity, see H McRae et al, *Indigenous Legal Issues* (4th ed, 2009), p 348.

26 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 2.

27 *Yorta Yorta v Victoria* (2002) 214 CLR 422.

28 *Risk v Northern Territory* [2006] FCA 404, para 839. The decision was upheld on appeal to the Full Federal Court: *Risk v Northern Territory* (2007) 240 ALR 75.

29 Chief Justice R S French, ‘Lifting the burden of native title: Some modest proposals for improvement’ (2009) 93 *Reform* 10, p 13.

The Native Title Act should specify that, where a claimant meets the threshold for triggering a presumption, continuity in the acknowledgement and observance of traditional law and custom and of the relevant society shall be presumed, subject to proof of substantial interruption. This would clarify that the onus rests upon the respondent, usually the government party, to prove a substantial interruption rather than upon the claimants to prove continuity.

This would mean that, if the respondent chose not to challenge the presumption, the parties could, in practice, disregard a substantial interruption in continuity of observance of traditional laws and customs.³⁰

However, these reforms alone would not lead to a just and fair native title system. They need to be accompanied by amendments to s 223 of the Native Title Act and, most importantly, shifts in the attitudes and behaviours of states and territories.

(d) Reforms to section 223 of the Native Title Act

Section 223 of the Native Title Act defines ‘native title’ and the rights and interests which constitute it. These include hunting, gathering, fishing and other statutory rights and interests.³¹

Section 223 has been interpreted and applied in successive court decision in ways that deny the promise of recognition inherent in the preamble to the Native Title Act. Consequently, reforms to s 223 are required to ensure that the proposed presumptions operate fairly and justly.

This includes clarifying the definitions of ‘traditional’ and ‘connection’ as used in s 223(1) and the related concept of ‘substantial interruption’.

(i) Clarify the definition of ‘traditional’

Native title rights and interests must be ‘possessed under the traditional laws acknowledged, and the traditional customs observed’ by the claimants.³²

Courts have interpreted ‘traditional’ to mean that laws and customs must remain largely unchanged.³³ If this interpretation of ‘traditional’ is retained, it may be too easy for a respondent to rebut the presumption of continuity by establishing that a law or custom is not practiced as it was at the date of sovereignty.

I recommend that ‘traditional’ should encompass laws, customs and practices that remain identifiable through time. This would go some way to allowing for recognition of Indigenous peoples’ rights to culture and would also clarify the level of adaptation allowable under the law.³⁴

(ii) Clarify the definition of ‘connection’

Section 223 requires that claimants ‘have a connection with the land or waters’ that is the subject of the claim, and have such a connection by virtue of their traditional law and customs.

30 Chief Justice R S French, ‘Lifting the burden of native title: Some modest proposals for improvement’ (2009) 93 *Reform* 10, p 13.

31 *Native Title Act 1993* (Cth), ss 223(1)–223(3).

32 *Native Title Act 1993* (Cth), s 223(1).

33 Justice A North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), pp 8–9.

34 For a discussion of the rights of Indigenous peoples to culture, including comments on the adaptation and revitalisation of culture, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission (2009), pp 87–88. At http://www.humanrights.gov.au/social_Justice/nt_report/ntreport08/index.html (viewed 21 October 2009).

The Native Title Act should explicitly state that claimants are not required to have a physical connection with the land or waters.

Requiring evidence of physical connection sets an unnecessarily high standard that may prevent claimants who can demonstrate a continuing spiritual connection to the land from having their native title rights protected and recognised.

Since the Full Federal Court decision in *De Rose*,³⁵ the courts have rejected the need for the claimants to demonstrate an ongoing physical connection with the land. However, setting this out clearly in s 223 would assist to clarify this issue for courts and parties.

(iii) *Clarify what constitutes 'substantial interruption'*

In the *Native Title Report 2008*, I proposed amendments to the Native Title Act to address the court's inability to consider the reasons for an interruption to the observance of traditional laws and customs.³⁶

Currently, the definition of native title in the Native Title Act does not require continuity, and for this reason, the Act similarly does not contemplate what constitutes a break in continuity. However, the courts have interpreted the Native Title Act as requiring literal continuous connection, ignoring 'the reality of European interference in the lives of Indigenous peoples'.³⁷

In *Yorta Yorta*, the High Court stated that 'the acknowledgement and observance of those laws and customs must have continued substantially uninterrupted since sovereignty'.³⁸

Yet, as Justice North and Tim Goodwin have stated, '[a]lthough the *Yorta Yorta* test includes certain ameliorating considerations, such as that the continuity required need not be absolute as long as it is substantial, the ameliorating factors have not had any significant practical effect'.³⁹

What constitutes a 'substantial interruption' is open to interpretation. As discussed above, the claim of the Larrakia people illustrates the vulnerability and fragility of native title, as currently interpreted. A break in continuity of traditional laws and customs for just a few decades was sufficient for the Court to find that native title did not exist. However, Justice Mansfield found that the Larrakia people 'clearly' existed as a society in the Darwin area with a structure of rules and practices directing their affairs.⁴⁰

Although referring to the text of s 223 as the basis for its decision, the majority in *Yorta Yorta* made a policy choice, although not expressly, in favour of a restricted entitlement to a determination of native title. No reference was made by the Court to the purpose of the Native Title Act to redress past injustices.

35 *De Rose v South Australia No 2* (2005) 145 FCR 290, 319.

36 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission (2009), p 90. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/index.html (viewed 21 October 2009).

37 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title, A proposal for reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 7.

38 *Yorta Yorta v Victoria* (2002) 214 CLR 422, 456.

39 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 14.

40 *Risk v Northern Territory* [2006] FCA 404, para 938.

A consequence of this construction of s 223 is that there is little room to raise past injustice as a counter to the loss of, or change in, the nature of acknowledgment of laws or the observance of customs.

Further, in cases where the claimant group has revitalised their culture, laws and customs, a comparatively minimal interruption should not be sufficient to defeat a claim to native title.

A shift in the burden of proof alone would not be sufficient to address the issues around continuity of connection that arise from the *Yorta Yorta* test.

In order to address this injustice, I recommend legislative amendments to address the Court's inability to consider the reasons for interruptions in continuity. Such an amendment could empower Courts to disregard any interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.

For example, amendments could provide:

- for a presumption of continuity, rebuttable if the respondent proves that there was 'substantial interruption' to the observance of traditional law and custom by the claimants.⁴¹
- that where the respondent establishes that the society which existed at sovereignty has not since then continuously and vitally acknowledged laws and observed customs relating to land (as required by the *Yorta Yorta* test), any lack of continuity or vitality resulting from the actions of settlers is to be disregarded.⁴² This could be achieved through providing a definition or a non-exhaustive list of historical events to guide courts as to what should be disregarded, such as the forced removal of children and the relocation of communities onto missions.⁴³

These amendments would complement a shift in the burden of proof.

(e) Shifting the attitudes of states and territories

Providing for presumptions and shifting the burden of proof can lead to better outcomes for native title claimants. However, as Justice North and Tim Goodwin observe, such provisions will

not solve the whole problem. ... Much will depend on the position taken by State respondents. Under the reverse onus amendment provision it would be still open to the respondents to prove lack of necessary continuity or that the applicants do not belong to the relevant society. It remains to be seen whether State respondents or other respondents would attempt such proof. ... Unless State respondents react to the spirit of the change as well as to the letter, the benefits of the reduction of cost and delay otherwise available might not eventuate.⁴⁴

41 As previously recommended in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission (2009), p 90. At http://www.humanrights.gov.au/social_Justice/nt_report/ntreport08/index.html (viewed 21 October 2009).

42 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 16.

43 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 16.

44 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 16.

I reiterate my belief, expressed in Chapter 2 of this Report, that there needs to be a fundamental shift in the attitudes of the states and territories to make these reforms work. I also believe that the Australian Government needs to play a leadership role in encouraging states and territories to change their behaviour, including through using its financial position and the processes of the Council of Australian Governments.

3.4 More flexible approaches to connection evidence

(a) Overview of connection evidence requirements

Sections 87 and 87A of the Native Title Act provide that the Federal Court may make a consent determination of native title when it is within its power and appropriate to do so.

As described by Justice Greenwood in the *Kuuku Ya'u* decision:

Section 87 ... provides that if ... the parties reach agreement on the terms of a proposed consent order in resolution of the proceeding (the agreement being filed in the Court) and the Court is satisfied that such orders are within power, the Court may make orders in or consistent with those terms, if it appears to the Court to be appropriate to do so. As to the question of power, s 13(1) of the Act provides that an application for a determination of native title may be made to the Court under Part 3 in relation to an area for which there is no approved determination of native title. The Act encourages parties to resolve such applications by negotiation, mediation and ultimately agreement rather than contested adversarial proceedings.⁴⁵

In most instances, state and territory governments set requirements that native title claimants must meet before the state or territory will engage in mediation or negotiations. In general, state and territory governments want to be 'satisfied that the claim meets the evidentiary requirements of the NTA and case law, in particular s 223 and the requirement for proof of connection'.⁴⁶

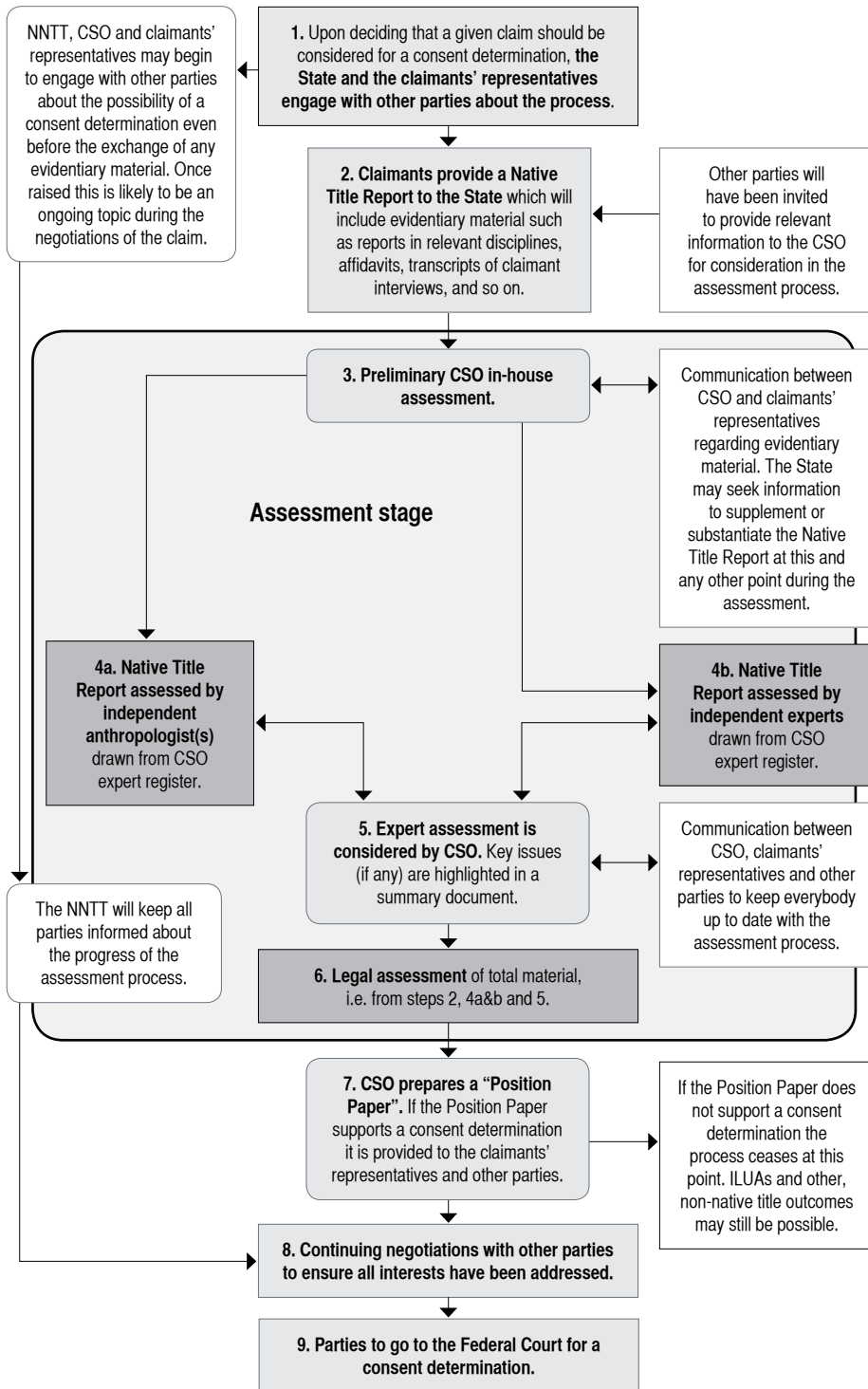
States and territories determine their own connection evidence requirements. These requirements are generally set out in guidelines and other policy documents.⁴⁷ The connection requirements differ between state and territories. Figure 3.1 sets out an example of a state process for assessing connection material. Note that in stage two of this process, claimants are required to provide a 'Native Title Report' to the state, including evidentiary material such as reports, affidavits and transcripts.

45 *Kuuku Ya'u People v State of Queensland* [2009] FCA 679, para 10.

46 R Farrell, J Catlin & T Bauman, *Getting Outcomes Sooner, Report on a native title connection workshop: Barossa Valley, July 2007*, Report prepared on behalf of the National Native Title Tribunal and the Australian Institute of Aboriginal and Torres Strait Islander Studies (2007). At http://ntru.aiatsis.gov.au/major_projects/connectionpdfs/getting_outcomes_sooner.pdf (viewed 31 August 2009).

47 For an overview of state and territory approaches to the preparation and assessment of connection materials, see R Farrell, J Catlin & T Bauman, *Getting Outcomes Sooner, Report on a native title connection workshop: Barossa Valley, July 2007*, Report prepared on behalf of the National Native Title Tribunal and the Australian Institute of Aboriginal and Torres Strait Islander Studies (2007), app 3. At http://ntru.aiatsis.gov.au/major_projects/connectionpdfs/getting_outcomes_sooner.pdf (viewed 31 August 2009).

Figure 3.1: South Australia’s assessment process



Source: Government of South Australia, *Consent Determinations in South Australia: A Guide to Preparing Native Title Reports* (2005), p 31. At http://www.iluasa.com/dl/Consent_Determinations_in_South_Australia.pdf (viewed 8 August 2009).

(b) What are some of the problems with connection evidence requirements?

The connection evidence requirements imposed by states and territories can be onerous. For example, in *Hunter v State of Western Australia (Hunter)*,⁴⁸ North J considered that the burden upon the claimants to satisfy Western Australia's Guidelines for the Provision of Information and Support of Applications for a Determination of Native Title did 'not seem to fulfil the purpose of ss 87 and 87A, namely, to assist in resolving applications quickly and with minimal cost'.⁴⁹

He further commented:

The power conferred by the Act on the Court to approve agreements is given in order to avoid lengthy hearings before the Court. The Act does not intend to substitute a trial, in effect, conducted by State parties for a trial before the Court. Thus, something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of a credible basis for an application. ...

It is to be hoped that the State will give careful consideration in future matters under s 87 and s 87A to easing the present unnecessary burden either placed on or assumed by native title applicants.⁵⁰

Similarly, the authors of a report on a Native Title Connection Workshop facilitated by the National Native Title Tribunal (NNTT) and the Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) in 2007 commented that 'in most jurisdictions the current processes have simply relocated the evidentiary process from the Court to, largely, State or Territory governments'.⁵¹ This shift is problematic, especially considering that the state and territory governments are also the primary respondents. The unfettered ability of states and territories to impose and unilaterally alter these requirements creates an inequality of bargaining power.

Meeting the requirements for connection materials imposed by the states and territories places under-resourced Native Title Representative Bodies (NTRBs) under a heavy burden. As observed in the *Native Title Report 2004*, 'connection reports require a substantial investment in terms of human and financial resources'.⁵²

Compiling connection materials is time consuming and can lead to significant delays. The NNTT identifies 'the timely preparation and assessment of native title connection materials' as critical for ensuring the steady progress of native title applications to resolution through mediation. Yet, this task is 'the primary source of delay in resolving many claimant applications'.⁵³

Some have suggested that uncertainty surrounding the criteria used by the Court in applying ss 87 and 87A further complicates this process and contributes to the early demands for significant connection materials.

48 *Hunter v State of Western Australia* [2009] FCA 654.

49 *Hunter v State of Western Australia* [2009] FCA 654, para 22.

50 *Hunter v State of Western Australia* [2009] FCA 654, paras 22–25.

51 R Farrell, J Catlin & T Bauman, *Getting Outcomes Sooner, Report on a native title connection workshop: Barossa Valley, July 2007*, Report prepared on behalf of the National Native Title Tribunal and the Australian Institute of Aboriginal and Torres Strait Islander Studies (2007), p 22. At http://ntru.aiatsis.gov.au/major_projects/connectionpdfs/getting_outcomes_sooner.pdf (viewed 31 August 2009).

52 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2004*, Human Rights and Equal Opportunity Commission (2005), p 21. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport04/index.html (viewed 12 October 2009).

53 National Native Title Tribunal, *National Report: native title* (2009), p 3. At <http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Corporate%20publications/National%20Report%20Card%20-%20March%202009.pdf> (viewed 13 August 2009).

The Court may make an order under ss 87 and 87A only when ‘it is appropriate to do so’. The concept of ‘appropriate’ has been considered to be ‘elastic’.⁵⁴

In *Hunter*, North J indicated that ‘[i]n most circumstances the fact of agreement will be sufficient evidence upon which the Court may act’.⁵⁵ However, as Tony McAvoy observes, the approach:

varies depending on which of the Justices of the Court are sitting on the matter ... on one view, it seems that nothing less than evidence meeting all the essential elements of native title will suffice.⁵⁶

The Victorian Government has commented that:

so long as what is expected by the Act regarding a consent determination is unclear, parties will feel compelled to provide, and to demand, more rather than less, for fear of falling short of the Federal Court’s expectations.⁵⁷

(c) Possible solutions

(i) Legislative responses

One response to the issue identified by the Victorian Government, and others, could be to remove the requirement that the Court must be satisfied that it is ‘appropriate’ to make the order sought by the parties (that is, to approve their agreement). Alternatively, ss 87 and 87A could be amended to give greater guidance as to what Courts should consider when determining whether it would be appropriate to grant the order.

For example, the Victorian Government has suggested that an amendment to s 87 ‘should be aimed at alerting the Federal Court to questions of the strength and fairness of process in reaching agreement worthy of a consent determination, and not just the evidentiary facts themselves’.⁵⁸ This could involve the Court being satisfied that ‘the agreement is genuine and freely made on an informed basis by all parties, represented by experienced independent lawyers’.⁵⁹

It has also been suggested that the examination of appropriateness should be confined to the consideration of whether the parties have had appropriate legal advice.⁶⁰

This focus on the ‘strength and fairness of process’ could have a further advantage of providing incentives to governments to ensure that native title claimants are adequately resourced and represented.

54 Chief Justice RS French, ‘Lifting the burden of native title: Some modest proposals for improvement’ (2009) 93 *Reform* 10, p 12.

55 *Hunter v State of Western Australia* [2009] FCA 654, paras 16–17.

56 T McAvoy, ‘Native Title Litigation Reform’ (2008) 8(12) *Native Title News* 193, p 195.

57 Victorian Government, *Comments on the Australian Government’s Discussion Paper: Proposed minor native title amendments* (2008), p 3. At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Submission+-+Victorian+Department+of+Justice.pdf/\\$file/Submission+-+Victorian+Department+of+Justice.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Submission+-+Victorian+Department+of+Justice.pdf/$file/Submission+-+Victorian+Department+of+Justice.pdf) (viewed 17 August 2009).

58 Victorian Government, *Comments on the Australian Government’s Discussion Paper Proposed minor native title amendments* (2008), p 3. At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Submission+-+Victorian+Department+of+Justice.pdf/\\$file/Submission+-+Victorian+Department+of+Justice.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Submission+-+Victorian+Department+of+Justice.pdf/$file/Submission+-+Victorian+Department+of+Justice.pdf) (viewed 17 August 2009), p 3.

59 *Kuuku Ya’u People v State of Queensland* [2009] FCA 679, para 13.

60 T McAvoy, ‘Native title litigation reform’ (2009) 39 *Reform* 30, p 31.

Introducing presumptions in favour of native title claimants may also help alter the expectations of states and territories as to the connection materials that native title claimants must marshal. Justice North and Tim Goodwin suggest that:

If the law required the applicants to establish only that Indigenous people occupied the land in question at sovereignty, State respondents would doubtless alter their practices, rewrite the guidelines, and in many cases make agreements for determinations of native title without delay and consequently with much reduced cost.⁶¹

(ii) Policy responses

Ultimately, the solutions to the onerous connection evidence requirements imposed by the states and territories will not lie in legislative reform alone. A fundamental change in attitudes on behalf of states and territories is essential to reducing the adversarial nature of the native title system, which is reflected by the burdens placed upon native title claimants to produce connection materials.

Rita Farrell, John Catlin and Toni Bauman observe that '[t]he States and Territories have an obligation and responsibility to act in the public interest and to be satisfied that they will be entering into agreements on behalf of their constituents with the people who hold native title over a particular area'.⁶²

However, states and territories need to understand that it is also in the public interest to arrive at agreements without unnecessary delay and expense. And, as I discussed in Chapter 2 of this Report, governments also have a responsibility to protect our rights and interests.

The legislative responses outlined above may go some way to encourage changes in attitude and behaviour. However, the Australian Government clearly has an important role to play in leading the process of change through non-legislative means. The Australian Government has a great deal of financial leverage with which to influence state behaviour and encourage the making of consent determinations.

For example, the Australian Government could play a leading role in setting national standards for connection requirements. These standards should be aimed at improving the likelihood of agreements being reached and claims being resolved with minimal delay and expense. The report of the NNTT / AIATSIS 'Getting Outcomes Sooner Workshop'⁶³ outlines some best practice principles that could inform the development of national standards (see Text Box 3.1).

61 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 15.

62 R Farrell, J Catlin & T Bauman, *Getting Outcomes Sooner, Report on a native title connection workshop: Barossa Valley, July 2007*, Report prepared on behalf of the National Native Title Tribunal and the Australian Institute of Aboriginal and Torres Strait Islander Studies (2007), p 27. At http://ntru.aiatsis.gov.au/major_projects/connectionpdfs/getting_outcomes_sooner.pdf (viewed 31 August 2009).

63 R Farrell, J Catlin & T Bauman, *Getting Outcomes Sooner, Report on a native title connection workshop: Barossa Valley, July 2007*, Report prepared on behalf of the National Native Title Tribunal and the Australian Institute of Aboriginal and Torres Strait Islander Studies (2007), pp 20–21. At http://ntru.aiatsis.gov.au/major_projects/connectionpdfs/getting_outcomes_sooner.pdf (viewed 31 August 2009).

Text Box 3.1: Report of the 'Getting Outcomes Sooner Workshop' – July 2007⁶⁴**Best practice principles**

Basing connection processes on the following principles would significantly enhance connection outcomes:

- Connection assessment processes are non-adversarial and observe the principles of good faith, co-operation and goodwill. In other words, the preparation and assessment of connection materials should form part of the mediation framework, and not be a precursor to it.
- All parties are mindful of resource limitations and plan together to ensure practical outcomes and realistic timeframes for preparing research and assessing connection.
- The early scoping of connection requirements with independent process management can:
 - clarify the needs and expectations of all parties
 - assist the parties to narrow the research brief by identifying specific issues that need to be addressed and eliminate issues that are not contentious
 - identify areas of concern
 - clarify threshold issues which match the nature of agreements
 - establish appropriate methods for incorporating direct evidence from Indigenous witnesses and the preferred formats for presenting research
 - facilitate regular meetings between the authors of the connection reports and government representatives
 - establish ways of keeping all parties informed
 - establish processes for tenure research
 - investigate the possibilities of parallel processes.
- Collaboration and co-operation involves the sharing of information, resources and support to produce reports in a timely manner and takes place during the production and assessment of research, with frequent consultation.
- Independent analysis of what is succeeding and what is unsuccessful will assist native title researchers, lawyers and claimants.

Suggested policy and strategic changes

A number of suggestions were made at the workshop that would require a significant shift in the policies of governments at state, territory and Commonwealth levels including:

- state and territory governments removing their requirement for comprehensive proof of connection before entering into negotiations
- developing a national framework and standards
- forming a national panel of peer review experts.

64 R Farrell, J Catlin & T Bauman, *Getting Outcomes Sooner, Report on a native title connection workshop: Barossa Valley, July 2007*, Report prepared on behalf of the National Native Title Tribunal and the Australian Institute of Aboriginal and Torres Strait Islander Studies (2007), pp 20–21. At http://ntru.aiatsis.gov.au/major_projects/connectionpdfs/getting_outcomes_sooner.pdf (viewed 31 August 2009).

3.5 Improving access to land tenure information

The progress of native title claims depends greatly on the time it takes states and territories to release land tenure information and assess it. Claimants invest significant human and financial resources to prepare claims. However, the discovery of historic and extinguishing tenures after a claim has been initiated can significantly undermine this investment in resources.

I consider that native title claimants should be able to access relevant tenure history information at the earliest possible opportunity. The Australian Government could facilitate this through statutory amendment and / or by use of financial and other leverage over the policies and practices of the states and territories. For example, state and territory governments should be required to provide comprehensive tenure information to the native title claimants and their representatives before requiring the native title claimants to submit connection reports.

The appropriate party to provide tenure information is the government party. The states and territories are responsible for land administration in their respective jurisdictions. As they also hold the relevant information, and have the resources to commit, the state and territory governments are in the best position to undertake thorough tenure searches and provide tenure information to claimants at the earliest possible opportunity.

The costs and delays described above can also be attributed to the lack of readily accessible, comprehensive land tenure information. Improving access to land tenure information could significantly reduce the time and costs associated with claims processes.

In 2004, a National Summit on Improving the Administration of Land and Property Rights and Restrictions (the Summit) was held to consider ways to improve the supply of information concerning land and property rights, obligations and restrictions (RORs) in Australia.

One of the issues considered at the Summit was the increasing difficulty experienced in every jurisdiction in obtaining comprehensive information on RORs affecting the use and / or ownership of land and property.

For example, Barry Cribb of the Department of Land Information in Western Australia informed the Summit that there are over 180 different types of property interests residing in some 23 custodian agencies in Western Australia alone. An interest may be a ROR that affects the use and / or enjoyment of land. Types of interests include easements and environmental, cultural, planning, building and health interests. Mr Cribb raised a number of concerns including that:

- the majority of property interests are not held in the Torrens Register
- there is no definitive source of interests in land
- there is no mechanism for the recognition or discovery of new interests.⁶⁵

⁶⁵ B Cribb, *Register of Interests in Land* (Presentation delivered at the National Summit on Improving the Administration of Land and Property Rights and Restrictions, Brisbane, 16 November 2004).

I consider that there is a further deficiency with the current level of access to tenure information. Aboriginal and Torres Strait Islander peoples have varying degrees of access and control of at least 20% of the Australian continent.⁶⁶ However, there is currently no baseline information that defines on a national basis the lands, waters, and tenures that make up the Indigenous estate.

At the Summit, Margaret C Hole AM considered that 'it is desirable to provide a registration system that discloses all things relating to title including ownership, mortgages, leases, easements, covenants, planning requirements, zoning, geographical restrictions, weather patterns, demographics etc'.⁶⁷

Since 2004, considerable work has been undertaken to address the concerns raised at the Summit. This includes a project initiated by the National Land and Water Resource Audit with the intention of creating a land tenure data set with Australia-wide coverage.⁶⁸

Further, the NNTT, in collaboration with other Australian Government agencies, is pursuing the development of a National Information Management framework for land tenure through ANZLIC – the Spatial Information Council, which is the intergovernmental body for spatial information.⁶⁹

I support the establishment of a comprehensive national information management database that co-ordinates national and jurisdictional land tenure information. To improve accessibility, this database could be made available online.

States and territories should be encouraged to provide a full inventory that maps the various tenures across their jurisdictions to contribute to such a database. This database should include native title rights and interests and other forms of Indigenous tenure, and lands where tenure resolution is required.⁷⁰

An online national land tenure database would significantly increase the ability of claimants to access information and reduce pressure on their resources.

66 J Altman, G Buchanan & L Larsen, *The environmental significance of the Indigenous estate: Natural resource management as economic development in remote Australia*, CAEPR Discussion Paper No 286/2007 (2007), p 14. At http://www.anu.edu.au/caepr/system/files/Publications/DP/2007_DP286.pdf (viewed 21 October 2009).

67 M C Hole AM, *Where to from here – some options* (Paper delivered at the National Summit on Improving the Administration of Land and Property Rights and Restrictions, Brisbane, 16 November 2004).

68 PSMA Australia Limited, *Final Project Report: Land Tenure: Version 1.0* (2008). At <http://nlwra.gov.au/files/products/national-land-and-water-resources-audit/pn21458/pn21458.pdf> (viewed 30 October 2009).

69 G Neate, National Native Title Tribunal, Email to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, 2 September 2009.

70 For a discussion on how access to such information could help Aboriginal and Torres Strait Islander peoples to identify opportunities to engage in economic development, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission (2009), p 120. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/index.html (viewed 21 October 2009).

3.6 Streamlining the participation of non-government respondents

There are frequently a large number of parties to native title proceedings. This can lead to unnecessary delays, costs and the frustration of settlement efforts.

The Australian Government has acknowledged that the numbers of respondent parties in native title claims is unacceptable. In Australia's comments to the United Nations Human Rights Committee, the Government said:

The involvement of a large number of non-government respondent parties in native title claims contributes to the complexity, time and cost of claims. While the interests of non-government respondents need to be considered to ensure sustainable outcomes, respondents should be concerned to clarify the interaction between Indigenous and non-Indigenous property rights, not to expend public resources on determining whether native title exists.⁷¹

The participation of respondents in native title proceedings must be managed effectively. Addressing the problems associated with excessive party numbers and improving the processes involved to become a party is critical to improving the efficiency of the native title system.

I believe that the current balance between the representation of native title and non-native title interests is poorly struck. Consideration needs to be given to a number of matters concerning the participation of respondents in native title claims, including:

- the role of state and territory governments in representing respondent interests
- party status
- processes for removing parties
- representative parties
- funding for respondent parties.

(a) The role of state and territory governments

The role of governments in a native title claim is primarily to represent the interests of the community and to test the validity of the claim.

Consequently, South Australian Native Title Services comments that:

Amendments should provide that the Federal Court should rely on the first respondent, being the State Government, to represent all respondent interests whose interests are gained from a grant of rights from the State...The State under legislation manages for example the Fishery or the Mineral resources for the public generally and as such, the State as the grantor of such interests is best placed to represent all persons holding such interests in the native title context.⁷²

71 UN Human Rights Committee, *International covenant on civil and political rights – Replies to the list of issues to be taken up in connection with the consideration of the Fifth Periodic Report of the Government of Australia (CCPR/C/Aus/5)*, UN Doc CCPR/C/AUS/Q/5/Add.1 (5 February 2009), para 42. At <http://www2.ohchr.org/english/bodies/hrc/hracs95.htm> (viewed 1 November 2009).

72 South Australian Native Title Services, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 14 August 2009.

Consistent with this, Daniel O’Dea of the NNTT stated:

Bearing in mind that the State goes to great lengths to ensure that all extant interests are listed in schedules to all determinations and that those interests will prevail over the native title interests to the extent of any inconsistency, it is arguable there is no real need for current holders [of those interests] to actively participate.⁷³

Given the role that state and territory governments play, I agree that the involvement of so many respondents in native title claim proceedings should be reappraised. Options for reform are discussed below.

(b) Party status

To streamline the participation of non-government parties, the Native Title Act should include stricter criteria that respondents must meet in order to become and remain parties to native title proceedings.

Text Box 3.2: Section 84 of the *Native Title Act 1993* (Cth)

Section 84 of the Native Title Act identifies who can become a party to a native title claim. In essence, the Act divides potential parties into two groups: those who have a specified interest in the proceeding, and those who fall within broad catch-all provisions.

Section 84 of the Native Title Act provides an extremely broad test for party status. The result is that there can be hundreds of parties to native title proceedings. In addition, the breadth of this test means that, exceptional cases aside, there is virtually no prospect of the claimant successfully challenging the addition of a particular respondent.

Amendments made to s 84 in 2007 included some positive elements.⁷⁴ For example, the amendments narrow one ground for eligibility as a party from ‘interests’ to ‘interest ... in relation to land or waters’.⁷⁵ The Court must now additionally consider whether it is ‘in the interests of justice’ to add a party that seeks to be joined after proceedings are already underway.⁷⁶ However, these amendments only apply to applications lodged on or after the date the amendments came into effect. The result is that the amendments do not apply to the 500 or so native title claims that had already commenced.

73 D O’Dea, *Negotiating consent determinations: Co-operative mediation – the Thalanyji experience* (Paper delivered to the Third Negotiating Native Title Forum Melbourne, 19 February 2009), p 28. At <http://www.nntt.gov.au/News-and-Communications/Speeches-and-papers/Documents/2009/Thalanyji%20Experience%20-%20Negotiating%20Consent%20Determinations.pdf> (viewed 7 July 2009).

74 The 2007 amendments slightly amended the test for party status by requiring that the interest is in ‘relation to land or waters’ and other minor changes. See further T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), p 35. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 12 October 2009).

75 *Native Title Act 1993* (Cth), s 84(3)(iii).

76 *Native Title Act 1993* (Cth), s 84(5).

The following options should be considered.

The threshold for joinder as a party could be amended to reflect more traditional tests for standing in civil proceedings, such as the 'special interest' test under general law⁷⁷ or the 'person aggrieved' test under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).⁷⁸

Another alternative would be to require the party seeking to be joined to satisfy criterion set out in Order 6 Rule 8 (Addition of Parties) of the Federal Court Rules, which includes that joinder of the person 'is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined and adjudicated upon'.

A further option is to revisit the criteria in ss 84(3) and 84(5). The following persons are among those who are entitled to be parties to a native title claim:⁷⁹

- a person whose interest, in relation to land or waters, may be affected by a determination in the proceedings⁸⁰
- any person who, when notice of a native title claim is given, holds a proprietary interest that is registered on a public register in relation to any of the area covered by the application.⁸¹

Such persons could be required to show that their interests are likely to be *substantially* affected by a determination in the proceedings. The Native Title Act could provide that a person claiming that their interests are substantially affected must make an application to the Court before they can be joined as a party.⁸² The application should set out how the person's interests are likely to be substantially affected if the Court were to make the determination sought. The claimant and the primary respondent should then have an opportunity to make submissions to the Court.

Alternatively, the Government could explore options to enable a reduced form of participation in native title proceedings for certain respondents, such as those who may seek only to be added as a party to ensure that their rights and interests are preserved under any final determination.

It may not be necessary to afford full procedural and other rights to such parties. A tiered system of participation may allow for certain procedural matters to be dealt with more expeditiously by only requiring the consent of the 'key players' to the proceeding, usually the native title claimant and the government party.

77 *Australian Conservation Foundation v Commonwealth* (1978)146 CLR 493. See further *Onus v Alcoa* (1981) 149 CLR 27; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Benefit Fund Pty Ltd* (1998) 194 CLR 247.

78 See generally, *Toohys Ltd v Minister for Business and Consumer Affairs* (1981) 54 FLR 421; *United States Tobacco Co v Minister for Consumer Affairs* (1988) 83 ALR 79; *Cameron v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 509; *Right To Life Association (NSW) Inc v Secretary, Department of Human Services and Health & Anor* (1995) 56 FCR 50; *Ogle v Strickland* (1987) 13 FCR 306.

79 Persons who meet the criteria listed in s 84(3)(a) must notify the Federal Court in writing that they want to be a party to the proceedings within the specified timeframes: *Native Title Act 1993* (Cth), s 84(3)(b).

80 *Native Title Act 1993* (Cth), s 84(3)(iii). See also *Native Title Act 1993* (Cth), s 84(5): 'The Federal Court may at any time join any person as a party to the proceedings, if the Court is satisfied that the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so'.

81 *Native Title Act 1993* (Cth), ss 84(3)(a)(i), 66(3)(a)(iv).

82 It is acknowledged that persons who become parties under ss 84(3)(a)(ii) or 84(3)(a)(i) (by virtue of ss 66(3)(a)(i)–(iii), 66(3)(a)(v)–(vi)) have interests of a nature that they would be substantially affected by a determination if it is made, and consequently they should not be required to make a formal application to the Court to be joined as a party.

If these amendments are made, the Court would retain the discretion as to whether to join the person as a party. However, raising the threshold for addition as a party, as well as requiring the proposed respondent to carry the burden of proof in establishing why they should be added, would contribute to the more effective management of the number of parties to claims.

In particular, claimants and primary respondents would have a firmer basis on which to challenge the addition of parties whose interests appear peripheral or adequately represented by other parties, together with a formal opportunity to make that challenge before the Court.

(c) Removal of parties throughout proceedings

Many people who become parties when a native title claim is first made may lose their relevant interest as the claim progresses. This might be due to changed circumstances over the intervening years or due to the fact that extinguishment is often not considered until late in the proceeding.

The Native Title Act already provides for the removal of parties from proceedings. Section 84 of the Act details a number of ways a party may be removed from the proceeding, such as through leave of the Court after the proceeding has begun.⁸³ Section 84(9) also states that the Court is to consider making an order that a person cease to be a party if the Court is satisfied that the person no longer has interests that may be affected by a determination in the proceeding.

However, the Court's powers to remove parties are not used regularly or consistently throughout native title proceedings. The most recent amendments to the Native Title Act give the Federal Court 'a central role' over the management of native title proceedings.⁸⁴ Complemented by focused amendments to provisions related to respondent parties, this power could enable proceedings and agreements to progress more efficiently.

The negotiation of the Thalanyji consent determination provides a practical example of where the Court's power to remove parties has been utilised:

the NNTT, in co-operation with the registrars of the Federal Court, sought the making of orders by His Honour, essentially in the character of a springing order, which required all parties, except specified parties who were actively participating, to notify the Court of their intention to remain a party within a specified time. Failure to do this would lead to those parties losing that status. Due to the number of parties, the process involved a great deal of correspondence and telephone communication and was extremely time-consuming. However, in the end, in the Thalanyji matter, a significant number of parties (approximately one third) chose to withdraw voluntarily and, subsequent to the springing orders being made, all the remaining parties consented to the determination in the form proposed to the Court.⁸⁵

83 *Native Title Act 1993* (Cth), s 84(7).

84 Explanatory Memorandum, Native Title Amendment Bill 2009 (Cth), p 1. At <http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/frame/odgmentattachments/AFDD13BE259AA5D7CA25757F000DB152> (viewed 12 October 2009).

85 D O'Dea, *Negotiating consent determinations: Co-operative mediation – the Thalanyji experience* (Paper delivered to the Third Negotiating Native Title Forum, Melbourne, 19 February 2009), pp 28–29. At <http://www.nntt.gov.au/News-and-Communications/Speeches-and-papers/Documents/2009/Thalanyji%20Experience%20-%20Negotiating%20Consent%20Determinations.pdf> (viewed 7 July 2009).

This example demonstrates the benefits of requiring parties to advise the court on a periodic basis how their interests continue to be affected by the proceedings in order to remain a party. I consider that the Native Title Act should be amended to require this. Such a process may assist with managing the current numbers of parties to native title proceedings.

Specifically, ensuring a regular 'clean up' of the party list could be achieved through amendments to s 84(9) of the Native Title Act. The Court should be required to regularly review the party list for all active native title proceedings and, where appropriate, require a party to show cause for its continued involvement.

The NNTT may also have a role to assist the Court, drawing on its expertise and access to information necessary to undertake such a review. The NNTT could also provide advice to the Court about parties that no longer hold the necessary interest to maintain party status.⁸⁶

If the above proposals to raise the threshold for party status were to be adopted, this could encourage the more effective utilisation of the Court's power to remove parties. Above all, it would enable claimants and respondents to more effectively challenge the ongoing involvement of parties whose interests have faded or disappeared during the life of the claim.

(d) Exploring the potential for using representative parties

The use of representative parties may also assist in the management of the number of respondents to native title claims.

Representative parties can already be used in Federal Court proceedings in a number of circumstances. In particular, Order 6, Rule 13 of the Federal Court Rules deals with representative respondents. It enables the Court, at any stage in proceedings, to appoint any one or more of the respondents to represent others with the same interests.

Further consideration could be given to how this rule or a similar rule could be used to achieve a more rational management of parties in native title proceedings. The Australian Government could also explore legislative amendments to facilitate the appropriate use of representative respondents to streamline native title litigation.

(e) Improving transparency in respondent funding processes

Currently, respondents may be funded by the Commonwealth under the 'respondent funding scheme' to participate in native title proceedings.⁸⁷ The Attorney-General may make guidelines that are to be applied in authorising the provision of assistance.⁸⁸

I consider that greater transparency in the implementation and operation of this funding scheme is required.

86 Section 94J (formerly s 136DA) of the *Native Title Act 1993* (Cth) already allows a member of the NNTT to refer to the Federal Court the question of whether the party should cease to be a party.

87 *Native Title Act 1993* (Cth), s 213A (formerly s 183, until the commencement of the *Native Title Amendment Act 2009* (Cth)). For more information see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 4. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 12 October 2009).

88 *Native Title Act 1993* (Cth), s 213A(5).

In 2006, the Australian National Audit Office observed that the Attorney-General's Department 'is unable to evaluate either the effectiveness of the Respondents Scheme at either the individual grant level or the contribution the programme is making to the larger Native Title System outcome'.⁸⁹

In particular, little information is available regarding which parties are being funded to participate in the proceedings, how the Attorney-General's funding guidelines (the Guidelines)⁹⁰ are being applied and whether the ongoing funding of particular parties is appropriate.

The Native Title Act and the Guidelines need to ensure greater transparency in the funding process.

For example, the Guidelines allow for the withdrawal of funding in certain circumstances, including where the respondent fails to act reasonably.⁹¹ Yet, the reference to a failure to act reasonably is not defined or clarified. It might be appropriate for s 213A or the Guidelines to be amended to stipulate that recipients of funding under the scheme must agree to abide by standards applied to the Commonwealth and its agencies under the Commonwealth model litigant guidelines appended to the Legal Service Directions.⁹² Section 213A or the Guidelines could also stipulate that failure to comply with these standards may result in withdrawal of funding.

Further, the Guidelines or s 213A could be amended to articulate a mechanism by which other parties or the appointed mediator can apply to the Attorney-General to have a party's funding withdrawn where a respondent inappropriately undermines the conduct or resolution of a claim. This could occur, for example, where the appointed mediator is of the view that the party has refused to make a bona fide and reasonable endeavour to resolve the dispute.⁹³

3.7 Promoting broader and more flexible native title settlement packages

(a) Background

The challenge is ... to effectively engage ... and to transform the potential wealth that participation in resource extraction may bring, into a sustainable social and economic future for those communities most impacted by the resources boom.⁹⁴

In this section, I consider the changes to law and process that are required to promote broader and more flexible native title settlement packages to support our social and economic development.

89 Australian National Audit Office, *Administration of the Native Title Respondents Funding Scheme*, Audit Report No 1 (2006), p 133. At http://www.anao.gov.au/uploads/documents/2006-07_Audit_Report_17.pdf (viewed 16 October 2009).

90 Attorney-General, *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* (2006).

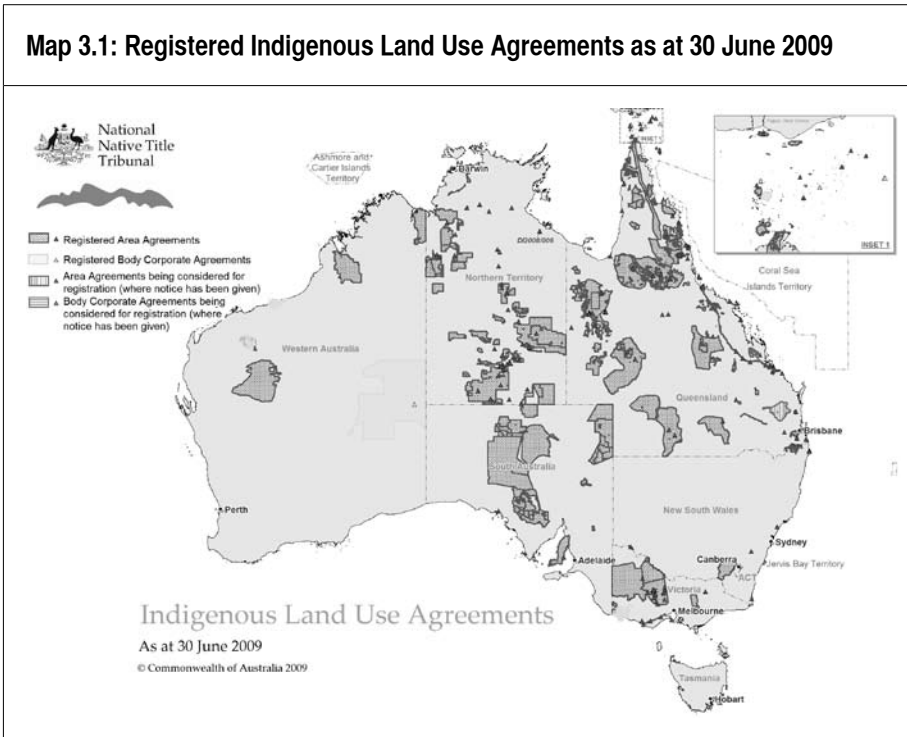
91 *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* (2006), div 7.9.

92 Legal Services Directions 2005, as amended, made under section 55ZF of the *Judiciary Act 1903* (Cth), app B.

93 See generally *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459, para 169.

94 L Godden et al, 'Introduction: Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability' (2008) 26(1) *Journal of Energy and Natural Resources Law* 1, p 22.

The 1998 amendments to the Native Title Act introduced a legal framework and process for the negotiation of ILUAs between native title holders and others about the use and management of lands, waters and resources. This agreement-making framework has gone some way to encourage negotiated outcomes and avoid costly litigation. As at 30 June 2009, 389 ILUAs had been registered with the NNTT.⁹⁵ See Map 3.1 for further information on ILUAs across Australia.



Since 1996, Rio Tinto alone has signed nine major development agreements and negotiated more than 100 exploration agreements across Australia. This has resulted in a commitment of approximately \$1.4 billion in social and economic investment over the next 20 years to Indigenous communities.⁹⁶

However, the Government is concerned that the benefits accruing to Indigenous interests under native title agreements are not adequately addressing the economic and social disadvantage faced by Indigenous communities.⁹⁷ It has been estimated that only 12 of the hundreds of agreements that have been negotiated between

95 National Native Title Tribunal, *Annual Report 2008–2009* (2009), p 52. At <http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Annual%20reports/Annual%20Report%202008-2009.pdf> (viewed 7 December 2009).

96 Rio Tinto, *Submission to the House Standing Committee Inquiry to develop Indigenous Enterprises* (24 July 2008), p 10. At www.aph.gov.au/house/committee/atsia/indigenousexplorations/subs.htm (viewed 20 August 2009).

97 Australian Government, *Australian Government Discussion Paper* (undated). At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)-Discussion+paper+-+final+version.DOC/\\$file/Discussion+paper+-+final+version.DOC](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)-Discussion+paper+-+final+version.DOC/$file/Discussion+paper+-+final+version.DOC) (viewed 12 October 2009).

traditional owners and industry provide substantial benefits to Aboriginal and Torres Strait Islander people and exhibit principles embodying best practice in agreement-making.⁹⁸

Further, agreements often deliver little in terms of cultural heritage protection or environmental management beyond what is already available under general legislation, and often require traditional owners to surrender their native title rights and interests.⁹⁹

As discussed in Chapters 1 and 2 of this Report, the Government is seeking to build partnerships with Indigenous communities through 'equitable agreements'.¹⁰⁰

Recent amendments to the Native Title Act enable the Federal Court to make determinations that cover matters beyond native title.¹⁰¹ The Native Title Amendment Act 2009 (Cth) clarifies that the Court can make orders that reflect agreements made by the parties.

There are a number of matters that could be included in such agreements, including economic development opportunities, training, employment, heritage, sustainability and existing industry principles.¹⁰²

The power for the Court to make orders about matters other than native title may also provide a mechanism for the 'alternative recognition of traditional ownership' (discussed in section 3.2, above), even in cases where native title was not determined to exist.

These reforms can ensure that agreements are formally recognised and more readily enforceable. This approach could also encourage parties to negotiate native title claims more laterally, creatively and flexibly, rather than to simply negotiate on an 'all or nothing' basis in relation to the determination of native title.

98 Native Title Payments Working Group, *Report* (undated), p 2. At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)-Working+Group+report+-+final+version.DOC/\\$file/Working+Group+report+-+final+version.DOC](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)-Working+Group+report+-+final+version.DOC/$file/Working+Group+report+-+final+version.DOC) (viewed 12 October 2009).

99 C O'Faircheallaigh, 'Aborigines, Mining Companies and the State in Contemporary Australia: A New Political Economic or Business as Usual?' (2006) 41(1) *Australian Journal of Political Science* 1, p 17.

100 R McClelland (Attorney-General), *Native Title Consultative Forum* (Speech delivered at the Native Title Consultative Forum, Canberra, 4 December 2008), para 7. At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FourthQuarter_4December2008-NativeTitleConsultative+Forum (viewed 16 November 2009).

101 Section 86F of the Native Title Act recognises that broad agreements can be negotiated. As drafted prior to the *Native Title Amendment Act 2009* (Cth), the Act did not clearly provide that it was within the Court's jurisdiction to make determinations dealing with matters beyond native title, or recognise that the Court may be able to assist the parties to negotiate side agreements covering matters beyond native title: Attorney-General, *Discussion Paper: Proposed minor native title amendments* (2008), p 4. At [http://www.ag.gov.au/www/agd/rwpattach.nsf/PublicbySrc/Native+Title+Amendment+Bill+2009+-+Discussion+paper.pdf/\\$file/Native+Title+Amendment+Bill+2009+-+Discussion+paper.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/PublicbySrc/Native+Title+Amendment+Bill+2009+-+Discussion+paper.pdf/$file/Native+Title+Amendment+Bill+2009+-+Discussion+paper.pdf) (viewed 19 October 2009). The 2009 amendments allow the Court to make separate orders, under ss 87 and 87A, covering matters beyond native title. The parties would have to agree on these further matters. The change allows the Court to assist parties to resolve native title and related matters at the same time and is intended to create more certainty, more finalised native title claims and better outcomes for stakeholders. See the Explanatory Memorandum, *Native Title Amendment Bill 2009* (Cth), p 31.

102 Explanatory Memorandum, *Native Title Amendment Bill 2009* (Cth), p 6. See also T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), chs 4–6, at http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 19 October 2009); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 11, at http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 19 October 2009).

For example, the South Australian Native Title Services commented as follows:

Depending on the terms of the agreement, native title claim groups who are either unable to establish native title by agreement, or are willing to surrender native title to avoid the risk of a determination of no native title, could secure other orders as to the terms of an agreement reached i.e. recognition of traditional rights, transfers of land etc.¹⁰³

The ability for the Court to make orders concerning non-native title outcomes may provide a mechanism whereby agreement-makers are able to coordinate the multiple and complex agreements that they are party to under various legal regimes, including lands rights and heritage legislation. This would allow these agreements to provide comprehensive strategic directions for Indigenous communities.

It is positive that the Government is encouraging parties (including states and territories) involved in native title claims to work together to reach agreements with broad and beneficial outcomes. However, the 'broader settlement' framework needs to be accompanied by amendments to address inadequacies and inequality in the Native Title Act.

There are many ways that agreement-making processes could be improved, including:

- strengthening procedural rights and addressing concerns with the future acts regime
- amending the definition of native title in s 223 to include rights and interests of a commercial nature
- using long-term adjournments to support agreement-making
- developing the capacity of communities to engage in effective decision-making.

(b) Strengthening procedural rights and the future acts regime

The future acts regime is an essential element of the Native Title Act. Its strengths (or weaknesses) directly impact on the way parties behave in negotiating agreements. The operation of the regime is integral to good agreements which benefit the parties – a priority of this Government. I recommend that the Government consider how the future acts regime can be amended to strike a better balance between native title and non-native title interests and create stronger incentives for the beneficial agreements the Government wants to see.

The right to negotiate regime is also a crucial element of the Native Title Act. It should not be construed narrowly.¹⁰⁴

103 South Australian Native Title Services, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 14 August 2009.

104 *Smith on behalf of the Gnaala Karla Booja People v State of Western Australia* [2001] FCA 19.

Text Box 3.3: Procedural rights**The right to negotiate**¹⁰⁵

Part 2, Division 3 of the Native Title Act makes provision for registered native title claimants to access procedural rights where mining tenements and certain compulsory acquisitions of native title rights and interests are being sought. These procedural rights amount to a 'right to negotiate' and apply to any act that would be invalid to the extent that it affects native title, unless done in accordance with the Native Title Act.

Generally, a government has two options to validly do an act that attracts the right to negotiate. It can either negotiate an ILUA with the native title holders and carry out the act in the manner allowed by that ILUA, or it must comply with the 'right to negotiate' procedures set out in Subdivision P of the Native Title Act. Section 29 of the Native Title Act requires that before the doing of a future act under Subdivision P, the relevant government must give notice to native title parties and the public.

The future acts regime¹⁰⁶

The Native Title Act seeks to protect native title rights by prescribing procedures that Commonwealth, state and territory governments must comply with before a future act can be validly done. Generally speaking, if a government department or agency is planning to do an act that has the potential to affect native title, governments involved in such activities need to consider the requirements of the Native Title Act.

A future act is an act done after 1 January 1994 (the date of the commencement of the Native Title Act) that affects native title. An act 'affects' native title if it extinguishes or is otherwise wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title. The word 'act' is defined widely to include the making or amendment of legislation, the grant or renewal of licences and permits, and can include executive actions in some circumstances. An act of government may 'affect' native title if, for example, it allows someone to do an activity on native title land that they otherwise have no right to do, or it prevents a native title holder from doing what their native title entitles them to do. If a future act does not fit within the relevant subdivisions of the Act, it can only be validly done in accordance with a registered ILUA.

However, the future acts regime in its present form has been the subject of international criticism.¹⁰⁷ And, as Sarah Burnside notes, recent decisions have illustrated the limitations of the right to negotiate, stemming from the terms of the Native Title Act and the way they have been interpreted by the NNTT and the Federal Court.¹⁰⁸

105 Attorney-General's Department, *The right to negotiate and the expedited procedure*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_Nativetitle_Therighttonegotiateandtheexpediteprocedure (viewed 26 August 2009).

106 Attorney-General's Department, *The future acts regime*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_Nativetitle_Thefutureactsregime (viewed 26 August 2009).

107 For further analysis, see W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1999*, Human Rights and Equal Opportunity Commission (2000), ch 2. At http://www.humanrights.gov.au/word/social_justice/native_title_report_99.doc (viewed 19 October 2009).

108 S Burnside, *'Take it or leave it': how not to negotiate in good faith* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 3 June 2009). At <http://ntru.aiatsis.gov.au/conf2009/papers/SarahBurnside.pdf> (viewed 24 June 2009).

The following reforms could address some of these limitations.

(i) *Improving procedural rights over offshore areas*

Procedural rights over the sea and offshore areas are limited, with the right to negotiate not being available for acts occurring below the high water mark.¹⁰⁹ However, the Court has considered that there is native title in offshore areas and this Government has recognised that native title can exist up to 12 nautical miles out to sea.¹¹⁰ This recognition seems inconsistent with the limitations on procedural rights over the sea. This situation could be improved by the repeal of s 26(3) of the Native Title Act.

(ii) *Addressing compulsory acquisition and extinguishment*

Section 24MD(2)(c) of the Native Title Act currently states that compulsory acquisition extinguishes native title. As originally enacted, s 23(3) of the Native Title Act stated that acquisition itself does not extinguish native title, only the act done in giving effect to the purpose of the acquisition that led to extinguishment. There appears to be no policy justification for the current position. I consider that it would be appropriate for s 24MD(2)(c) be amended to revert to the wording of the original s 23(3).

(iii) *Strengthening the requirement to negotiate in good faith*

Parties are prevented from resorting to an arbitral body (usually the NNTT) for a period of six months from the issue of a notice that the government intends to grant a mining tenement.¹¹¹ During this negotiation period, s 31 of the Native Title Act obliges the parties involved to negotiate in good faith.

In Chapter 1, I reviewed the Full Federal Court's decision in *FMG Pilbara Pty Ltd v Cox (FMG Pilbara)*.¹¹² It is clear from this decision that it is difficult for claimants to establish that a mining company has not acted in good faith.

Several problems are evident in the wake of the *FMG Pilbara* decision, which deserve the close attention of the Australian Government.

Reconsidering time periods for negotiations

The Native Title Act imposes a severe time constraint on mining negotiations. Six months is a very short period for the establishment of negotiations protocols, assembly of relevant information, presentation of proposals, discussions amongst native title parties and their advisers, the making of offers and counter-offers and so on. This is particularly so in areas such as the Pilbara where the abundance of mining activity creates huge pressures on under-resourced NTRBs. For situations where no claim is on foot, a credible application has to be prepared, lodged and registered within the first four months after the notice period.

The same statutory time limits apply regardless of the breadth of negotiations. In *FMG Pilbara*, the parties had sought to conclude an agreement on a 'whole of claim' basis. This not only sought to make efficient use of time and resources, but offered the mining company the prospect of much greater long-term resource security. Such negotiations are necessarily far more complex than the grant of a single

109 *Native Title Act 1993* (Cth), s 26(3).

110 See, for example, R McClelland (Attorney-General), *3rd Negotiating Native Title Forum* (Speech delivered at the Third Negotiating Native Title Forum, Melbourne, 20 February 2009), para 30. At http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2009_20February2009-3rdNegotiatingNativeTitleForum (viewed 4 September 2009).

111 *Native Title Act 1993* (Cth), s 35(1).

112 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 21.

mining tenement. In this case, negotiations with one of the native title parties had not proceeded far past the conclusion of a preliminary protocol agreement on how the planned comprehensive negotiations were to be conducted. I find it difficult to agree with the Full Federal Court's assessment that six months 'ensures that there is reasonable time to enable those negotiations to be conducted'.¹¹³

Under such time pressures, miners can drive a very hard bargain on questions such as compensation, knowing that an arbitral body cannot make a mining grant conditional on a royalty or similar payment.¹¹⁴

The same six month time limit is also imposed regardless of whether the parties have negotiated before and have, for example, a process agreement in place to regulate their talks.

The brevity and uniformity of time limits under the right to negotiate need to be reviewed. Alternatively, s 31 could be amended to require parties to have reached a certain stage before they may apply for an arbitral body determination.

Shifting the onus of proof

In relation to s 31, the burden of proof for establishing the absence of good faith negotiations is on the native title party. Shifting the onus onto the proponents of development, to positively show their good faith, is likely to alter their behaviour during negotiations and alleviate some of the current unfairness embedded in the right to negotiate process. It may improve the quality of the offers made by miners and discourage conduct such as bringing negotiations to an end mid-stream and seeking arbitration without notice to the native title parties.

Revisiting the onus of proof offers another means for improving the fairness of the right to negotiate procedure and is likely to encourage agreement-making.

Allowing arbitral tribunals to impose royalty conditions

Agreements struck during the six month good faith negotiation period regarding a mining act or a compulsory acquisition can include provisions for royalties or profit sharing.¹¹⁵

Pursuant to s 38, if an agreement is not reached and the matter is referred to the NNTT for arbitration, the NNTT must make a determination either that the act:

- must not be done
- may be done
- may be done subject to conditions to be complied with by any of the parties.¹¹⁶

However, under s 38(2), the NNTT cannot make a determination that an act may be done subject to conditions of profit-sharing or the payment of royalties.¹¹⁷

113 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 21.

114 *Native Title Act 1993* (Cth), s 38(2).

115 *Native Title Act 1993* (Cth), s 33.

116 *Native Title Act 1993* (Cth), s 38(1).

117 *Native Title Act 1993* (Cth), s 38(2).

When the drafters of the Native Title Act in 1993 denied the NNTT the capacity to include a royalty-style condition in an arbitral determination, their decision was premised on a certain prediction about the balance of power under the right to negotiate. As events have transpired, the drafters clearly over-estimated the impact on miners of a six-month hiatus in the approvals phase of a mining project. The premise of the drafters' decision has been falsified and that has seriously diminished the quality of outcome typically obtainable by native title parties from the right to negotiate.

As Tony Corbett and Ciaran O'Faircheallaigh observe, this creates a 'fundamental inequality'¹¹⁸ and 'places native title holders and claimants under considerable pressure to conclude an agreement within the negotiation period'.¹¹⁹

The Victorian Government has recommended amendments to the Native Title Act to allow 'the arbitral body to make determinations about the amount of profits, income and productions that were the subject of negotiations'.¹²⁰ I also believe that s 38(2) should be reconsidered.

(c) Recognition of commercial rights

The Government has stated that it considers that Indigenous communities should be using their native title rights to leverage economic development.¹²¹ The link between native title and economic development has been further acknowledged by the Government through its decision to include native title in its Indigenous Economic Development Strategy.¹²²

Agreement-making can be an important vehicle for social and economic development. However, the Native Title Act does not clearly provide for the recognition of commercial rights.

This may prevent a community from being able to use native title rights to support their economic development aspirations.

Courts have often appeared to take the view that customary Indigenous laws and customs for the purpose of native title do not include commercial activity. This perception has created distinction between customary rights and commercial rights.¹²³

118 C O'Faircheallaigh, *Submission to the Department of Families, Housing, Community Services and Indigenous Affairs on Optimising Benefits from Native Title Agreements* (February 2009), pp 3–4.

119 T Corbett & C O'Faircheallaigh, 'Unmasking the politics of native title: the National Native Title Tribunal's application of the NTA's arbitration provisions' (2006) 33(1) *University of Western Australia Law Review* 153, pp 157–158.

120 Victorian Government, *Comments on the Australian Government's Discussion Paper Proposed minor native title amendments* (2008), p 7. At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)-Submission+-+Victorian+Department+of+Justice.pdf/\\$file/Submission+-+Victorian+Department+of+Justice.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)-Submission+-+Victorian+Department+of+Justice.pdf/$file/Submission+-+Victorian+Department+of+Justice.pdf) (viewed 17 August 2009).

121 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Beyond Mabo: Native title and closing the gap* (Speech delivered as the 2008 Mabo Lecture, James Cook University, Townsville, 21 May 2008), p 3. At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/beyond_mabo_21may08.htm (viewed 19 October 2009).

122 See further, Chapter 2 of this Report.

123 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 10. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 19 October 2009).

There is growing evidence that this distinction is neither necessary nor accurate. For example, in the *Native Title Report 2007* I considered the experience of the Gunditjmara people in Victoria who were able to prove that their ancestors had established an ancient aquaculture venture. The Federal Court recognised their native title rights and the Gunditjmara peoples are now using these rights to re-establish commercial eel farming.¹²⁴

Further, the high evidential bar for establishing the relevant bundle of native title rights excludes or significantly limits the prospect of commercial rights being recognised. For example, in *Yarmirr v Northern Territory* at first instance, in response to evidence of trade with neighbouring tribes in clay, bailer shells, cabbage palm baskets, spears and turtle shells, Olney J held:

The so-called 'right to trade' was not a right or interest in relation to the waters or land. Nor were any of the traded goods 'subsistence resources' derived from either the land or the sea.¹²⁵

His Honour also observed that evidence of trade with Macassan fishermen related only to the gathering of trepang, but did not assist in establishing rights or interests in relation to other resources of the sea.¹²⁶

This is a very narrow approach to the characterisation of rights. In addition to an uninterrupted practice of commercial fishing, his Honour appeared to require further proof of a specific traditional right to commercial fishing before he would accept it as a 'right or interest in relation to waters'. Furthermore, even if a community could establish such a continuous right, his Honour's reasoning then calls for a 'drilling down' to the particular species being traded (such as trepang), rather than allowing a more generic right to trade in the marine resources of the claim area.

I consider that the definition of native title in s 223 should be amended to include rights and interests of a commercial nature. This would help to clarify that native title rights and interests should not be regarded as inherently non-commercial. Such an amendment might also provide guidance as to what evidential requirements must be met in establishing a commercial native title right and the scope of that right.

I also consider it appropriate for the Government to pursue amendments that discourage courts from over-specifying the rights and that allow for a reasonable level of generality. For example, a court could recognise a right to trade in resources of the area rather than confining the right to trading in specific species only under certain conditions.

In the *Native Title Report 2007*, I also raised the problem that even if commercial native title rights and interests are proven and recognised by the court, the commercialisation of those native title rights would remain subject to relevant state and territory laws and regulations.¹²⁷ The important protections for native title holders in s 211 of the Act would be unavailable due to its focus on non-commercial rights.

124 *Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474. See further T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 225–227. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 19 October 2009).

125 *Yarmirr v Northern Territory* (1998) 82 FCR 533, 587[D].

126 *Yarmirr v Northern Territory* (1998) 82 FCR 533, 588[C]. This approach appears to have been endorsed by Beaumont and von Doussa JJ in the Full Court, where their Honours noted 'the group was confronted with obvious difficulties in seeking to prove title to resources of the kind in question, given their diversity of specific character and location in a relatively large area of sea': *Commonwealth v Yarmirr & Ors* (2000) 101 FCR 171, 231.

127 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 223–224. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 19 October 2009).

Section 211 of the Native Title Act provides native title holders with immunity from government permit or licensing regimes, when they carry on activities such as fishing and hunting in the exercise of their native title rights.

If a government regulates an activity under the section, then that regulation does not apply to restrict native title rights and interests to the extent that the activities are undertaken for personal, domestic or *non-commercial* needs. As a result, even if Indigenous people can overcome all of the s 223 requirements, any commercial use of their native title rights remain subject (and vulnerable) to government regulation. In short, having travelled the long road to establish a commercial native title right, the claimant would nevertheless still need to join the queue for the applicable permit or licence to engage in commercial activities.

There are valid reasons why regulation of a commercial activity in respect of native title rights is necessary, particularly in respect of protecting public safety, competing rights and interests and the environment. However, I propose that the Government explore options that would limit the impact of government regulation in relation to holders of native title rights in appropriate cases. For example the Government could explore options for:

- state and territory governments to afford priority treatment for native title holders in obtaining applicable permits and licences to commercialise the relevant right
- developing limited markets for particular commercial activities, such as trade within and between particular native title groups in a particular industry. Such limited markets could be freed from more complex layers of regulation that might otherwise apply and could be adapted to be more culturally appropriate to the particular groups and activities.

(d) Disregarding extinguishment

As discussed in the *Native Title Report 2002*, the breadth and permanency of the extinguishment of native title through the Native Title Act is contrary to Australia's international human rights obligations.¹²⁸ It is also an unnecessary approach, without a satisfactory policy justification.

I consider that the Government should explore alternatives to current approaches to extinguishment.

For example, Chief Justice French suggests that the Native Title Act could be amended to allow extinguishment to be disregarded where an agreement is entered into between the state and the applicant. The Chief Justice further suggests that this could be limited to situations where the land in question is Crown land or a reserve:

If, for example, the vesting of a reserve was taken to have extinguished native title an agreement of the kind proposed could require that extinguishing effect to be disregarded while either applying the non-extinguishment principle under the [Native Title Act] or providing in the agreement itself for the relationship between native title rights and interests and the exercise of powers in relation to the reserve.¹²⁹

128 W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, Human Rights and Equal Opportunity Commission (2003), ch 2. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport02/chapter2.html#1.2 (viewed 12 January 2009).

129 Chief Justice RS French, 'Lifting the burden of native title: Some modest proposals for improvement' (2009) 93 *Reform* 10, 13.

According to the Chief Justice, ss 47–47B provide a model for such a provision. These provisions provide for prior extinguishment concerning pastoral leases held by native title claimants, reserves and vacant Crown land to be disregarded in certain circumstances.

The Native Title Act could be amended to provide a greater number of specific circumstances in which extinguishment may be disregarded.

(e) Providing for long-term adjournments

In the course of collecting information for the *Native Title Report 2008*, I received suggestions from a number of stakeholders who believed that the Native Title Act should allow the parties (where the claimant and the primary respondent consent) to request a long-term adjournment. This would give the parties the room and time to negotiate ancillary outcomes, without being under pressure from the Court to resolve the determination of native title. For example, Victorian Attorney-General Robert Hulls MP has commented:

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.¹³⁰

Under s 86F of the Native Title Act, the Court can order an adjournment to help negotiations. It may do this on its own motion or on application by a party. The Court can then end the adjournment on its own motion, on application by a party, or if the NNTT reports that the negotiations are unlikely to succeed.¹³¹ However, Graeme Neate, President of the NNTT, has stated in respect of s 86F that the parties ‘should not assume that alternative or even related agreement-making will be accepted by the Court as legitimate reason for delaying resolution of the claim’.¹³²

Section 86F could be amended to clarify that an adjournment should ordinarily be granted where an application is made jointly by the claimant and the primary respondent unless the interests of justice otherwise require, having regard to such factors as:

- the prospect of a negotiated outcome being reached
- the resources of the parties
- the interests of the other parties to the proceeding.

130 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.

131 *Native Title Act 1993* (Cth), ss 86F(3), 86F(4).

132 G Neate, *Native title claims: Overcoming obstacles to achieve real outcomes* (Paper delivered at the Native Title Development Conference, Brisbane, 27 October 2008), p 36. At <http://www.nntt.gov.au/News-and-Communications/Speeches-and-papers/Documents/2008/Overcoming%20obstacles%20to%20achieve%20real%20outcomes%20-%20Graeme%20Neate%20-%20October%202008.pdf> (viewed 19 October 2009).

(f) Building the capacity of Indigenous communities to effectively engage in agreement-making

(i) Prerequisites for effective engagement

We as Indigenous stakeholders must be central participants in setting the development goals and agendas of our communities. It is imperative that those most affected by legislation or policy are actively included in the process of negotiating and deciding upon the economic and social details that will impact our communities.

Being able to fully understand agreement processes and having the time, the resources and the platform to participate meaningfully in decision-making are prerequisites for being able to give our free, prior and informed consent. This is the foundation of real self determination.

In the *Native Title Report 2006*, I presented the results of a national survey on land, sea and economic development.¹³³ The survey results demonstrated that the majority of traditional owners did not have a good understanding of agreements.

The survey results also demonstrate what communities feel they need in order to effectively engage in agreement-making processes and leverage opportunities from agreements.

Text Box 3.4: Survey on land, sea and economic development – 2006¹³⁴

Understanding agreements

Only 25% of traditional owner respondents claimed an understanding of agreements, while 60% of their representative bodies claimed that traditional owners were able to understand agreements. This raises questions about whether our representatives are aware of the level of comprehension, the extent to which traditional owners are able to give informed consent to land decisions, and ultimately our capacity to effectively participate in negotiations. This can limit our ability to leverage opportunities from our lands. One traditional owner commented:

Stop giving us tonnes of paperwork that we don't understand, put it clearly in simplified plain English, otherwise people sign on the dotted line without understanding what they're signing to.¹³⁵

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

133 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), ch 1. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_1.html (viewed 12 August 2009).

134 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), ch 1. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_1.html (viewed 12 August 2009).

135 Traditional owner from North Queensland (not specified), quoted in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), p 25. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_1.html (viewed 12 August 2009).

The survey responses showed that the complex and technical terminology of native title and land rights is the greatest barrier. Almost all survey respondents cited some form of difficulty in understanding agreements. The following comments are typical of many responses:

The Aboriginal Land Act was set up by lawyers and anthropologists ...only the professionals can understand it ... [they] become the gatekeepers and owners of our knowledge, they run everything on our behalf.¹³⁶

We need clear explanations of matters of law, anthropology and political development...The procedures are unfair and biased against Indigenous people. Our people are misled and individuals are paid off to act outside our social and decision-making structures.¹³⁷

A lack of Indigenous perspective in the processes and a lack of information were also identified as the most significant factors preventing an understanding of land agreements.

Traditional owners and their representatives were asked to identify the three most important actions or resources that would help them understand and participate in land agreements.

- 90% of survey respondents identified the need to conduct meetings and workshops with traditional owner groups to explain agreements as the top priority
- 51% identified the need for plain English native title information
- 16.6% of respondents identified the amount of time afforded for consideration prior to giving a decision on aspects of agreements as equally important as training in governance and administration.

The survey also highlighted the need for an information campaign to improve understanding of land regimes and the funding and support programs available to assist indigenous people in pursuing economic and commercial initiatives. In particular, there is clearly a need to run workshops and meetings to explain native title and land rights regimes.

Leveraging opportunities from agreements

Survey respondents were asked to nominate the three most important resources required to progress development on land.

- 42% of survey respondents claimed that they need skilled personnel to support them
- 39% of survey responses identified funding, or an income source, as one of the top priorities to progress and support development on land
- 13% of respondents identified a need for training and employment.

136 Traditional owner of the Umpila territories, Cape York, quoted in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), p 26. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_1.html (viewed 12 August 2009).

137 Traditional owner of the Gubbi Gubbi and Butchulla territories, quoted in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), p 26. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_1.html (viewed 12 August 2009).

An economic base is required for any enterprise. Survey respondents also identified infrastructure as a major requirement for economic development, including roads, offices, equipment and capital. The lack of infrastructure in remote locations of Australia must not be underestimated in any discussion about economic development. A traditional owner commented that '[i]nfrastructure is needed badly. Our capacity is limited to volunteer work and no professional assistance'.¹³⁸

Some survey respondents identified land ownership as a precondition for economic development.

I consider that the lack of understanding identified in the survey is a major impediment to the development of sustainable and beneficial agreements. Certainly, communities require improved access to resources to support them in their negotiations. Yet, I believe that the process of agreement-making could become easier to understand and to participate in if:

- communities were able to access other agreements, where appropriate, to learn from best practice models and the experience of other negotiations
- agreement-making was conducted in a spirit of cross-cultural communication.

I consider these options below.

(ii) *Increasing access to agreements, including examples of best practice or 'model' agreements*

One way to equip communities with information to assist them to negotiate and understand agreements would be to make examples of agreements widely accessible.

Native title agreements are confidential, in whole or in part. Indigenous peoples are entitled to have confidential information appropriately protected.

However, the Native Title Payments Working Group has argued that 'unnecessarily broad confidentiality provisions in agreements' results in a 'lack of available data about the terms of many native title agreements', which works against the interests of native title holders as a whole. Drafters of agreements can be more targeted and selective in identifying the aspects of an agreement that warrant confidentiality. Meanwhile greater transparency on issues such as structure and technical content can assist other native title groups entering into future negotiations.¹³⁹

Victoria is attempting to strike a better balance between accessibility and confidentiality. For agreements entered into under the Victorian Alternative Settlement Framework (discussed in Chapter 1 of this Report), the state government will not seek for any part to be confidential. However, it will agree to reasonable requests from traditional owners to protect sensitive information.¹⁴⁰

138 Traditional owner of the Gubbi Gubbi and Butchulla territories, quoted in T Calma, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), p 26. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_1.html (viewed 12 August 2009).

139 Native Title Payments Working Group, *Report* (undated), p 2. At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Working+Group+report++final+version.DOC/\\$file/Working+Group+report++final+version.DOC](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report++final+version.DOC/$file/Working+Group+report++final+version.DOC) (viewed 12 October 2009).

140 Department of Justice, Native Title Unit (on behalf of the State of Victoria), *Submission on Australian Government's discussion paper: "Optimising Benefits from Native Title Agreements"* (undated), p 12.

Further consideration should be given to expanding the information about agreements that is publicly available, while also respecting confidentiality, privacy obligations and the commercial in confidence content of agreements.

Existing mechanisms for sharing agreements, such as the Agreement, Treaties and Negotiated Settlements Project, hosted by Melbourne University, and the NNTT's Register of Indigenous Land Use Agreements (the Tribunal's Register) could be utilised more effectively for this purpose.

For example, s 199B of the Native Title Act specifies the details of agreements that are required to be entered on the Tribunal's Register. The Victorian Department of Justice suggests that the Tribunal's Register could be better utilised and provide access to greater levels of information if s 199B was amended to broaden the list of details that must be included on the Tribunal's Register.¹⁴¹

I also consider it important that further research be conducted into 'best practice' or 'model' agreements. We have much to learn from agreements such as the Argyle Participation Agreement, which I profiled in my *Native Title Report 2006* and discuss further in Text Box 3.5.¹⁴²

Text Box 3.5: The Argyle Participation Agreement

The Argyle Participation Agreement was made up of two parts. The first part was the ILUA, which is legally binding on the parties and outlines and formalises the financial and other benefits that traditional owners receive (the confidential issues). It also specifies how the benefits are to be administered, and contains a process that ensures that the traditional owners' native title rights and interests are recognised to their fullest potential.

The second part was the Argyle Management Plan Agreement, which contained eight management plans that dealt with a number of areas important to the traditional owners, such as:

- Aboriginal site protection
- land access
- land management
- training and employment
- cross-cultural training
- decommissioning of the mine
- business development and contracting
- Devil Devil Springs – a significant site.

The traditional owners were happy to make the framework behind the ILUA available to other Indigenous peoples to assist them in these processes. However, the financial component and issues concerning traditional knowledge remain confidential.

141 Department of Justice, Native Title Unit (on behalf of the State of Victoria), *Submission on Australian Government's discussion paper: "Optimising Benefits from Native Title Agreements"* (undated), p 12.

142 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), ch 5. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 29 October 2009). Other examples of templates and framework agreements are considered in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), ch 4, at http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 29 October 2009); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 11, at http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 19 October 2009).

A further option is to draw upon these best practice examples to create template agreements or clauses that native title holders and their representatives can tailor to their circumstances. This could save traditional owners time and resources. It could also assist them to learn from the experiences of others. Such templates could provide clear guidance to other parties (including governments) as to best practice.

However, it is important that these templates be as flexible as possible, and that they be used as a starting point for discussions rather than treated as definitive or restrictive frameworks.

(iii) Encouraging cross-cultural communication and understanding

It is also important that agreement-making processes are tailored to enable the full and effective participation of traditional owners. For example, two-way cultural communication processes can provide opportunities for non-Indigenous parties to practically understand the cultural and spiritual importance of the lands they are seeking to access. It can also assist the native title holders to understand what will happen on their lands as a result of granting access. This approach has proven beneficial in previous negotiations.

The negotiating process that led to the Argyle Participation Agreement illustrates a powerful example of how this can be done.

Text Box 3.6: The Argyle Participation Agreement: Negotiation process¹⁴³

The preparations for negotiation included a process for recognition and co-operation between two systems of law: Western law and Indigenous law. The mediation and negotiation processes guided by the Native Title Act and ILUA regulations met the requirements of Western law, while the conduct of particular ceremonies at the mine site met the responsibilities of Indigenous traditional law.

In the early meetings, the traditional owners made the point: 'we are not moving on with your system until you hear our grief, pain, distress and hurt from the past'. According to meeting participants, many of the early meetings had no formal agenda and Argyle Diamonds personnel made a point of listening to the traditional owners and apologising for the past.

The parties to negotiations recognised that there were implicit power imbalances between the mining interests and the traditional owner interests. Argyle Diamonds endeavoured to redress the imbalance by ensuring that communication was tailored to the needs of the traditional owners. Traditional owners were taken on tours of the mine, including the underground mine. Different visual strategies were developed to assist with explanations of the impact of the mining activity on their country. Translators were used throughout to ensure that everyone could follow and participate in the negotiations. All key documents were prepared in a format that included plain English interpretations.

The traditional owners also recognised that representatives of Argyle Diamonds required interpretations of the traditional processes of agreement-making and traditional law of the region. In a reciprocal process, the traditional owners provided the mining company representatives with information about their laws and customs. They also performed ceremonies to ensure that the mining operation could be conducted free from danger and interruption by the local Dreaming beings and spirits of the 'old people'.

143 See further T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), ch 5. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 19 October 2009).

Ted Hall, Chairperson of the Gelganyem Trust described what he saw as the legacy of the Argyle Participation Agreement for the traditional owners:

It's been empowering, it has empowered us to made decisions on our own terms. We determine what happens in our area. We set the terms and goals and we are achieving them also. This process has bought unity between the elders and the young. The young bring the education and the elders bring the knowledge.¹⁴⁴

The Argyle experience demonstrates the importance of a culturally appropriate negotiating process. I consider that further research should be conducted into best practice negotiating experiences. This research could involve the development of case studies and clear principles that other negotiating parties can access and learn from.

(g) Promoting a regional approach to agreement-making

The preamble to the Native Title Act provides that:

Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:

- a. claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders
- b. proposals for the use of such land for economic purposes

Regional agreements are not new in Indigenous affairs. The previous Australian Government contemplated the use of broader Regional Partnership Agreements (RPAs) to complement its policy of pursuing more community-specific Shared Responsibility Agreements (SRAs), although only three RPAs were concluded (in 2005 and 2006).¹⁴⁵

The benefits of regional agreements include that they:

- are a means of eliminating overlaps or gaps and promoting collaborative effort to meet identified regional needs and priorities
- seek to build communities' capacity to control their own affairs, negotiate with government, and have a real say in their region's future.
- should not affect Aboriginal people's access to benefits or services available to all Australians.¹⁴⁶

Regional agreements may prove effective in the management of the various land dealings that are the responsibility of Indigenous land holders. The expanded breadth of Prescribed Bodies Corporate (PBCs) to also manage land trust responsibilities, for example those negotiated over national park lands, or lands held for the benefit of Aboriginal peoples could also be provided for in regional agreements. Governments will need to ensure that PBCs are adequately resourced and supported to undertake this duty.

144 T Hall, quoted in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), p 136. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 19 October 2009).

145 For further information about RPAs and SRAs, see Australian Government, *Indigenous Portal*, <https://www.indigenous.gov.au/sra.html> (viewed 12 October 2009).

146 Department of Indigenous Affairs (Government of Western Australia), *Regional Partnership Agreements*, <http://www.dia.wa.gov.au/Our-Business/Partnerships/> (viewed 4 September 2009).

(h) Improving mechanisms for evaluation and monitoring

The Australian Government has identified that regular review of long-term objectives and the extent to which these are being met is a critical feature of a good agreement.¹⁴⁷

The National Native Title Tribunal has also stressed that:

Review mechanisms are important elements in helping to maintain and keep an agreement 'on-track', ensuring that the respective expectations and objectives of the parties are managed, as well as to ensure on-going communication between the parties. Few agreements appear to make provision for periodic or regular review despite the fact that it provides clear opportunities for the parties to get together to objectively examine the progress of an agreement. They do not need to wait for a dispute to arise to trigger communication. It may be a useful strategy to 'stage' implementation, and to undertake reviews when identified objectives or targets are reached.¹⁴⁸

I consider that native title agreements should provide for regular review. During such reviews, parties could:

- monitor the progress on the implementation of the agreement
- evaluate the benefits derived from the agreement, including the social, economic, environmental and cultural benefits received by the Indigenous community
- consider issues concerning compliance with the terms of the agreement and identify any barriers to compliance
- consider whether outcomes remain achievable and relevant.

I recommend that the Australian Government work with native title parties to identify and develop criteria to provide guidance on how to monitor, measure, and evaluate agreements. It may be that the NNTT could play a central role in developing and promoting such criteria.

3.8 Initiatives to increase the quality and quantity of anthropologists and other experts working in the native title system

Assembling the expert services necessary to achieve a native title determination or to pursue complex negotiations with governments and miners is a time-consuming and expensive aspect of the native title system. However, native title claimants must have access to the necessary expertise to achieve the best outcomes. This may require advice from anthropologists, economists, investment advisors, business managers, contract lawyers and many others.

The Native Title Payments Working Group was established in 2008 by the Australian Government to advise on maximising benefits from native title agreements. It considered that any significant future act negotiations should be based on the

147 Australian Government, *Australian Government Discussion Paper* (undated), p 6. At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Discussion+paper++final+version.DOC/\\$file/Discussion+paper++final+version.DOC](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Discussion+paper++final+version.DOC/$file/Discussion+paper++final+version.DOC) (viewed 12 October 2009).

148 M Allbrook & M Jebb, *Implementation and Resourcing of Native Title Agreements: Final Report*, National Native Title Tribunal (2004), p 23. At <http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Implementation%20and%20resourcing%20of%20native%20title%20and%20related%20agreements.pdf> (viewed 25 August 2009).

principle that traditional owners should have advice and representation of a similar quality as the mining company or other proponent. In other words, there should be a level playing field.¹⁴⁹

A mining company would not come to the negotiating table without all of the necessary expertise required to secure the best protection possible for their interests. But many native title bodies do not have sufficient access to this expertise in-house. Nor do they have sufficient resources to obtain it by contracting-out. Non-recurrent funding also impacts upon the ability of native title bodies to recruit and retain experienced experts. NTRBs are substantially under-resourced for the tasks they are expected to perform or manage.¹⁵⁰ As a result, the playing field is often far from level.

In addition to providing further funding to NTRBs and PBCs, this inequality could be addressed by:

- establishing a register of experts
- promoting better use of independent experts in native title claims
- improving training and development opportunities for anthropologists.

(a) Establishing a register of experts

An innovative response to this issue would be for the Government to fund a register of experts through which NTRBs and native title parties have access to the expertise they require to negotiate the best native title agreement possible.

The register could also serve as a quality control mechanism – to be included on the register, experts should be required to prove that they meet relevant professional and ethical standards.

The expert register could extend to professions such as:

- interpreters
- legal and financial experts
- anthropologists.

There may be existing mechanisms that can be built upon and accessed by those engaged in native title processes. For example, the Government constituted and has maintained an Australia-wide panel of consultants to assist with its Indigenous affairs policies and to negotiate SRAs. These experts are required to undertake a number of roles including facilitating, negotiating, providing training to government employees, and providing support to community members.¹⁵¹

A register of experts will require dedicated resources. However, it can lead to the making of good agreements – facilitated by skilled negotiators and entered into by capable communities who know their rights.

149 Native Title Payments Working Group, *Native Title Payments Working Group Report* (undated). At http://www.fahcsia.gov.au/sa/indigenous/progserv/land/Documents/native_title_wg_report/Native_title_working_group_report.pdf (viewed 10 August 2009).

150 Attorney-General's Department, *Closing the Gap – Funding For the Native Title System (Additional Funding and Lapsing): Budget 2009–10*, Fact Sheet (2009). At [http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingFortheNativeTitleSystem\(AdditionalFundingandLapsing\)](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingFortheNativeTitleSystem(AdditionalFundingandLapsing)) (viewed 19 September 2009). See further, my comments in Chapter 1 of this Report.

151 Success Works, Melbourne Australia, *Facilitation of Community Development and Engagement, Department of Immigration and Multicultural Affairs (DIMIA) (current)*. At <http://www.success-works.com.au/projects.htm> (viewed 28 August 2009).

(b) Better use of independent experts in native title claims

Over the past five years, I have voiced concerns about the inappropriate nature of, and the negative consequences that flow from, the adversarial system in which native title is determined. I have supported changes to lessen the impacts of the adversarial system, including to the way that evidence is received.¹⁵²

As discussed in Chapter 1 of this Report, the Australian Government has proposed new powers to allow the Federal Court to refer questions arising from proceedings to a referee for inquiry and report.¹⁵³ This may go some way to reducing the negative impacts of the adversarial setting upon native title claimants and the outcomes reached.

Significant time and expense is incurred in the collection of expert evidence. Courts are often faced with multiple and conflicting expert reports and testimony. A mechanism by which the court can deal with particular questions of fact, such as in respect of genealogy, by referring the question to one independent expert referee may therefore prove useful.

I consider that such a power should only be used with the agreement of the applicant and the primary respondent. The available pool of appropriate expert referees is small and parties may legitimately hold strong views about the appropriateness of a particular referee, particularly where the relevant question referred is pivotal to the claim.

This approach would also be consistent with the inquiries function provided for under Part 6, Division 5 of the Native Title Act. This Division provides for an inquiry to be undertaken by the NNTT at the request of the court (and in other circumstances) during mediation. However, s 138B(2)(b) provides that the applicant that is affected by the proposed inquiry must agree to participate. This consent is necessary for the efficient progression of the claim and to ensure that resources are not diverted away from the process that is already underway.

The proposed new provision for referees offers more flexibility in the native title area as to the timing of the inquiry and who can conduct it. Since its inception, Part 4 of the Native Title Act has permitted the Federal Court to make use of an assessor. Also, under the Federal Court rules, trial judges have convened experts' conferences outside the court process and had experts give evidence concurrently within that process.¹⁵⁴

The question of who would be responsible for the costs of the independent expert is a matter for further consideration. If the costs are shared between the parties, it could have significant implications for NTRBs and the running of that claim and their other claims. It is my view that the most appropriate party to pay the expert's costs is the Australian Government. Ideally, a separate funding stream would be established by the Government under the Attorney-General's portfolio for this purpose.

152 For example, for recommendations regarding the application of the rules of evidence to native title proceedings, see Australian Human Rights Commission, *Submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Senate Standing Committee on Legal and Constitutional Affairs* (23 April 2009), paras 144–157. At http://www.humanrights.gov.au/legal/submissions/2009/20090424_ntab.html (viewed 16 October 2009).

153 Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008 (Cth).

154 See R Farrell, 'Hot-tubbing' *anthropological evidence in native title mediations* (2007). At www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Hot%20tubbing.pdf (viewed 6 October 2009).

(c) Improved training and development opportunities for anthropologists

Experts, such as anthropologists, play a vital role in the preparation and progress of a native title application and native title agreements. However, communities can face difficulties in attracting quality expert advice. A study conducted by the NNTT in 2004 concluded that a key factor in attracting and maintaining good quality professional anthropologists is whether or not native title work can positively contribute to the development of their careers.¹⁵⁵

The study found that:

- only 20% of consultant anthropologists surveyed saw native title work as enhancing a career in anthropology
- 40% of consultant anthropologists considered that native title work limited their careers
- 30% of anthropologists working in NTRBs viewed native title as enhancing their career
- 40% of anthropologists surveyed offered no opinion.¹⁵⁶

To ensure that communities are able to access quality advice, it is important that experts receive training that is appropriate for working within the native title system and that ongoing development opportunities are available to them.

I consider that courses for students and development programs for experts need to adopt an interdisciplinary approach. This is required to address challenges such as the need for anthropologists and other experts to be able to understand the role of expert witnesses in accordance with the Federal Court's guidelines.¹⁵⁷ It could also serve to promote effective cross-disciplinary communication between experts and to encourage team work and ethical professionalism.¹⁵⁸

155 D F Martin (Anthropos Consulting Services), *Report to the National Native Title Tribunal – Capacity of Anthropologists in Native Title Practice* (2004), para 13. At <http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Capacity%20of%20Anthropologists%20in%20Native%20Title%20Practice.pdf> (viewed 1 November 2009).

156 D F Martin (Anthropos Consulting Services), *Report to the National Native Title Tribunal – Capacity of Anthropologists in Native Title Practice* (2004), para 13. At <http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Capacity%20of%20Anthropologists%20in%20Native%20Title%20Practice.pdf> (viewed 1 November 2009).

157 Chief Justice M E J Black, Federal Court of Australia, *Practice Note CM 7 – Expert Witnesses in Proceedings in the Federal Court of Australia* (25 September 2009). At http://www.fedcourt.gov.au/how/practice_notes_cm7.html (viewed 16 October 2009).

158 Martin's study found anecdotal evidence from anthropologists working within NTRBs that suggests ongoing professional tension between legal and anthropological perspectives. For example, while anthropologists are often required to implement Federal Court directions relating to the role of expert witnesses, there have been claims of lawyers pressuring anthropologists into writing reports in terms with which they professionally and ethically disagree. See D F Martin (Anthropos Consulting Services), *Report to the National Native Title Tribunal – Capacity of Anthropologists in Native Title Practice* (2004), paras 41, 42. <http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Capacity%20of%20Anthropologists%20in%20Native%20Title%20Practice.pdf> (viewed 1 November 2009).

David Martin comments that 'the place for training in anthropological native title practice (for consultants and those in NTRBs and government agencies etc) is not in Bachelors degrees but rather should lie in special purpose courses'.¹⁵⁹ An example of one such course is the University of Western Australia's Graduate Diploma in Applied Anthropology (Native Title and Cultural Heritage).¹⁶⁰

Partnerships between communities, universities, government and industry are also essential for providing training and development opportunities for experts. For example, the Aurora Project works with university, corporate and government partners to deliver capacity building programs and professional development opportunities in disciplines such as law, anthropology, research, management and education.¹⁶¹ This approach is commendable and worthy of further support.

3.9 Conclusion

The Prime Minister's National Apology to the Stolen Generations raised our spirits. It also raised our hopes that this Government would work with us to remedy the impacts of dispossession.

I believe that an effective native title system is essential to righting the wrongs of the past and to securing our future.

As I indicated in Chapter 1 of this Report, the Australian Government has taken some important first steps in reforming the native title system. It is also encouraging that the Australian Government has committed to engaging in discussions focused on improving the native title system. We must ensure that this opportunity is not wasted.

Throughout Chapter 3, I have identified a number of elements of native title law and policy in need of reform. I have also discussed proposals for further consideration. My hope is that we are able to continue this conversation. Above all, I encourage governments, in the spirit of reconciliation, to show genuine leadership and take action to create a just and equitable native title system.

159 D F Martin (Anthropos Consulting Services), *Report to the National Native Title Tribunal – Capacity of Anthropologists in Native Title Practice* (2004), para 175. At <http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Capacity%20of%20Anthropologists%20in%20Native%20Title%20Practice.pdf> (viewed 1 November 2009).

160 See University of Western Australia, Faculty of Arts, Humanities and Social Sciences, *Graduate Diploma in Applied Anthropology (Native Title and Cultural Heritage)*, <http://www.arts.uwa.edu.au/courses/postgrad/coursework/graddipappanth> (viewed 30 October 2009).

161 See The Aurora Project, <http://www.auroraproject.com.au> (viewed 29 October 2009).

Recommendations

- 3.1 That the Australian Government adopt measures to improve mechanisms for recognising traditional ownership.
- 3.2 That the Native Title Act be amended to provide for a shift in the burden of proof to the respondent once the applicant has met the relevant threshold requirements.
- 3.3 That the Native Title Act provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgement and observance of traditional law and custom and of the relevant society.
- 3.4 That the Native Title Act be amended to define ‘traditional’ more broadly than the meaning given at common law, such as to encompass laws, customs and practices that remain identifiable over time.
- 3.5 That section 223 of the Native Title Act be amended to clarify that claimants do not need to establish a physical connection with the relevant land or waters.
- 3.6 That the Native Title Act be amended to empower Courts to disregard an interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.
- 3.7 That the Australian Government fund a register of experts to help NTRBs and native title parties access qualified, independent and professional advice and assistance.
- 3.8 That the Australian Government consider introducing amendments to sections 87 and 87A of the Native Title Act to either remove the requirement that the Court must be satisfied that it is ‘appropriate’ to make the order sought or to provide greater guidance as to when it will be ‘appropriate’ to grant the order.
- 3.9 That the Australian Government work with state and territory governments to encourage more flexible approaches to connection evidence requirements.
- 3.10 That the Australian Government facilitate native title claimants having the earliest possible access to relevant land tenure history information.
- 3.11 That the Australian, state and territory governments actively support the creation of a comprehensive national database of land tenure information.
- 3.12 That the Australian Government consider options to amend the Native Title Act to include stricter criteria on who can become a respondent to native title proceedings.
- 3.13 That section 84 of the Native Title Act be amended to require the Court to regularly review the party list for all active native title proceedings and, where appropriate, to require a party to show cause for its continued involvement.

- 3.14 That the Australian Government review section 213A of the Native Title Act and the Attorney-General's *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* to provide greater transparency in the respondent funding process.
- 3.15 That the Australian Government consider measures to strengthen procedural rights and the future acts regime, including by:
- repealing section 26(3) of the Native Title Act
 - amending section 24MD(2)(c) of the Native Title Act to revert to the wording of the original section 23(3)
 - reviewing time limits under the right to negotiate
 - amending section 31 to require parties to have reached a certain stage before they may apply for an arbitral body determination
 - shifting the onus of proof onto the proponents of development to show their good faith
 - allowing arbitral bodies to impose royalty conditions.
- 3.16 That section 223 of the Native Title Act be amended to clarify that native title can include rights and interests of a commercial nature.
- 3.17 That the Australian Government explore options, in consultation with state and territory governments, Indigenous peoples and other interested persons, to enable native title holders to exercise native title rights for a commercial purpose.
- 3.18 That the Australian Government explore alternatives to the current approach to extinguishment, such as allowing extinguishment to be disregarded in a greater number of circumstances.
- 3.19 That section 86F of the Native Title Act be amended to clarify that an adjournment should ordinarily be granted where an application is made jointly by the claimant and the primary respondent unless the interests of justice otherwise require, having regard to such factors as:
- the prospect of a negotiated outcome being reached
 - the resources of the parties
 - the interests of the other parties to the proceeding.
- 3.20 That the Australian Government:
- consider options for increasing access to agreements (while respecting confidentiality, privacy obligations and the commercial in confidence content of agreements)
 - support further research into 'best practice' or 'model' agreements
 - support further research into best practice negotiating processes.
- 3.21 That, where appropriate and traditional owners agree, the Australian Government promote a regional approach to agreement-making.
- 3.22 That the Australian Government work with native title parties to identify and develop criteria to guide the evaluation and monitoring of agreements.
- 3.23 That the Australian Government ensure that NTRBs are sufficiently resourced to access expert advice.
- 3.24 That the Australian Government provide further support to initiatives to provide training and development opportunities for experts involved in the native title system.

Chapter 4:

Indigenous land tenure reform

4.1 Introduction

During the reporting period, Australian governments continued to develop tenure reform policies for Indigenous land. Governments frequently describe these policies as a means of promoting home ownership and economic development on Indigenous land. The reality is not so simple.

I have previously expressed my concern with arguments that tenure reform is the key to removing impediments to economic development in communities on Indigenous land. I continue to hold this concern. Issues such as remoteness, education, health, job readiness, poor infrastructure and the failure of governments to respect Indigenous forms of ownership, including native title, are substantially more important and have a greater impact on the economic development of communities.

This Chapter reviews tenure reform programs across Australia and reveals that the focus of reforms has been on enabling governments to obtain secure tenure over Indigenous land. However, this focus on secure tenure is not about assisting Indigenous people to make use of their land – it is about governments having control over decision-making.

If the main effect of these reforms is to enable governments to implement policies that impede self-governance and decrease effective control by Indigenous peoples over their lands, then Indigenous people across Australia will feel betrayed and further alienated.

Tenure reform does not have to have this focus. If the aim of tenure reform is to provide clarity of ownership and improved opportunities for development, this can be achieved by quickening processes for the return of land to Indigenous people and supporting them to pursue their right to development. Government policies need to be flexible to accommodate different types of land ownership (for instance, communally-held native title land or freehold land granted under a land rights regime) and to support the distinct development aspirations of specific communities.

To a significant extent, tenure reform of Indigenous land is being directed by the Australian Government, both through its role in the Council of Australian Governments (COAG) and more directly in the case of the Northern Territory. Despite its central role, the Australian Government is yet to provide a clear statement that sets out the aims and parameters of its tenure reform policy and provides Indigenous people with a clearer sense of where they stand.

The purpose of this Chapter is to identify the Australian Government's approach to tenure reform and to highlight developments in the Northern Territory, Queensland, New South Wales, South Australia and Western Australia during the reporting period.

In this Chapter, I first seek to provide a clearer picture of what the Indigenous land reform policies of the Australian Government look like. I provide a number of extracts from government statements and documents and follow this with a discussion of what these mean.

Next, I describe the related policy of delivering services through priority locations. This is an important development for Indigenous communities.

The Chapter then reviews developments in relation to tenure reform in the Northern Territory, and includes an updated discussion of the Northern Territory Emergency Response and of township leasing.

I then focus on tenure reform developments in other states that are participating in the COAG process – Queensland, New South Wales, South Australia and Western Australia.

Finally, I consider the principles that should be followed in implementing any reforms to Indigenous land tenure in Australia.

4.2 Identifying a national Indigenous land reform policy

The Australian Government is yet to publish a comprehensive statement of its tenure reform policy. And yet, tenure reform is being rolled out in many places across Australia.

In this section, I piece together extracts of statements to provide a picture of what the Australian Government's tenure reform policy entails. I also review developments at the COAG level. Finally, I evaluate the features of the Government's policy.

(a) The Australian Government's policy

In 2006, the former Australian Government introduced 'township leasing' through a new s 19A in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA).

Under a s 19A lease, also known as a 'whole of township lease', all of the land in and around a community on Aboriginal land is leased to a government entity for an extended period. The government entity can then issue subleases over parts of the community.

When it was in opposition, the Labor Party expressed concerns regarding the former Coalition Government's approach to Indigenous land tenure reform. On 13 June 2007, Jenny Macklin MP (then Shadow Minister for Indigenous Affairs) told the House of Representatives that the township leasing model 'removed direct control by traditional owners over development on township land'. She went on to say:

The government is arguing that land rights have not delivered economic outcomes, and is therefore seeking to construct a Hobson's choice for Indigenous people.

Choose between your rights to land and your rights to economic development. I do not believe that it is beyond the wit of traditional owners and the government to devise land tenure arrangements which streamline transaction costs without fundamentally undermining Indigenous ownership and control of their land.¹

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 June 2007, p 92 (The Hon Jenny Macklin MP, Shadow Minister for Indigenous Affairs). At <http://www.aph.gov.au/hansard/rep/dailys/dr120607.pdf> (viewed 6 September 2009).

Yet, when Jenny Macklin made her first address to the National Press Club as Minister for Families, Housing, Community Services and Indigenous Affairs on 27 February 2008, she said that she considers 'there are many advantages to whole of township leases'.²

The Minister also told the Press Club that her government had a policy of requiring appropriate security for new housing investment in Indigenous communities across Australia. The Minister explained that this means a lease or other arrangement that:

- ensures clarity of ownership and responsibility for assets
- delivers the effective provision and management of public or community housing
- ensures tenants are required to look after their houses and be held to public tenancy requirements
- encourages and facilitates private sector investment to expand the housing asset base and to encourage private home ownership.³

This speech signalled the new Labor Government's intention to continue to implement the secure tenure policy that had been taking form under the Howard Government.

The first application of this policy by the new Government was in relation to the Strategic Indigenous Housing and Infrastructure Program (SIHIP), which was announced on 21 April 2008.⁴ Under SIHIP, the Australian Government agreed to contribute \$547 million over four years toward Indigenous housing in the Northern Territory.

Sixteen communities were selected for new housing, on the condition that there was a grant of secure tenure to the government. As the Minister stated:

Security of tenure will be a key element in allocating this funding. Communities receiving capital works under this program will need to enter into a lease for a period of time appropriate to the life of the capital works being funded.⁵

The Minister stated the reasons for this being:

In the past, the absence of secure tenure has meant inferior repairs and maintenance which, exacerbated by overcrowding, has led to houses becoming run down and unliveable.⁶

2 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Closing the Gap – Building an Indigenous Future* (Speech delivered to the National Press Club, Canberra, 27 February 2008). At http://www.jennymacklin.fahcsia.gov.au/Internet/jennymacklin.nsf/content/closing_the_gap_27feb08.htm (viewed 23 October 2009).

3 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Closing the Gap – Building an Indigenous Future* (Speech delivered to the National Press Club, Canberra, 27 February 2008). At http://www.jennymacklin.fahcsia.gov.au/Internet/jennymacklin.nsf/content/closing_the_gap_27feb08.htm (viewed 23 October 2009).

4 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), P Henderson (Northern Territory Chief Minister) & W Snowdon (Member for Lingiari), 'Landmark Housing Project for NT Indigenous Communities' (Media Release, 12 April 2008). At http://www.jennymacklin.fahcsia.gov.au/Internet/jennymacklin.nsf/content/landmark_housing_12april08.htm (viewed 7 September 2009).

5 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), P Henderson (Northern Territory Chief Minister) & W Snowdon (Member for Lingiari), 'Landmark Housing Project for NT Indigenous Communities' (Media Release, 12 April 2008). At http://www.jennymacklin.fahcsia.gov.au/Internet/jennymacklin.nsf/content/landmark_housing_12april08.htm (viewed 7 September 2009).

6 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'SIHIP upgrades underway in the Territory' (Media Release, 3 July 2009).

On 26 February 2009, the Prime Minister delivered the Government's 'Closing the Gap Report' to Parliament. He spoke about the Government's commitment to remote Indigenous housing, and said:

This includes making funding for communities conditional on the reform of land tenure arrangements that obstruct new housing investment. Only with clear, well-functioning tenure arrangements will government agencies, housing authorities and private businesses make substantial housing investments in remote communities. We are driving an aggressive land tenure reform agenda, which is necessary to underpin sustainable tenancy management, give tenants the assurance that routine repairs and maintenance will be carried out and lay the foundations for economic development in remote communities.

For the first time, remote Indigenous citizens will have access to mainstream housing arrangements that public housing tenants in cities and towns take for granted. And, over time, remote Indigenous citizens will have a realistic opportunity to own their own homes. In return, Indigenous tenants – like all public housing tenants – will be expected to pay rent on time, to cover the cost of any damage and to not disturb the peace of their neighbours.

- If people fail to pay their rent, action will be taken to deduct it from their accounts automatically as a condition of remaining.
- People who damage their homes will be made to cover the cost of any damage and be required to enter into acceptable behaviour agreements.
- People who allow unacceptable behaviours to occur on their premises will be subject to further action including orders by the Commissioner for Tenancies.
- And people who wilfully fail to meet these commitments will face eviction.⁷

In this speech, and on a number of other occasions, the Australian Government has referred to the issues of tenure reform and secure tenure at the same time. In this case, Prime Minister Rudd raised these issues together also with housing management reform. While this can make it appear that secure tenure and tenure reform policies are the same thing, or have the same aims, this is often not the case. In the event of a conflict between the aims of the two policies, the practice of the Australian Government has been to give preference to the aims of secure tenure. I describe this further below.

In two key speeches in 2009, the Minister for Families, Housing, Community Services and Indigenous Affairs has provided further information about the Australian Government's approach to Indigenous land tenure. In a speech to the NSW Aboriginal Land Council on 5 March 2009, the Minister said:

Over the past year the Government has worked on two parallel paths:

First, we are working to establish the policy foundations required in relation to land tenure and housing reform; and second, we have made unprecedented financial commitments directed to changing the face of Indigenous housing across the nation within a decade. ...

At the heart of Government policy is our respect for cultural connections to land and our respect for communal and traditional land holding systems. This is non-negotiable.

Within that non-negotiable framework, we want to work with Aboriginal people to also provide the secure tenure needed to attract government and commercial investment, to enable better service delivery and facilities, and to drive economic development. ...

⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 February 2009, p 2031 (The Hon K Rudd, Prime Minister). At <http://www.aph.gov.au/Hansard/rep/dailys/dr260209.pdf> (viewed 23 October 2009).

But housing on Aboriginal land has never been put on that secure footing. The consequences of this can be seen across the country. Houses that are unliveable because no-one takes responsibility for repairs and maintenance.

The absence of any incentive to collect the rent to help pay for repairs and maintenance. Poor tenancy management where overcrowding isn't checked and routine inspections are irregular or even non-existent. All conditions which have contributed to a general reluctance to invest in housing.

With secure tenure arrangements in place government is accountable for the ongoing condition and maintenance of public housing. Secure tenure firmly places the responsibility at the feet of each housing authority or community housing organisation to provide a decent level of housing service just as mainstream public housing providers must do in the city.

To put it simply, this is not about taking land away from Aboriginal communities; it's about making sure housing providers do their job.

I have recently written to the New South Wales Housing Minister and to housing ministers elsewhere in Australia to set out the secure tenure requirements which will underpin our major COAG investment.

There are three requirements.

First, the government must have long term control over and access to public housing – and therefore responsibility – subject to the privacy of tenants. Governments will be able delegate this control and responsibility to community housing organisations which have the capacity to manage housing assets at public housing standards.

Second, we must be able to put housing management reforms into place – better repairs and maintenance and ordinary tenancy agreements which protect tenants and clarify responsibilities.

And third, any native title issues need to be resolved to ensure that construction and refurbishment can proceed as quickly as possible.⁸

These three requirements relate to the two COAG agreements which are discussed in the next section. In relation to the negotiation of leases, the Minister said:

This approach means that governments must treat Aboriginal land owners like any other land owners. If we want to build public housing on your land, we must negotiate a lease to do it. And you have the opportunity to negotiate the terms of those leases including boundaries, the restriction of development in special places and to require that any new investment proceeds in places where a lease has been agreed.⁹

It is misleading to suggest that all terms of a lease are open for negotiation. The Australian Government has imposed clear rules about what it will allow a lease to contain, and in the case of township leases some of those rules are contained in s 19A of the ALRA itself. As I will discuss further in this Chapter, the Australian Government will not pay rent for housing leases and has refused to recognise local Indigenous decision-making authority in the terms of leases.

8 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Address to the NSW Aboriginal Land Council* (Speech to the NSW Aboriginal Land Council, Cessnock, 5 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/aboriginal_land_council_5mar09.htm (viewed 7 September 2009).

9 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Address to the NSW Aboriginal Land Council* (Speech to the NSW Aboriginal Land Council, Cessnock, 5 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/aboriginal_land_council_5mar09.htm (viewed 7 September 2009).

Indigenous communities are in desperate need of housing.¹⁰ As the provision of housing is conditional upon agreeing to a lease, Indigenous land owners may be negotiating at a disadvantage and under duress.

The Minister also went on to refer to the possibility of home ownership:

We recognise that home ownership can bring important social and economic benefits. Greater financial security. Greater independence. A more stable environment for raising children. And greater confidence in engaging with the employment market.

One of the advantages of moving to put secure tenure arrangements in place on land council land is that home ownership will become an option for those tenants who wish to move in that direction.¹¹

In a further speech on 21 April 2009, the Minister referred to the Australian Government's total funding commitment for remote Indigenous housing of \$5.5 billion over ten years. The Minister made further statements in relation to the reasons for the Australian Government's secure tenure policy:

As a pre-condition to new housing investment, the Commonwealth requires security of tenure. This is essential to protect assets and establish with absolute clarity who is responsible for tenancy management and ongoing repairs and maintenance.

In the past, the absence of secure, long-term tenure has meant inferior repairs and maintenance which, exacerbated by overcrowding, has meant houses become unliveable well before they should.

Over the past year, the Government has resolutely pursued long overdue reforms to put security of tenure at the centre of Indigenous housing policy – in exactly the same way that it underpins the private and social housing markets around the country.

We are working closely with Indigenous interests and traditional owners, recognising that differing circumstances across jurisdictions will require different pathways forward in different places. ...

The length of the leases varies. ... Essentially we are looking for leases that reflect the life of the asset we are building.¹²

The length of leases has varied, although this does not appear to be connected to the life of the asset. One of the aims of the National Partnership Agreement on Remote Indigenous Housing (the Remote Indigenous Housing Agreement), discussed in the next section, is to '[increase] the life cycle of remote Indigenous housing from seven years to a public housing-like lifecycle of up to 30 years'.¹³ The Australian Government has said that it requires a lease of at least 40 years for new housing under that agreement.

10 See Human Rights and Equal Opportunity Commission, *Submission of the Human Rights and Equal Opportunity Commission (HREOC) to the Green Paper on Homelessness – Which Way Home?* (4 July 2008), pp 23–25. At http://www.humanrights.gov.au/legal/submissions/2008/20080704_homelessness.pdf (viewed 7 September 2009). For an analysis of the Indigenous housing need across Australia, see also N Biddle, *The Scale and Composition of Indigenous Housing Need, 2001–06*, Centre for Aboriginal Economic Policy Research, CAEPR Working Paper No. 47/2008 (2008). At <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP47.pdf> (viewed 11 November 2009).

11 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Address to the NSW Aboriginal Land Council* (Speech to the NSW Aboriginal Land Council, Cessnock, 5 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/aboriginal_land_council_5mar09.htm (viewed 7 September 2009).

12 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Speech to the John Curtin Institute of Public Policy* (Speech delivered to the John Curtin Institute of Public Policy, Perth, 21 April 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/john_curtis_21april09.htm (viewed 7 September 2009).

13 Council of Australian Governments, *National Partnership Agreement on Remote Indigenous Housing*, cl 13(c). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_indigenous_housing.pdf (viewed 7 September 2009).

(b) COAG reform processes

The Australian Government is also implementing its Indigenous land tenure policies through its role in COAG.

Following the November 2008 meeting of COAG, the Australian governments entered into a number of National Partnership Agreements in relation to remote Indigenous communities. Two of these agreements refer to Indigenous land tenure – the National Partnership Agreement on Remote Service Delivery (the Remote Service Delivery Agreement)¹⁴ and the Remote Indigenous Housing Agreement.

(i) National Partnership Agreement on Remote Service Delivery

The Remote Service Delivery Agreement concerns the development of coordinated service delivery in select communities. One important aspect of this agreement is its reference to 26 priority communities, which I discuss in section 4.3 of this Chapter.

The Remote Service Delivery Agreement refers to Indigenous land tenure in two contexts. Firstly, it states that the objectives and outcomes of the Agreement will be achieved by ‘changes to land tenure and administration to enable the development of commercial properties and service hubs’.¹⁵

The Agreement states that delivering ‘the land tenure component’ is the responsibility of each of the states.¹⁶

The second reference to tenure is in relation to the ‘national principles for investments in remote locations’. These principles relate to decisions about which communities will receive government investment. Included in the principles is a statement that:

priority for enhanced infrastructure support and service provision should be to larger and more economically sustainable communities where secure land tenure exists, allowing for services outreach to and access by smaller surrounding communities.¹⁷

The Agreement does not clarify what ‘changes to land tenure’ and ‘secure land tenure’ means. I asked for further information about this, and was advised that these references are connected to the Australian Government’s three requirements for secure tenure, which I describe in the next section.¹⁸ Those requirements relate only to providing secure tenure for governments, rather than implementing tenure reform.

14 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*. At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf (viewed 7 September 2009).

15 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*, cl 17(l). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf (viewed 7 September 2009).

16 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*, cl 20(d). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf (viewed 7 September 2009).

17 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*, sch A. At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf (viewed 7 September 2009).

18 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

The Minister for Families, Housing, Community Services and Indigenous Affairs has said that another aim of the reforms is to provide 'greater economic opportunities (business investment and home ownership) as a result of resolution of land tenure and land administration issues'.¹⁹

(ii) *National Partnership Agreement on Remote Indigenous Housing*

Under the Remote Indigenous Housing Agreement, the Australian Government has committed to provide a total of \$4.75 billion over a ten-year period for the states and the Northern Territory to deliver improved remote Indigenous housing.²⁰

One of the outputs that the Agreement seeks to achieve is:

[the] progressive resolution of land tenure on remote community-titled land in order to secure government and commercial investment, economic development opportunities and home ownership possibilities in economically sustainable communities.²¹

As with the Remote Service Delivery Agreement, tenure reform under the Remote Housing Agreement is the obligation of the states, who have responsibility for:

developing and implementing land tenure arrangements to facilitate effective asset management, essential services and economic development opportunities.²²

The obligation of the Australian Government to provide the housing funding is expressed as being 'conditional on secure land tenure being settled'.²³

The Minister has since written to each of the state ministers responsible for housing advising them of three key requirements that determine whether secure land tenure has been settled:

1. The government must have access to and control of the land on which construction will proceed for a minimum period of 40 years. A longer period has additional advantages.
2. Tenure arrangements must support the implementation of tenancy management reforms including the issue of individual tenancy management agreements between the state housing authority and the tenant without requiring further consent from the underlying land owner. This capacity must also permit replacement of the housing service provider if required.
3. Native title issues must also have been resolved, in that any applicable process required by the Native Title Act has been conducted.²⁴

19 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), '\$1.3 billion towards closing the gap' (Media Release, 12 May 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/1.3billion_closing_gap_12may2009.htm (viewed 7 September 2009).

20 Council of Australian Governments, *National Partnership Agreement on Remote Indigenous Housing*. At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_indigenous_housing.pdf (viewed 7 September 2009).

21 Council of Australian Governments, *National Partnership Agreement on Remote Indigenous Housing*, cl 13(g). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_indigenous_housing.pdf (viewed 7 September 2009).

22 Council of Australian Governments, *National Partnership Agreement on Remote Indigenous Housing*, cl 16(c). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_indigenous_housing.pdf (viewed 7 September 2009).

23 Council of Australian Governments, *National Partnership Agreement on Remote Indigenous Housing*, cl 15(a). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_indigenous_housing.pdf (viewed 7 September 2009).

24 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

These three requirements are important. State governments have been making changes to their laws in order to be able to comply with these requirements.

(c) Assessing the elements of the Australian Government's policy

Although there is no comprehensive federal policy document on tenure reform, several themes have emerged from government statements, including:

- the relationship between tenure reform and obtaining secure tenure
- clarity of ownership of land and infrastructure
- providing clear housing management relationships
- encouraging public sector investment
- encouraging private sector investment
- encouraging private home ownership
- the negotiation of leases on Aboriginal land
- resolving native title issues.

I consider these aspects of the Australian Government's approach to tenure reform below.

(i) *The relationship between tenure reform and obtaining secure tenure*

It is important to make clear the distinction between tenure reform and secure tenure policies.

The term 'tenure reform' generally refers to changing the way in which land is owned or how interests in land (such as leases) can be granted. This can be done in a number of ways. While there is some confusion about the aims of Indigenous land tenure reform, a common theme is the aim of making it easier for Indigenous land owners to make use, including commercial use, of their land.

On the other hand, references to obtaining 'secure tenure' in statements of the current Australian Government are concerned with providing governments with some form of secure interest over land and infrastructure, often in the form of a lease. The main aim of secure tenure policies is to provide governments with authority and control, often at the expense of the Indigenous owners.

At times there is an overlap between tenure reform and secure tenure, such as when reforms to land tenure make it easier to grant a lease to the government.

This does not mean that the two policies are complementary, and at times, the aims are in conflict. There are a number of examples of this, such as the five-year leases in the Northern Territory. These leases provide the Australian Government with control over land use decision-making in communities, but inhibit the ability of Aboriginal land owners to make use of their land.

At times references by governments to Indigenous land tenure blur the distinction between the two policies. This can give the impression that by obtaining secure tenure, governments will be helping Indigenous land owners to make better use of their land.

While the Australian Government appears to have both a tenure reform policy and a secure tenure policy, it is clear that its main focus has been obtaining secure tenure. Where tenure reform has been introduced, it is mostly being used as a mechanism for the Government to obtain secure tenure.

(ii) *Clarity of ownership of land and infrastructure*

There is also a difference between providing clarity of ownership and providing governments with clear ownership.

Many parties have a legal interest in Indigenous peoples' lands. There can be confusion about rights and responsibilities of each party and uncertainty about how decisions should be made. Providing clarity of ownership can be a legitimate aim of tenure reform. It can be done in a number of ways.

There is a history across Australia of governments relying on informal title when providing infrastructure in Indigenous communities – that is, they have frequently built infrastructure without obtaining a lease or other type of formal permission. There is also a history of governments failing to provide the planning and survey work required to clarify the rights of occupants of individual blocks. In both cases, the main reason that this was done was to save money or to make limited funding go further.

For example, in the Northern Territory, governments have rarely made provision for leases when installing infrastructure (such as schools, police stations, administrative centres, sewerage ponds or social housing) in communities on Aboriginal land. By instead relying on informal arrangements, they have avoided the costs of obtaining surveys, negotiating and administering land use agreements and even paying rent.²⁵

While this has enabled governments to provide infrastructure more cheaply, it has also meant that some of the things that are normally dealt with in a lease – such as the rights of the occupier and a description of each parties' responsibilities – are now unclear.

Reforms to rectify this and improve clarity of ownership and the rights and responsibilities of each party must not be unilaterally imposed or result in the devaluing of Indigenous land. In particular, such reforms should not simply result in the transfer of land, or decision-making about land, to governments. I continue to hold the view that the current Minister for Families, Housing, Community Services and Indigenous Affairs previously expressed, that it is not 'beyond the wit of traditional owners and the government to devise land tenure arrangements which streamline transactions costs without fundamentally undermining Indigenous ownership and control of their land'.²⁶

A reform process should instead aim to provide long-term clarity through changes that deliver improved Indigenous land ownership, support the development of local governance and allow communities to meet their development needs. This requires consultation and negotiation at the local level, rather than bilateral consultation at the COAG level.

(iii) *Providing clear housing management arrangements*

In addition to providing a significant amount of funding for new housing and housing upgrades, the Australian Government is also pursuing reform of remote Indigenous housing management.

25 See M C Dillon & N D Westbury, *Beyond Humbug: Transforming government engagement with Indigenous Australia* (2007), p 131.

26 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 June 2007, pp 92–93 (The Hon Jenny Macklin MP, Shadow Minister for Indigenous Affairs). At <http://www.aph.gov.au/Hansard/reps/dailys/dr120607.pdf> (viewed 23 October 2009).

This housing management reform is being implemented through its secure tenure policy. By obtaining long-term leases over housing areas, governments will have long-term control over housing-related decision-making and responsibility for its management of housing.

As I have said, this is not tenure reform, although tenure reforms have been introduced to enable some states, such as Western Australia and Queensland, to comply with the Australian Government's requirements.

The housing reform policies of the Australian Government promote the extension of mainstream public housing to remote Indigenous communities. This policy rests on an assumption that public housing will deliver better outcomes in all remote Indigenous settings. This runs contrary to the Government's general housing reform policy for non-Indigenous communities. In relation to its general housing policy, the Minister for Families, Housing, Community Services and Indigenous Affairs said:

In 2007, community housing organisations held 34,700 properties nationally. This compares with 340,000 held by public housing authorities.

For the most part, community housing organisations are relatively small organisations that manage properties but do not own them.

There are about 1,000 providers nationally – some managing as few as 10 properties – others who themselves have developed and own over 1,000 properties.

Overall, they are very good at tenancy management. Often they have lower rates of rental arrears and better track records at maintenance than state housing authorities.

...

The centrepiece of the Government's reform agenda is to facilitate the growth of a number of sophisticated not for profit housing organisations that will operate alongside existing state-run housing authorities.²⁷

While the Australian Government's general housing reforms support the growth of community housing organisations, its Indigenous housing reforms promote management by state-run, public housing authorities.

Providing clear management arrangements should not necessarily mean providing clear government management arrangements. While some communities welcome the government taking more responsibility for the delivery of housing, others are concerned that public housing authorities have failed to deliver for Indigenous people and believe a community housing organisation can better meet their needs.

I discuss this further in section 4.4(a)(iii) of this Chapter.

(iv) *Encouraging public sector investment*

The Australian Government has stated that one of the reasons for tenure reform is to 'provide the secure tenure needed to attract government and commercial investment'.²⁸

27 T Plibersek (Minister for Housing), *Room for more: boosting providers of social housing* (Speech to the Sydney Institute, Sydney, 19 March 2009). At http://www.tanyaplibersek.fahcsia.gov.au/internet/tanyaplibersek.nsf/content/social_housing_19mar09.htm (viewed 23 October 2009).

28 See, for example, J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Address to the NSW Aboriginal Land Council* (Speech to the NSW Aboriginal Land Council, Cessnock, 5 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/aboriginal_land_council_5mar09.htm (viewed 7 September 2009).

Secure tenure does not of itself attract government investment. Government policies may prevent investment where certain tenure requirements are not met, but this is at the discretion of governments. There can be benefits in governments providing for clear and secure tenure arrangements. However, the imposition of policies that require secure tenure for the provision of government services can impede effective service delivery.

Government policies should target investment at those locations where it can do the most good. This is determined by the level of need and the effectiveness of programs. While the Australian Government has committed itself to an evidence based approach to policy implementation,²⁹ there is no evidence that secure land tenure for governments is a key determinant of the effectiveness of programs. Making secure tenure a precondition elevates this above other factors that will determine whether or not a program will be successful.

This does not mean that governments should not pursue policies to resolve problems with tenure where they exist. However, this should not result in delays in providing government investment. Government investment should instead be determined by strategies that reduce Indigenous disadvantage in the shortest possible time frame, in accordance with the *Close the Gap* principles.³⁰ That is, a human rights-based approach to development.³¹

In section 4.5(a) of this Chapter, I describe how the Australian Government's secure tenure policy is being implemented in Queensland. In my view, this policy has diverted attention from long-term tenure reform to finding ways to comply with the Australian Government's requirements. The Australian Government and state governments should instead be providing increased support for programs that lead to long-term resolution of tenure and native title.

Linking government investment to tenure reform can also create confusion and resentment at a community level. Rather than having the opportunity to be proactively involved in fixing any problems, Indigenous communities are instead presented with a set of requirements that they must comply with in order to receive services.

In some circumstances, these requirements relate not just to the land on which the service will be delivered, but also to other areas of land. The rules for new housing under the SIHIP in the Northern Territory are an example of this. The Australian Government requires a lease over not just the new housing areas, but over all housing, including existing and proposed housing areas, or over the entire community.³²

As the Director of the Central Land Council, David Ross, has stated, the Australian Government's lease requirements have created confusion in central Australian communities, who feel pressured into agreeing to the leases.³³

29 See, for example, J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Macklin Meets Northern Territory Emergency Taskforce' (Media Release, 17 January 2008). At http://www.jennymacklin.fahcsia.gov.au/Internet/jennymacklin.nsf/content/ntetaskforce_17jan08.htm (viewed 7 September 2009).

30 *Close the Gap Statement of Intent* (signed at the Indigenous Health Equality Summit, Canberra, 20 March 2008). At www.humanrights.gov.au/social_justice/health/statement_intent.html (viewed 3 November 2009).

31 *United Nations Declaration on the Right to Development*, GA Resolution 41/128 (Annex), UN Doc A/RES/41/128 (1986). At <http://www.un.org/documents/ga/res/41/a41r128.htm> (viewed 30 October 2009).

32 For further detail, see section 4.4(c) of this Chapter.

33 Central Land Council, 'Community confusion over leases' (Media Release, 5 June 2009). At <http://www.clc.org.au/Media/releases/2009/hermannsburg.html> (viewed 7 September 2009).

(v) *Encouraging private sector investment*

One of the main reasons for tenure reform is to make Indigenous land available to attract ‘commercial investment’, including ‘private sector investment to expand the housing asset base’.³⁴

I support improved economic opportunities for Indigenous people. However, in my view, it has not always been clearly explained how tenure reform will be used to deliver economic development. Clear information must be provided about the exact nature of proposed reforms, and how they will attract commercial investment, before Indigenous communities and landowners are asked to agree to them.

An effective way of giving Indigenous people more opportunities for economic development is to provide them with improved forms of Indigenous land ownership, particularly in those parts of Australia where Indigenous land is held under inferior forms of title. Yet, this approach is not reflected in tenure reform policies.

The Australian Government first implemented its tenure reform policies in the Northern Territory, initially through township leases and then as part of the Northern Territory Emergency Response. Previously, Aboriginal land in the Northern Territory was one of the most secure forms of Indigenous land ownership in Australia. The result of the Government’s reforms has been to weaken that security.

While five-year leases are a clear example of this, I am also concerned about the impact of township leases. As the Northern Land Council said in its submission to the Senate inquiry into the legislation which introduced township leasing, ‘traditional owners are expected to forgo their right to engage in commercial development over large areas of vacant land for 99 years’.³⁵ I share the Land Council’s concerns, and do not accept that opportunities to attract commercial investment are improved by bringing land under the control of a government entity.

I have also previously said that one of the key factors that determines whether an economic development project will be successful is whether there is Indigenous control over decision-making.³⁶ I support reforms to land tenure that deliver improved forms of Indigenous land ownership and improved control over decision-making.

However, it is not true that all tenure reform will deliver improved economic opportunities for Indigenous people. For example, the long-term legacy of tenure reform may be negative if it results in commercially valuable areas of Indigenous land being effectively sold off.

Reforms to land tenure for the purpose of attracting commercial investment will be experienced differently by diverse Indigenous communities across Australia. I would like to see Indigenous communities provided with clear information about how particular reforms will operate before they are called upon to engage in those reforms. Principles for engagement and consultation are set out in Appendix 3 to this Report.

34 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Closing the Gap – Building an Indigenous Future* (Speech delivered to the National Press Club, Canberra, 27 February 2008). At http://www.jennymacklin.fahcsia.gov.au/Internet/jennymacklin.nsf/content/closing_the_gap_27feb08.htm (viewed 23 October 2009).

35 Northern Land Council, *Submission to Senate Community Affairs Committee Inquiry into Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* (21 July 2006), p 13. At http://www.aph.gov.au/senate/committee/clac_ctte/completed_inquiries/2004-07/aborig_land_rights/submissions/sub13.pdf (viewed 7 September 2009).

36 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), ch 2. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 29 October 2009).

(vi) *Encouraging private home ownership*

In 2006, the former Minister for Indigenous Affairs, Mal Brough, stated that reforms to Aboriginal land tenure in the Northern Territory to introduce township leasing would 'allow Aboriginal Australians in parts of the Northern Territory who have been denied rights for many years to be able to own their own home'.³⁷

The current Government has been more considered in its references to home ownership, saying instead that as a result of tenure reform 'over time, remote Indigenous citizens will have a realistic opportunity to own their own homes'.³⁸

As many Australians know, there can be significant benefits in home ownership. The Minister for Families, Housing, Community Services and Indigenous Affairs has recognised:

that home ownership can bring important social and economic benefits. Greater financial security. Greater independence. A more stable environment for raising children. And greater confidence in engaging with the employment market.

One of the advantages of moving to put secure tenure arrangements in place on land council land is that home ownership will become an option for those tenants who wish to move in that direction.³⁹

For home ownership to provide social and economic benefits, a number of things must be present. For example, the financial circumstances of the owner must support the requirements of home ownership, including the costs of providing repairs. There must be a market, and the purchase price must be appropriate to both the market and the financial circumstances of the purchaser. There must be a low risk of mortgage default. The house must be suitable for the needs of the purchaser and able to retain its value. The obligations and risks must be clearly understood and agreed upon and the scheme must be appropriate to the cultural needs of the residents.

The cost of housing construction in remote communities presents a significant challenge for any home ownership scheme. These costs have increased dramatically over the last decade.⁴⁰ While this Report was being written, the Australian Government announced that the cost of constructing houses under the SIHIP in the Northern Territory would be between \$450 000 and \$550 000 per house.⁴¹ That is well beyond the financial reach of remote Indigenous community residents and indeed of many people in other parts of Australia.

It also needs to be remembered that the existence of a housing market in remote Indigenous communities cannot be assumed.

37 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2006, p 121 (The Hon Mal Brough MP, Minister for Indigenous Affairs). At http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2006-06-19/0163/hansard_frag.pdf;fileType%3Dapplication%2Fpdf (viewed 7 September 2009).

38 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 February 2009, p 2031 (The Hon K Rudd, Prime Minister). At <http://www.aph.gov.au/Hansard/rep/dailys/dr260209.pdf> (viewed 23 October 2009).

39 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Address to the NSW Aboriginal Land Council* (Speech to the NSW Aboriginal Land Council, Cessnock, 5 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/aboriginal_land_council_5mar09.htm (viewed 7 September 2009).

40 See A Szava et al, *The Cost of Housing in remote Indigenous Communities: Views from the Northern Territory Construction Industry* (2007). At <http://www.icat.org.au/media/Research/housing/Cost-of-housing-construction-industry-views.pdf> (viewed 7 September 2009).

41 See J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Improving Indigenous housing in the NT' (Media Release, 31 August 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/sihip_31aug09.htm (viewed 7 September 2009).

An important issue for residents in Indigenous communities is whether a housing market should be open or closed. A closed market will ensure that housing remains in local Aboriginal ownership but may mean lower prices. An open market will mean outsiders have the opportunity to buy into the community. Given that the status of Indigenous lands across Australia will vary from communally owned land to freehold and to special purpose leased land, a one-size-fits-all approach is neither appropriate nor desirable.

These, and a number of other factors, make ownership in remote Indigenous communities a complicated matter. Encouraging residents to take on home ownership, with an associated housing loan / mortgage, may put them in a vulnerable position.

Any home ownership scheme needs to have a clear set of aims. Aims can include providing economic security and independence and a greater sense of ownership.

For a scheme to be effective, the aims must be determined by the participants themselves and the rules about the scheme must be consistent with these aims. Where the aims are not realistic, or ignore certain risks, these need to be reconsidered before a scheme is implemented. Setting out the aims of a scheme will also assist in reviewing its effectiveness, so that other communities can learn about the risks and opportunities of home ownership.

In section 4.6 of this Chapter I set out some principles that should underpin the introduction of any land tenure reforms or home ownership schemes. This includes providing the community and participants with clear and appropriate information, such as economic modelling, reports on the condition of houses, financial planning and legal advice. The central principle is free, prior and informed consent, both at an individual and community level.

(vii) The negotiation of leases on Aboriginal land

The Minister for Families, Housing, Community Services and Indigenous Affairs has stated that the approach of the Australian Government to housing and tenure ‘means that government must treat Aboriginal land owners like any other land owners. If we want to build public housing on your land, we must negotiate a lease to do it’.⁴²

However, when the Australian Government will not provide services such as housing, education or health facilities unless a lease is granted, it is clearly in the stronger position during lease negotiations. To a significant extent, government policy determines how much is open for negotiation. The payment of rent and control of decision-making are two examples of this.

The Australian Government appears to still be developing its policy in relation to rent for leases on Indigenous land. For long-term housing leases, it has not provided for the payment of rent ‘in recognition of the significant government investment in housing set to follow’ the grant of the lease.⁴³

42 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Address to the NSW Aboriginal Land Council* (Speech to the NSW Aboriginal Land Council, Cessnock, 5 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/aboriginal_land_council_5mar09.htm (viewed 7 September 2009).

43 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

However for other leases, the Australian Government agrees that rent should be paid, and says that an important part of land reform is to see land users, including government agencies, pay for the cost of doing business on Aboriginal land as they would elsewhere in Australia.⁴⁴

I consider that Aboriginal and Torres Strait Islander land owners should have the same rights as other land owners when leasing their land to governments, including the right to receive rent.

I am aware that in many cases Aboriginal and Torres Strait Islander land owners have agreed not to charge rent for leases on their land, particularly when the lease is to a local Indigenous organisation or is for the delivery of a community service.⁴⁵ One of the problems with township leases is that it is a government entity, rather than the traditional owners, who decide whether or not organisations pay rent on subleases. And, this government entity is funded from the Northern Territory Aboriginal peoples' future fund – the Aboriginals Benefit Account.⁴⁶

In the Northern Territory, the Australian Government has also used the offer of rent to try and obtain the form of lease that it prefers, as I describe in section 4.4(c). While it will not pay rent for a housing precinct lease, the Australian Government agrees to provide an upfront rental payment as well as a community benefits package on the grant of a township lease. This does not reflect a commercial distinction, rather the use of incentives to encourage traditional owners to grant the form of lease which the Australian Government prefers.

In relation to decision-making, the Australian Government will not accept a term that requires the consent of the Indigenous land owners for certain key decisions.⁴⁷ However, this is at odds with the Government's recognition, in relation to Closing the Gap, that:

Another important aim – and the basis for any sustainable improvement – is to strengthen Indigenous leadership and governance and increase economic and social participation.⁴⁸

This aim needs to be reflected in the terms of leases, which should support local Indigenous decision-making and build Indigenous capacity for self-governance.

(viii) *Resolving native title issues*

As I have commented above, Australian governments have not always obtained formal permission when building infrastructure and have instead relied on informal title. At times, this attitude has extended to native title, with some governments not complying with the *Native Title Act 1993* (Cth) (Native Title Act), or interpreting it in such a way that it is not necessary for the government to comply with any of the Act's procedures. This attitude has often meant that the impact of any works

44 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

45 See, for example, Central Land Council, *Policy Paper: Communal Title and Economic Development* (2005), p 21. At http://www.clc.org.au/Media/papers/CLC_%20tenure_paper.pdf (viewed 9 November 2009).

46 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 64(4A). See also Australian Government, Office of Township Leasing, *Annual Report 2008–2009* (2009), p 13. At http://www.otl.gov.au/docs/annual_report_0809.pdf (viewed 23 November 2009).

47 See further section 4.4(b)(i), below.

48 Commonwealth Government, *Budget 2009–2010 Ministerial Statement on Closing the Gap between Indigenous and non-Indigenous Australians*. At http://www.aph.gov.au/Budget/2009-10/content/ministerial_statements/indigenous/html/ms_indigenous-03.htm (viewed 7 September 2009).

on native title, and any consequent implications for compensation or validity of the works, are uncertain.

However, the Minister for Families, Housing, Community Services and Indigenous Affairs has now stated that one requirement for Australian Government funding under the COAG agreement is that ‘any native title issues need to be resolved to ensure that construction and refurbishment can proceed as quickly as possible’.⁴⁹

There are two regimes within the native title system that governments can use to achieve resolution of native title issues as required by the Australian Government.

The Native Title Act creates the procedures for parties to reach an Indigenous Land Use Agreement (ILUA), which is an agreement between a native title group and others about the use and management of land and waters. ILUAs can be negotiated as part of a native title determination, or settled separately from a native title claim. They are flexible and can cover a wide range of topics including how native title holders can agree to a future development, how native title rights coexist with the rights of other people, access to an area, extinguishment of native title and compensation.⁵⁰ The ILUA process can already be used to negotiate for the building of houses in Indigenous communities.

However, when the ILUA process is not being utilised (usually because governments consider it to be too resource intensive and time consuming), governments turn to the future acts regime to ensure their actions comply with the Native Title Act and are valid.

The future acts regime establishes a procedural framework that parties must comply with before undertaking any activity which may affect native title.

The Native Title Act sets out different processes that apply when a party wants to undertake different types of future acts. These processes vary, from simply requiring that a native title party be notified, to requiring that negotiations be conducted with the native title party. The future acts regime also provides for other implications such as whether compensation is payable and what the long-term impact on native title will be.

However, none of the existing future acts processes apply specifically to the building of public housing in Indigenous communities, and there is confusion over whether any of the existing processes apply at all. Governments consider that this uncertainty is a factor which contributes to delays in building infrastructure.⁵¹

For this reason, the Australian Government released a discussion paper on possible amendments to the future acts regime that would insert a new process which deals specifically with building of housing, and possibly other public infrastructure, in Indigenous communities.⁵²

49 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Address to the NSW Aboriginal Land Council* (Speech to the NSW Aboriginal Land Council, Cessnock, 5 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/aboriginal_land_council_5mar09.htm (viewed 7 September 2009).

50 See National Native Title Tribunal, *About indigenous land use agreements*, http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Pages/About_iluas.aspx (viewed 28 October 2009).

51 Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs, *Discussion Paper: Possible housing and infrastructure native title amendments* (2009), p 4. At http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/NativeTitleAmendments_DiscussionPaper.aspx (viewed 7 September 2009).

52 Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs, *Discussion Paper: Possible housing and infrastructure native title amendments* (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/NativeTitleAmendments_DiscussionPaper.aspx (viewed 7 September 2009). At the time of writing, consultations on the discussion paper were ongoing.

I made a submission in response to the discussion paper in which I emphasised the benefits of governments reaching ILUAs rather than applying any future acts process. These include that ILUAs can provide certainty for all parties, including certainty around future developments and the long-term relationship between the parties. An ILUA can be tailored to the circumstances of the specific community and can be holistic, covering a range of issues that the parties want to address. As ILUAs require *agreement* between the parties, not simply consultation, they are also consistent with Australia's international human rights obligations, in particular the rights affirmed by the *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration on the Rights of Indigenous Peoples).⁵³

Nonetheless, the proposed new future acts process could impose greater procedural requirements than many other existing future acts processes. That is, it may require that governments undertake 'genuine consultation' as opposed to simply notify and receive comments on the proposal. Because of the requirement for 'genuine consultation', the proposal in the discussion paper could be an improvement on many of the existing future acts processes, but in any case it is not preferable to the parties reaching an ILUA.

4.3 Priority locations

The development of tenure reform policies has been accompanied by a new policy of identifying priority communities. There has been a strong connection between the two policies, particularly in relation to the 26 priority locations selected under the COAG National Partnership Agreements, but also under the Northern Territory's 'A Working Future' policy.

While the policy of identifying priority locations has not received much attention, it is a significant development, particularly for Indigenous people who do not live in or near a priority community and who wonder what will happen to services in their community over time.

On the one hand, the new policy is just a way of approaching service delivery. It utilises a 'hub and spoke' model where outreach services are delivered from identified regional centres.⁵⁴ It is not clear in all circumstances how this will work. Some services (such as housing) cannot be delivered through a hub and spoke model. Many remote communities will be hundreds of kilometres from the nearest service hub, making access difficult.

The priority location policy also represents a shift in the way in which services will be allocated. Communities that are selected as priority locations will receive a higher level of support than other communities. One anticipated outcome of the policy is the 'voluntary mobility' of individuals and families towards certain areas.⁵⁵

In this section, I describe the development of policies related to priority locations, initially in relation to housing in the Northern Territory and then more broadly.

53 GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007). At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 23 November 2009).

54 See further T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009*, Australian Human Rights Commission (2009), ch 4.

55 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*, sch A. At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf (viewed 7 September 2009).

(a) The Australian Government's priority locations: Northern Territory

In September 2007, a memorandum of understanding between the Australian Government and Northern Territory Governments in relation to Indigenous housing described Indigenous communities in the Northern Territory as falling into three levels of priority.⁵⁶

First priority communities are main urban centres (including town camps) and 'larger / strategically placed growth communities'. Second priority communities are described as 'smaller communities', third priority communities as other communities and homelands.⁵⁷ Under the agreement, first priority communities will receive new housing to meet existing demand and future growth and the Australian Government would seek to negotiate township leases over the communities. Second priority communities would, for the most part, receive only repairs and upgrades with new housing provided on 'a case by case basis'. Third priority communities would receive no Australian Government funding for housing construction.

The SIHIP, which was announced by the new Australian Government on 21 April 2008, implements the principles set out in the memorandum of understanding.⁵⁸

Under SIHIP, the Australian Government has identified 73 significant Indigenous communities in the Northern Territory, being those communities which generally have a population of more than 100 people. Of these 73 communities, only 16 are eligible to receive new housing while the remaining 57 communities will receive only housing upgrades. There is no provision for those remaining communities to receive new housing, regardless of levels of housing stress. Homelands and other smaller Indigenous communities do not receive any assistance under SIHIP.

(b) COAG processes

The Australian Government is extending its focus on priority locations beyond the Northern Territory through its role in COAG, and in particular through the two National Partnership Agreements that I described in section 4.2(b).

The Remote Service Delivery Agreement describes 26 proposed locations for initial implementation of a new approach to remote Indigenous service delivery:

- a) the 15 larger major works communities in the Northern Territory already identified for significant housing and infrastructure investment under the Strategic Indigenous Housing and Infrastructure Program;⁵⁹
- b) 4 locations in the Cape York and Gulf regions in Queensland;
- c) 3 locations in Western Australia, with at least 2 locations in the Kimberley;

56 *Memorandum of understanding between the Australian Government and the Northern Territory Government: Indigenous Housing, Accommodation and Related Services September 2007* (2007). At http://www.aph.gov.au/senate/committee/indig_ctte/submissions/sub28_attachment_8.pdf (viewed 7 September 2009).

57 *Memorandum of understanding between the Australian Government and the Northern Territory Government: Indigenous Housing, Accommodation and Related Services September 2007* (2007), cl 17. At http://www.aph.gov.au/senate/committee/indig_ctte/submissions/sub28_attachment_8.pdf (viewed 7 September 2009).

58 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), P Henderson (Northern Territory Chief Minister) & W Snowdon (Member for Lingiari), 'Landmark Housing Project for NT Indigenous Communities' (Media Release, 12 April 2008). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/landmark_housing_12april08.htm (viewed 7 September 2009).

59 The SIHIP program provides for new housing in 16 select communities. However, the community of Milyakburra has been removed from this list for the purpose of the National Partnership Agreements, and the number of NT communities has been reduced to 15.

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- d) 2 locations in the Anangu Pitjantjatjara Yankunytjatjara Lands in South Australia; and
- e) 2 remote locations in the Murdi Paaki region in Western New South Wales.⁶⁰

The communities outside of the Northern Territory were not identified at the time.

The second of these COAG agreements, the Remote Indigenous Housing Agreement, did not itself refer to the 26 priority locations. However on 23 March 2009, the Australian Government announced that 'initial housing investment' under that Agreement 'will focus on these 26 larger communities which have the potential for economic development'.⁶¹

The identity of the remaining priority locations was announced by the Minister for Families, Housing, Community Services and Indigenous Affairs in a speech on 21 April 2009:

Today I can announce the priority locations across Australia.

In Western Australia, we will implement the Remote Service Delivery Strategy in towns and communities around Fitzroy Crossing, Halls Creek and on the Dampier Peninsula, including the communities of Ardyaloon and Beagle Bay.

In the Northern Territory: Galiwinku, Gapuwiyak, Gunbalanya, Hermannsburg, Lajamanu, Maningrida, Milingimbi, Nguui, Ngukurr, Numbulwar, Wadeye, Yirrkala, Yuendumu, Angurugu and Umbakumba.

In Queensland: Mornington Island, Doomadgee, Hope Vale and Aurukun (together with continuing work in Mossman Gorge and Coen which are also part of the Cape York Welfare Reform).

In South Australia: Amata and Mimili.

And in New South Wales: Walgett and Wilcannia.⁶²

A table of these communities, including a brief description of the land ownership, is provided at Appendix 5 to this Report.

(c) How priority locations are selected

I have asked the Government how the number of 26 locations was decided upon, rather than a greater or smaller number. I have been told only that it was decided upon through the COAG Working Group on Indigenous Reform, following bilateral discussions with each jurisdiction.⁶³

60 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*, cl 13. At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf (viewed 7 September 2009). The 26 communities are named in Appendix 5 to this Report.

61 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Remote Indigenous housing investment' (Media Release, 23 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/remote_indigenous_housing_23mar2009.htm (viewed 7 September 2009).

62 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Speech to the John Curtin Institute of Public Policy* (Speech delivered to the John Curtin Institute of Public Policy, Perth, 21 April 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/john_curtis_21april09.htm (viewed 7 September 2009).

63 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

In relation to the process for selecting the locations, the Remote Service Delivery Agreement includes some general information. The Agreement attaches a set of principles called the ‘Principles taken into account in deciding sequencing’, which says:

The following principles will be taken into account in deciding sequencing:

- (a) areas where we have already applied significant reform effort that can be readily built upon (see below):
 - (i) that is, locations where communities have demonstrated a willingness to actively participate in the change process, supported by strong leadership;
- (b) preparedness to participate in steps to rebuild social norms – for example, welfare reform and alcohol management;
- (c) labour market opportunities and potential for corporate investment/partnerships and business development;
- (d) capacity to be developed and utilised as a service hub (including transport) with linkages with smaller communities/homelands; and
- (e) capacity of service supply needs to be met – including consideration of capacity of existing local service providers and capacity of the location to support incoming services (for example, availability of built facilities and staff housing for staff).⁶⁴

The Agreement also states that:

priority for enhanced infrastructure support and service provision should be to larger and more economically sustainable communities where secure land tenure exists, allowing for services outreach to and access by smaller surrounding communities, including:

- (i) recognising Indigenous peoples’ cultural connections to homelands (whether on a visiting or permanent basis) but avoiding expectations of major investment in service provision where there are few economic or educational opportunities; and
- (ii) facilitating voluntary mobility by individuals and families to areas where better education and job opportunities exist, with higher standards of services.⁶⁵

In addition to these principles, the following criteria were also taken into consideration in deciding on the specific locations:

- significant concentration of population
- anticipated demographic trends and pressures
- the potential for economic development and employment
- the extent of pre-existing shortfalls in government investment in infrastructure and services.⁶⁶

64 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*, sch B. At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf (viewed 7 September 2009).

65 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*, sch A. At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf (viewed 7 September 2009).

66 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

Consideration was also given to the locations where the Australian Government was already engaged in significant projects – such as in the Northern Territory and Cape York – and in the case of the Dampier Peninsula, to the opportunities presented by the Browse Basin LNG Project and the involvement of several communities in that area in leadership work.⁶⁷

The selection of specific locations by the COAG Working Group on Indigenous Reform followed only bilateral discussions with each jurisdiction.⁶⁸ There was no process for consultation with Indigenous people or organisations or with the general public. No details have been provided about the material that was relied on, such as demographic or population data, or the tools used to assess economic viability or preparedness to participate in reforms.

Under this policy, further communities may be selected as priority locations. The criteria described above will be used to determine those further locations.⁶⁹ An Implementation Plan includes some information about how this will take place in the Northern Territory:

Once the strategy is established in the first fifteen locations [in the Northern Territory], consideration will be given to expanding the approach to additional locations, including those identified as Territory Growth Towns under the Northern Territory Government's A Working Future policy framework [see below for a description of this policy].

This process will be consistent with the principles outlined in the *Principles Taken into Account in Deciding Sequencing* at Schedule B of the Agreement and with the *Coordinator-General for Remote Indigenous Services Act 2009*, which provides that the Australian Government Minister for Indigenous Affairs must consult with the relevant Northern Territory Minister prior to specifying new remote locations under the Act.⁷⁰

As with the locations that have already been selected, the process for selecting new locations requires only bilateral consultation with the relevant state or territory Minister. It does not require consultation with the affected Indigenous communities or organisations or with the general public.

As I have repeatedly said, for reforms to be effective they must be made with the full participation of the Indigenous people whose lives are affected by them. In relation to such a significant policy, it is not sufficient for governments to consult only with themselves.

67 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009. See also J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Speech to the John Curtin Institute of Public Policy* (Speech delivered to the John Curtin Institute of Public Policy, Perth, 21 April 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/john_curtis_21april09.htm (viewed 7 September 2009).

68 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

69 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Speech to the John Curtin Institute of Public Policy* (Speech delivered to the John Curtin Institute of Public Policy, Perth, 21 April 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/john_curtis_21april09.htm (viewed 7 September 2009).

70 Commonwealth of Australia and the Northern Territory, *Implementation Plan for National Partnership Agreement on Remote Service Delivery*. At http://www.workingfuture.nt.gov.au/download/NT_RSD_Bilat_Imp_Plan.pdf (viewed 7 September 2009).

(d) What the priority location policy means

While it has been described as marking a new approach to remote Indigenous service delivery, there is no policy document that describes what the new priority location policy will mean for Indigenous communities, especially for non-priority communities.

In part, the policy of identifying priority communities is a new way of structuring service delivery. The Australian Government has recognised that the old ‘scattergun’ approach did not work, and claims that the new approach will provide for more targeted service delivery:

Our new model for remote service delivery will initially concentrate resources in priority locations across Australia.

So that in just a few years we can build a critical mass of support and assistance to bring services and conditions in remote Indigenous communities up to the same standard as comparably sized communities elsewhere in Australia. ...

Of course, other communities and townships will continue to receive government support and services.

This will include access to new housing construction and upgrades, employment programs and CDEP, and the range of normal funding arrangements across the whole of government.

But, the intention is to maximise the role of priority communities as service hubs.⁷¹

I sought clarification from the Australian Government on what services will be affected by this new model, and was advised that governments will work together to improve access to services ‘including early childhood, health, housing and welfare services’.⁷² I was also referred to the Local Implementation Plans that will be developed in each priority location under the Remote Service Delivery Agreement.

The first step in the preparation of Local Implementation Plans is baseline mapping of social and economic indicators, current government services and gaps in those services. When these are completed, Local Implementation Plans will be developed in consultation with local community members and other parties, for example, non-government organisations and business / industry partners.⁷³

One of the functions of the new Coordinator-General for Remote Indigenous Services is to monitor the implementation of Local Implementation Plans.⁷⁴

It is hoped that this model will deliver better coordinated and better managed services in communities that have been selected to be priority locations. Local Implementation Plans will be public documents. When they are completed, Indigenous residents of those communities should have a clearer picture of how this new model will work.

71 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Speech to the John Curtin Institute of Public Policy* (Speech delivered to the John Curtin Institute of Public Policy, Perth, 21 April 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/john_curtis_21april09.htm (viewed 7 September 2009).

72 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

73 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*, cl 12(d). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.rtf (viewed 9 September 2009).

74 *Coordinator-General for Remote Indigenous Services Act 2009* (Cth), s 14.

However, as I said above, the policy of identifying priority locations is not just a new service delivery model. It is also a policy of providing higher levels of support to select communities. The provision of housing in the Northern Territory is an example of this.

The principles that determine sequencing, which are set out above, are not designed to identify the communities with the greatest need. While need and the adequacy of existing services are considered, the focus of the principles is on identifying those communities that meet government-set criteria for sustainability or growth. This includes economic sustainability, but also preparedness to participate in reforms and willingness to provide secure tenure to the government.

This policy anticipates supporting the growth of select locations ahead of other communities and its principles include 'facilitating voluntary mobility by individuals and families to areas where better education and job opportunities exist, with higher standards of services'.⁷⁵

This aspect of the policy needs to be made clearer to residents of remote Indigenous communities. In the course of preparing this Report, I spoke to remote community members and it was clear that there is a very low level of awareness of the priority location policy. This was the case even in those communities that have been selected as priority locations.

(e) Extension of the priority location policy

Though less publicised, the Western Australian Government has stated that it is also developing a priority location policy:

Essentially, services are provided to large settlements who in turn service the small, satellite communities on an outreach basis. This model was endorsed in the COAG Remote Service Delivery National Partnership Agreement in Western Australia. ...

The State targets housing resources to communities that are assessed as being sustainable using specified criteria such as the quantity and quality of water; risk of flooding; access to services; and access to employment and enterprise opportunities.⁷⁶

As with the Australian Government policy, this describes both a hub and spoke service delivery model and a policy of providing a higher level of support for select communities and less support for other communities. Further details of this policy have not yet been announced.

75 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*. At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.rtf (viewed 9 September 2009).

76 Department of Indigenous Affairs, Government of Western Australia, *Submission to the Senate Select Committee on Regional and Remote Indigenous Communities* (27 May 2009), p 6.

(f) Northern Territory – A Working Future

Consistent with the principles developed by the Australian Government, on 20 March 2009 the Northern Territory Government announced a policy called ‘A Working Future’.⁷⁷ ‘A Working Future’ includes both a new policy on homelands and the identification of 20 growth towns.⁷⁸

(i) Policy on homelands

Under the memorandum of understanding between the Australian and Northern Territory Governments of September 2007, which I described earlier, the Northern Territory Government was also required to assume full responsibility for municipal and essential service delivery to homelands from 1 July 2008. The Australian Government agreed to contribute \$20 million per year for the first three years, which the Northern Territory Government was concerned would be ‘insufficient to fund adequate services to outstations’.⁷⁹

As a result, the Northern Territory Government was required to develop a new policy. It released a discussion paper and engaged Pat Dodson to conduct community consultations in relation to the development of the policy.⁸⁰ A report on the outcome of those consultations was delivered in January 2009.⁸¹

The report, which recommended the use of the term ‘homeland’ in place of ‘outstation’, stated that the starting point should be comprehensive economic modelling to determine the costs of investing in homelands (at different levels of service) and to provide a cost / benefit analysis of the implications of not investing.

This recommendation was not implemented. ‘A Working Future’ instead sets out new rules for when a homeland can receive funding and new limits on what that funding can include. As part of this, there will be no financial support for new homelands or for further housing on existing homelands. Services to existing housing will move towards a user-pay system.⁸²

77 Northern Territory Government, ‘A Working Future: Real Towns, Real Jobs, Real Opportunities’ (Media Release, 20 May 2009). At <http://newsroom.nt.gov.au/index.cfm?fuseaction=printRelease&ID=5584> (viewed 23 October 2009).

78 In its Headline Policy Statement, the Northern Territory Government uses ‘outstations / homelands’ as a generic description, and uses homelands or outstations interchangeably as appropriate to each location. See Northern Territory Government, *Working Future: Fresh Ideas/ Real Results – Headline Policy Statement* (2009). At http://www.workingfuture.nt.gov.au/download/Headline_Policy_Statement.pdf (viewed 17 September 2009). This Report will use the term ‘homelands’, except for where the specific community uses the term ‘outstation’ or where the Report quotes other sources or cites existing documents.

79 *Memorandum of understanding between the Australian Government and the Northern Territory Government: Indigenous Housing, Accommodation and Related Services September 2007* (2007). At http://www.aph.gov.au/senate/committee/indig_ctte/submissions/sub28_attachment_8.pdf (viewed 7 September 2009).

80 Northern Territory Government, ‘Outstations Consultations to Continue’ (Media Release, 2 December 2008). At <http://newsroom.nt.gov.au/index.cfm?fuseaction=printRelease&ID=4854> (viewed 23 October 2009).

81 Socom + Dodson Lane, *NTG Outstations Policy: Community Engagement Report* (2009). At http://www.workingfuture.nt.gov.au/download/Community_Engagement_Report.pdf (viewed 7 September 2009).

82 See Northern Territory Government, *Working Future: Fresh Ideas/ Real Results – Headline Policy Statement* (2009). At http://www.workingfuture.nt.gov.au/download/Headline_Policy_Statement.pdf (viewed 17 September 2009).

Dodson was critical of this policy for ignoring the recommendations in his report and failing to recognise the positive attributes of homelands, stating:

Australia has not learned anything from the history of destabilising Indigenous people if this policy is allowed to stand and homelands people are forced to co-locate in these major towns against their wishes.⁸³

(ii) *Twenty growth towns*

'A Working Future' also identifies 20 Aboriginal communities that will be developed into what are described as 'growth towns' or 'service hubs'. The communities selected are the 15 priority communities for the Northern Territory under the National Partnership Agreements described above, together with the communities of Borroloola, Ramingining, Daguragu / Kalkarindji, Papunya, Elliott and Ali Curung.⁸⁴

As with the Australian Government policy, the implications of the Northern Territory's policy for service delivery in other Aboriginal communities is not yet clear. The Northern Territory Government states that it will not take money away from other communities to build up the 20 growth towns⁸⁵ but has been criticised for not providing details about what the reforms will mean for community services.⁸⁶

The Northern Territory Government has also connected the growth town policy to tenure reform, stating:

Many of our remote towns are built on Aboriginal land.

The Territory Government will work with the land owners in towns to get secure leases for private investment. To be successful at attracting private investment it is critical that security and certainty can be provided to investors.

With secure leases in place, new businesses will be created and new investments will flow. That will mean more jobs and opportunities for local people. It will break the welfare cycle.⁸⁷

In 'A Working Future', the Government does not specify the type of lease contemplated by this policy. However, the Australian Government and the Northern Territory Government have committed to try to negotiate s 19A township leases with the 15 communities that are also covered by the Remote Service Delivery Agreement.⁸⁸

83 S Everingham, 'Killing us softly: Dodson slams outstations plan', *ABC News Online*, 2 June 2009, <http://www.abc.net.au/news/stories/2009/06/02/2587462.htm> (viewed 7 September 2009).

84 Northern Territory Government, *Working Future: Territory Growth Towns*, http://www.workingfuture.nt.gov.au/growth_towns.html (viewed 7 September 2009). While the policy refers to 20 growth towns, there are in fact 22 communities named in the policy. The communities of Daguragu and Kalkarindji are referred to as one growth town, as are the communities of Angurugu and Umbakumba.

85 Northern Territory Government, *Working Future: Frequently asked questions*, <http://www.workingfuture.nt.gov.au/download/FAQ.pdf> (viewed 7 September 2009).

86 Central Land Council, 'Working Future – No detail, no timeline, no track record' (Media Release, 21 May 2009). At http://www.clc.org.au/Media/releases/2009/Working_Future.html (viewed 23 October 2009).

87 Northern Territory Government, *Working Future: Employment and Economic Development*, <http://www.workingfuture.nt.gov.au/employment.html> (viewed 7 September 2009).

88 Commonwealth of Australia and the Northern Territory, *Implementation Plan for National Partnership Agreement on Remote Service Delivery*. At http://www.workingfuture.nt.gov.au/download/NT_RSD_Bilat_Imp_Plan.pdf (viewed 7 September 2009).

4.4 Land reforms in the Northern Territory

The Northern Territory was the place where the Australian Government first started implementing its Indigenous land reform programs. Indigenous people in other parts of Australia have been looking at what has happened in the Northern Territory and wondering how it will affect them. This section provides an update in relation to land reforms in the Northern Territory. The first part of this section provides an update on the Northern Territory Emergency Response, the second part provides an update on township leases and the third part looks at the lease requirements for new houses.

It has become clearer over time that the focus of these policies has been on giving governments greater control over Indigenous land.

(a) Northern Territory Emergency Response

On 21 June 2007, the Australian Government announced a series of measures to combat child sex abuse in Aboriginal communities in the Northern Territory, which became known as the ‘intervention’ or the ‘Northern Territory Emergency Response’.

The impact of the Northern Territory intervention on Aboriginal land is described in detail in Chapter 9 of my *Native Title Report 2007*.⁸⁹

In this Chapter, I provide an update on three measures which form part of the intervention and which impact on Aboriginal land tenure: the compulsory five-year leases, statutory rights and the power to compulsorily acquire town camp land.

(i) Five-year leases

One of the reforms introduced under the intervention was the compulsory acquisition of five-year leases over 64 communities.

The five-year leases are created under s 31 of the *Northern Territory National Emergency Response Act 2007* (Cth) (the NTNER Act). Leases normally contain negotiated terms. While interests acquired under the NTNER Act are described as leases, the interests were acquired compulsorily and the terms and conditions were determined by the Australian Government and not negotiated.

The Australian Government also determined the area of the five-year leases. This was done broadly, with reference to latitude and longitude points set out in the Schedule to the NTNER Act. Commonly, the leases included large areas of land around communities, including air strips, quarries, rubbish dumps, cattle yards, nearby homelands and areas of vacant land.

On 27 February 2009, the Australian Government announced that it had reassessed the boundaries for the five-year leases. Commencing from 1 April 2009, the total area covered by five-year leases was more than halved.⁹⁰

89 T Calma, Aboriginal and Torres Strait Islander Social Justice Commission, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008). At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 29 October 2009).

90 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), ‘Government finalises five-year lease boundaries in NT Indigenous communities’ (Media Release, 27 February 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/lease_boundaries_27feb09.htm (viewed 7 September 2009).

Normal process for compulsory acquisition of property by the Commonwealth

Section 51(xxxi) of the Constitution of Australia gives the federal Parliament the power to acquire property 'on just terms'. The *Lands Acquisition Act 1989* (Cth) (Lands Acquisition Act) sets out a process that the Government must follow to use this power and rules for how compensation should be determined.

Normally, the Australian Government must first make a declaration about its intention to acquire property. The declaration includes information about the public purpose for the acquisition, details about what the land will be used for and the reason why the land appears to be suitable for the proposed use. In addition to the declaration, each person who will be affected is entitled to a statement setting out a summary of their rights under the Lands Acquisition Act.⁹¹

Where there is an 'urgent necessity', the Minister may avoid the need for a declaration but must instead lodge a certificate with Parliament and the land owners.⁹² The Lands Acquisition Act then provides a mechanism for negotiations to achieve an acquisition by agreement or by compulsory acquisition.⁹³

The Lands Acquisition Act also states that compensation must be provided and sets out rules for determining what amounts to just terms compensation.⁹⁴ Where land is acquired under the Lands Acquisition Act, land owners have a clear right to compensation with procedures and rules based on what is fair and workable.

This process was not followed for the intervention. The NTNER Act excludes the Lands Acquisition Act in relation to the five-year leases,⁹⁵ meaning that land owners are denied the usual rights in relation to how land is acquired and compensated and must instead rely on the NTNER Act itself.

Acquisition under the NTNER Act

The NTNER Act gives land owners almost no procedural rights. Five-year leases are created by the legislation itself, and there are no procedures for the provision of notice or reasons and no opportunities for negotiation or review.

The NTNER Act also avoids saying that land owners have a right to compensation, instead saying that the Australian Government is only required to pay compensation if it is obliged to do so under the Constitution.⁹⁶ At the time the NTNER Act was passed, there was some uncertainty about whether the Australian Government was required to pay just terms compensation for an acquisition of property in the Northern Territory.

The former Minister for Indigenous Affairs told Parliament that 'compensation when required by the Constitution will be paid'.⁹⁷ However, the Coalition Government took no action to assess or pay compensation.

91 *Lands Acquisition Act 1989* (Cth), s 22.

92 *Lands Acquisition Act 1989* (Cth), s 24.

93 *Lands Acquisition Act 1989* (Cth), pt VI.

94 For a more detailed consideration of the usual application of the *Lands Acquisition Act 1989* (Cth), see Gilbert + Tobin Centre of Public Law, *Supplementary Submission to the Senate Legal and Constitutional Committee's Inquiry into the Northern Territory National Emergency Response Bill* (11 August 2007), pp 3–5. At http://www.gtcentre.unsw.edu.au/resources/docs/IRLG/Supplementary_Submission_SLCLC_Aug2007.pdf (viewed 7 September 2009).

95 *Northern Territory National Emergency Response Act 2007* (Cth), s 50.

96 *Northern Territory National Emergency Response Act 2007* (Cth), pt 4, div 4.

97 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, p 14 (The Hon M Brough MP, Minister for Indigenous Affairs). At <http://www.aph.gov.au/Hansard/rep/dailys/dr070807.pdf> (viewed 23 October 2009).

On 29 May 2008, the new Labor Government introduced the Indigenous Affairs Legislation Amendment Bill 2008 (Cth), which included a process for land owners and the Government to agree on ‘an amount to be paid’ by the Australian Government for the five-year leases. The Minister said that the purpose of the amendments was to ‘minimise the prospect of these matters needing to be resolved in the courts’.⁹⁸ The amendments did not make it any clearer as to whether the Government was required to pay compensation.

In October 2008, after receiving the report of the Northern Territory Emergency Response Review Board (Report of the NTER Review Board),⁹⁹ the Australian Government commenced a process for making payments by asking the Northern Territory Valuer-General to determine a reasonable rent for the five-year leases.¹⁰⁰

Wurridjal v Commonwealth

In Chapter 1 of this Report, I summarised the High Court’s decision in *Wurridjal v Commonwealth*.¹⁰¹

In this case, the Australian Government argued that it was not required by the Constitution to pay compensation because:

- it is not required to pay compensation for an acquisition in the Northern Territory
- it continues to have a significant controlling interest in Aboriginal land and the five-year leases were a statutory readjustment of that interest rather than an acquisition.¹⁰²

This second argument, in particular, reflects poorly on the Australian Government. It is an attempt to treat Aboriginal land under the ALRA as a lesser form of ownership. The High Court did not accept the Government’s argument, and found that the Constitution does require the Australian Government to pay compensation for the five-year leases.

How to assess compensation for the five-year leases

The NTNER Act denigrates the rights of Aboriginal land owners in the Northern Territory, by both denying them an appropriate process for the acquisition of land and by attempting to avoid the obligation to pay compensation.

The issue of compensation for land that has been compulsorily acquired is difficult for Aboriginal people. Any amount of compensation needs to reflect not just the economic value of the land but also the importance of the land to Aboriginal people (including its cultural and spiritual importance) and the impact of the loss of control that results from the compulsory acquisition of the land.

98 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), ‘Greater flexibility in NT leases’ (Media Release, 29 May 2008). At http://www.jennymacklin.fahcsia.gov.au/Internet/jennymacklin.nsf/content/nt_lease_29may08.htm (viewed 23 October 2009).

99 Northern Territory Emergency Response Review Board, *Northern Territory Emergency Response: Report of the NTER Review Board* (2008). At <http://www.nterreview.gov.au/> (viewed 29 October 2009).

100 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), ‘High Court decision on NT 5-year leases’ (Media Release, 2 February 2009). At http://www.jennymacklin.fahcsia.gov.au/Internet/jennymacklin.nsf/content/high_court_decision_02feb09.htm (viewed 5 December 2009).

101 *Wurridjal v Commonwealth* (2009) 237 CLR 309.

102 S Brennan, ‘The Northern Territory Intervention and Just Terms for the Acquisition of Property: *Wurridjal v Commonwealth*’ (*Melbourne University Law Review*, forthcoming).

I asked Minister Macklin what method the Australian Government was using to determine the amount of compensation for the five-year leases.¹⁰³ She replied that the Government is committed to making 'appropriate payments', and described how the Government had asked the Northern Territory Valuer-General to determine reasonable amounts of rent as set out in the NTNER Act.¹⁰⁴

The NTNER Act says that the Northern Territory Valuer-General must not take into account the value of any improvements on the land when making a determination of a reasonable amount of rent, but provides no other guidance.¹⁰⁵

I do not accept that a reasonable amount of rent based on the unimproved value of the land represents just terms compensation for the compulsory acquisition of Aboriginal land under five-year leases. This minimises the economic value of the land – by excluding the value of any improvements which were installed by persons other than the government, or provided to the Aboriginal owners in lieu of rent. Further, it places no value on the importance of the land to its Aboriginal owners and fails to account for the fact that the land was acquired by compulsion rather than negotiation.

The future of five-year leases

One of the recommendations of the Report of the NTER Review Board was that the Government ensure that all actions affecting Aboriginal communities respect Australia's human rights obligations and conform with the *Racial Discrimination Act 1975* (Cth) (RDA).¹⁰⁶

On 23 October 2008, the Australian Government said that it accepted this recommendation and committed to introducing legislation to remove provisions that exclude the operation of the RDA.¹⁰⁷ On 21 May 2009, the Australian Government released a discussion paper called *Future Directions for the Northern Territory Emergency Response*.¹⁰⁸ The discussion paper sets out proposals in relation to those parts of the Emergency Response that relate to the RDA and provides a starting point for consultations with communities.

While the discussion paper proposes certain changes to five-year leases, it does not allow for the consideration of their removal. Community residents and traditional owners are not being consulted on whether they want five-year leases to continue. They are only being consulted in relation to the proposed amendments, as the Australian Government has already formed the view that five-year leases have

103 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Correspondence to J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 15 July 2009.

104 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

105 *Northern Territory National Emergency Response Act 2007* (Cth), s 62(1).

106 Northern Territory Emergency Response Review Board, *Northern Territory Emergency Response: Report of the NTER Review Board* (2008), p 12. At <http://www.nterreview.gov.au/> (viewed 29 October 2009).

107 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Compulsory income management to continue as key NTER measure' (Media Release, 23 October 2008). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/nter_measure_23oct08.htm (viewed 29 October 2009).

108 Department of Families, Housing, Community Services and Indigenous Affairs, *Future Directions for the Northern Territory Emergency Response* (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/default.aspx (viewed 7 September 2009).

operated for the benefit of Aboriginal residents of the 64 communities and that it proposes to continue them.¹⁰⁹

The discussion paper says that:

The five-year leases have provided temporary tenure to underpin the provision of safe houses and GBM accommodation, and will underpin substantial housing refurbishments under the Strategic Indigenous Housing and Infrastructure Program.¹¹⁰

It is wrong to suggest that the provision of safe houses and Government Business Manager (GBM) accommodation, or the refurbishment of housing, required the acquisition of the five-year leases. These could easily have been achieved in other ways. Such infrastructure has been installed and refurbished for many years in the same communities without the compulsory acquisition of five-year leases.

The five-year leases represent a low point in the Government's treatment of Aboriginal land. They are a most direct expression of the Australian Government's focus on gaining control over Aboriginal land, rather than reforming tenure to assist Aboriginal people to better use their land. The five-year leases also disrupt the balance for the negotiation of long-term voluntary leases. In my view, there is no justification for their continuation.

(ii) *Statutory rights*

A further reform to Aboriginal land under the intervention was the introduction of 'statutory rights'.¹¹¹

This is a procedure under which the Australian or Northern Territory Governments can obtain a set of rights (which are called statutory rights) over certain Aboriginal land.

Statutory rights can only apply when infrastructure is installed or repaired¹¹² on Aboriginal land and the works are wholly or partly funded by the government.¹¹³ The process requires the Minister to first identify the area of land to which the statutory rights will apply and for the Land Council to provide consent.

While aspects of this process are similar to applying for the grant of a lease, statutory rights are very different from a lease. They provide no benefits to the land owner, only rights in favour of the government occupier. Those rights include the exclusive and perpetual right to occupy the land without having to pay rent.¹¹⁴

109 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

110 Department of Families, Housing, Community Services and Indigenous Affairs, *Future Directions for the Northern Territory Emergency Response* (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/individual_measures.aspx#4 (viewed 7 September 2009).

111 Introduced by the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), which inserted a new Part IIB into the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

112 Statutory rights can apply in the context of repairs where the total estimated costs of the repairs or renovations exceeds \$50 000: see the definition of 'threshold amount' and 'works' in s 20T of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

113 For statutory rights to be able to apply, the works must be either wholly government funded or, if the Minister determines in writing that the provisions apply, partly government funded: see *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), ss 20(u)(1)(d), 20ZF(1)(d).

114 For the definition of statutory rights, see *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), ss 20W(2), 20ZH(2).

Statutory rights are like a one-sided lease, under which the interests of the traditional owners are ignored. Traditional owners are unlikely to agree to such an arrangement by choice when they can instead negotiate a lease. To my knowledge these provisions have not been used.

However, the Government introduced modifications to the statutory rights regime in the *Indigenous Affairs Legislation Amendment Act 2008* (Cth). This could be seen to reflect an intention on the part of the Government to utilise those rights at some time in the future.

(iii) *Power to acquire town camp land*

Section 47 of the NTNER Act provides a process for the Australian Government to compulsorily acquire all rights and interests in town camp land. During the reporting period the Australian Government announced steps towards using this power in relation to the Alice Springs town camps.

Over the last few years, the Australian Government has tried to secure long-term subleases over the Alice Springs town camps. The Australian Government said that if it was granted a long-term sublease over town camp land it would upgrade housing and supporting infrastructure.

The former Howard Government had offered to spend \$60 million on upgrades if the town camps were subleased to the Northern Territory Government for 99 years. The town camp associations did not agree to this, saying that they were not opposed to long-term subleases but wanted to maintain a role in how housing was managed. They proposed a number of other subleasing and housing models. The Northern Territory Government did not agree to these other models.¹¹⁵

Negotiations in relation to subleases continued under the new Labor Government. On 10 July 2008, the parties agreed that 40-year subleases would be granted to the Executive Director of Township Leasing (EDTL). I describe this Australian Government body in more detail in section 4.4(b). The Australian Government agreed to spend \$50 million on upgrades to housing and infrastructure, and to set up a performance based selection process to determine who would manage housing in the camps within 3 years.¹¹⁶ This was later increased to \$100 million.¹¹⁷ The parties then began negotiations on the sublease terms.

Under this framework agreement, the Australian Government also provided funding for the establishment of a new community housing organisation called Central Australian Affordable Housing Company (CAAHC). CAAHC was modelled on 'growth providing' affordable housing companies such as the Brisbane Housing Company (Qld) and Community Housing Limited (Vic). The Australian Government sees this approach as representing best practice in the provision of social housing.¹¹⁸

115 Tangentyere Council, 'Alice Springs Town Camp Residents Reject Conditional \$60M Offer' (Media Release, 18 May 2007). At http://www.tangentyere.org.au/publications/press_releases/2007/PR_18May07%20TOWN%20CAMP%20RESIDENTS%20REJECT%20CONDITIONAL%20OFFER.pdf (viewed 23 October 2009).

116 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), '\$5.3 million upgrade for Tangentyere housing' (Media Release, 10 July 2008). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/upgrade_tangentyere_10jul08.htm (viewed 23 October 2009).

117 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), P Henderson (Northern Territory Chief Minister) & W Snowdon (Member for Lingiari), '\$125 million Alice Springs Transformation Plan' (Media Release, 2 May 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/125mil_alicesprings_2may09.htm (viewed 27 November 2009).

118 T Plibersek, *Room for more: boosting providers of social housing* (Speech to the Sydney Institute, Sydney, 19 March 2009). At http://www.tanyaplibersek.fahcsia.gov.au/internet/tanyaplibersek.nsf/content/social_housing_19mar09.htm (viewed 23 October 2009).

Text Box 4.1: Central Australian Affordable Housing Company

CAAHC was created to allow for a new model of Aboriginal social housing that gives Aboriginal people control over their own lives while working in partnership with governments, community agencies and the private sector in a transparent and accountable manner.

CAAHC's constitution provides for three types of members: the founding member, which is Tangentyere Council, ordinary members and agency members. Any non-government organisation which supports the objects set out in CAAHC's constitution can apply to be an ordinary member, and the Northern Territory and Commonwealth governments are both entitled to be agency members.

CAAHC will be managed by a Board of Directors. These Directors are appointed by the members. Board appointments will be made with reference to the set of skills required to manage the activities of CAAHC, including social and cultural knowledge of the town camp communities and legal, economic, property management, tenancy advocacy and housing management skills.

The aims of CAAHC are to participate in all aspects of Aboriginal social housing, including design, construction and management. CAAHC has been set up to utilise mixed funding arrangements that are similar to those used by affordable housing companies in the mainstream social housing sector. This includes private investment, the National Rental Affordability Scheme and Commonwealth Rent Assistance.

CAAHC will be able to offer affordable accommodation for both employed people and those on government benefits as well as shared equity or full home ownership. The performance of CAAHC will be assessed against the National Community Housing standards.

CAAHC represents a genuine model for Aboriginal people taking responsibility for their own housing in partnership with governments and the private and community sector.¹¹⁹

On 22 May 2009, Tangentyere announced that negotiations in relation to the terms of the sublease were close to resolution, but that it still sought agreement that:

- under the 40-year sublease to the EDTL, the community retain some key decision-making powers
- in the three-year interim period before the open tender process begins, CAAHC (and not Territory Housing) be appointed as the housing manager for town camp housing.¹²⁰

The Australian Government did not agree to further negotiation on these two points. On 24 May 2009, the Australian Government announced that it was taking the first step towards compulsory acquisition of town camp land under s 47 of the NTNER Act. Minister Macklin said:

This action is being considered as a last resort following the failure of Tangentyere Council to meet its commitments under the previously Agreed Work Plan for the town camps by the deadline of 21 May 2009. ...

119 See Tangentyere Council, *Submission to the National Human Rights Consultation Committee* (12 June 2009), pp 3–7. At http://www.tangentyere.org.au/publications/submissions/2009/SUBMISSION_HUMANRIGHTSCOMMITTEE_JUNE%2009.pdf (viewed 7 September 2009).

120 Tangentyere Council, 'Resolution on Lease Negotiations Close' (Media Release, 22 May 2009). At <http://www.tangentyere.org.au/publications/documents/TangentyereLeaseNegn.pdf> (viewed 23 October 2009).

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For 10 months, the Australian and Northern Territory Governments have been in negotiations with Tangentyere Council. Last Thursday, the final deadline for an agreement passed. Tangentyere Council has not agreed to a fair and consistent tenancy management system.¹²¹

Tangentyere rejected that claim that it would not agree to a fair and consistent tenancy management system. Tangentyere's Executive Director, William Tilmouth, said:

We are saying that there are two ways to achieve tenancy reform, one through the public housing system and one through the community housing system by reaching accreditation against the National Community Housing Standards. ...

Town Camp people have no faith in the Northern Territory Government or their public housing system. This is why we lobbied successfully in March last year to establish the Central Australian Affordable Housing Company.¹²²

The National Community Housing Standards are the standards which apply to social housing providers across Australia.

To avoid the town camp land being acquired compulsorily, on 29 July 2009 the town camp associations agreed to the grant of a sublease on the terms required by the Australian Government.¹²³ William Tilmouth said in relation to the agreement:

We've had the gun at our head ... compulsory acquisition is the last resort. At the end of the day it's something that we've been threatened with, and it's a pretty high thing to consider. I think at the end of the day we need to work with what we have got and make some agreement.¹²⁴

The making of an agreement under threat of acquisition was described as a low point in Indigenous affairs by Australians for Native Title and Reconciliation, who noted:

While in mainstream Australia 70% of the Australian Government's \$6.4 billion Social Housing Initiative will go to community housing, Indigenous communities are being locked out of community housing. This denies them any meaningful control or decision-making role. Instead they will be forced to accept control by a government authority – Territory Housing – with a poor record in relation to Indigenous housing.¹²⁵

While this report was being prepared, an Alice Springs town camp resident commenced court action in relation to the compulsory acquisition process.¹²⁶ The Australian Government has responded by recommencing the notice period for consultations under the compulsory acquisition procedures.¹²⁷

121 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Alice Springs town camps' (Media Release, 24 May 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/alice_springs_town_camps_24may09.htm (viewed 23 October 2009).

122 Tangentyere Council, 'Tangentyere Supports Open and Transparent Tenancy Reform' (Media Release, 25 May 2009). At http://www.tangentyere.org.au/publications/documents/TENANCYREFORM_25MAY2009.pdf (viewed 23 October 2009).

123 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), P Henderson (Northern Territory Chief Minister) & W Snowdon (Member for Lingiari), 'Agreement on Alice Springs Transformation Plan' (Media Release, 29 July 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/alice_springs_transformation_plan_29jul09.htm (viewed 23 October 2009).

124 W Tilmouth, quoted in Australian Broadcasting Corporation, 'Transcript: Town camps acquisition seen as "step backwards" for land rights', *The 7.30 Report*, <http://www.abc.net.au/7.30/content/2009/s2641518.htm> (viewed 7 September 2009).

125 Australians for Native Title and Reconciliation, 'Town camps takeover a low point in Indigenous affairs – ANTaR' (Media Release, 31 July 2009). At <http://www.antar.org.au/media/town-camps-takeover> (viewed 23 October 2009).

126 L Wood, 'Court halts building in Alice town camps', *The Age* (7 August 2009). At <http://www.theage.com.au/national/court-halts-building-in-alice-town-camps-20090806-ebi7.html> (viewed 11 November 2009).

127 J Macklin (Minister for Families, Housing, Community Services, and Indigenous Affairs), 'Alice Springs town camps' (Media Release, 24 August 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/alice_springs_town_camps_24may09.htm (viewed 23 October 2009).

(b) Township leasing

Township leasing, which was introduced in 2006, remains important as the first changes made by the Australian Government as part of its Indigenous land tenure reform policy. Township leasing is made possible through s 19A of the ALRA. I described the introduction of s 19A in the *Native Title Report 2006*,¹²⁸ and in this section I provide an update on the operation of township leases.

(i) Section 19A of the ALRA

The ALRA has always provided for the leasing of Aboriginal land through s 19. This section allows for a lease to be made to any person for any purpose and contains no restrictions on the period of the lease. Leases under the new s 19A can apply only to ‘township land’, which is land on which a community is situated and which has been described by regulation. Township leases may only be made to a ‘government entity’, and must be for a period of between 40 and 99 years.

In 2007, the former Coalition Government made changes to the ALRA to create the position of the EDTL, whose role it is to hold s 19A leases on behalf of the Australian Government.¹²⁹ When a township area is leased to the EDTL, it is the job of the EDTL to create and manage subleases.

In 2008, the new Labor Government made further changes to the ALRA to expand the role of the EDTL beyond township leases. The EDTL can now also accept leases under s 19, leases over Aboriginal community living areas and subleases of a town camp (such as the Alice Springs town camps).¹³⁰

In normal circumstances the terms of a lease are decided upon by negotiation. However, s 19A specifies that certain matters cannot be included in a township lease.

Firstly, a township lease cannot contain a rule requiring the consent of any person to the grant of a sublease.¹³¹ For example, the traditional owners may wish to put a rule in the township lease which says that the EDTL must get the consent of the traditional owners or community members before granting a sublease, or before granting a certain type of sublease such as a commercial sublease. Section 19A says that such a rule is not allowed.

This means that all subleases are decided upon by the EDTL and not by the traditional owners or the community. The EDTL may be required to consult with the traditional owners or community members, but cannot be required to follow their directions or obtain their consent.

Secondly, a lease under s 19A cannot contain a rule relating to the payment or non-payment of rent under a sublease.¹³² For example, the traditional owners may wish to put a rule in the township lease which says that a sublease to a business must be for a commercial rent or that a sublease to a community organisation must be rent free. Section 19A of the Act says that such a rule is not allowed.

128 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), ch 2. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 29 October 2009).

129 *Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Act 2007* (Cth).

130 *Indigenous Affairs Legislation Amendment Act 2008* (Cth).

131 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 19A(14).

132 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 19A(15).

This means that the amount of rent which is required to be paid under a sublease is determined by the EDTL. Again, the EDTL may be required to consult with traditional owners or community members, but the EDTL is not required to follow their directions.

This is particularly important where the amount of rent that traditional owners receive under the township lease is determined by the amount of rent collected on subleases. This is the case with the two existing township leases described below, and is Australian Government policy for township leases.¹³³ This means that traditional owners cannot know, or control, whether they will receive ongoing rent under a township lease.

Overall, a major concern with township leases is that traditional owners and Aboriginal community members are required to give up control over land use decision-making in the township area.

(ii) *The Nguiu and the Groote Eylandt leases*

There have been two township leases granted under s 19A of the ALRA. The first lease was granted on 30 August 2007 over the community of Nguiu (the Nguiu lease) and the second was granted on 4 December 2008 over the communities of Angurugu, Umbakumba and Milyakburra (the Groote Eylandt lease).¹³⁴

Both leases are granted to the EDTL. The Nguiu lease is for a period of 99 years and covers an area of 454 hectares, or 4.54 square kilometres.¹³⁵ This area includes the existing community, the airport, the foreshore and a large area of vacant land around the community.

The Groote Eylandt lease is for a period of 40 years, with the EDTL having the option to renew for a further 40 years. The lease also covers large areas of land around each community. Most notably, while the community of Milyakburra has a population of around 110,¹³⁶ the lease over the community covers an area of 510 hectares, or 5.10 square kilometres.¹³⁷

The rent for both township leases comprises a one-off introductory payment and an ongoing payment. The one-off introductory payment for the Nguiu lease is \$5 million and for the Groote Eylandt lease is \$4.5 million. These amounts are paid out of the Aboriginals Benefit Account.¹³⁸

The Australian Government also agreed to provide a number of benefits for the communities. In Nguiu, this included 25 new houses, repairs and maintenance for

133 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

134 Copies of these leases are available for a small fee from the Northern Territory Land Titles Office. The Nguiu lease is lease number 662214 and the Groote Eylandt lease is lease number 692818. I follow the convention of describing the lease for the communities of Angurugu, Umbakumba and Milyakburra as the Groote Eylandt lease, however Milyakburra is situated on Bickerton Island rather than Groote Eylandt.

135 *Aboriginal Land Rights (Northern Territory) Regulations 2007* (Cth), r 5.

136 Northern Territory Government Bushtel, *Milyakburra community*, http://www.bushtel.nt.gov.au/northern_territory/community_search_display?comm_num=532 (viewed 7 September 2009).

137 *Aboriginal Land Rights (Northern Territory) Regulations 2007* (Cth), r 6.

138 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 64(4A)(b). In relation to the Nguiu lease, see also Department of Families, Housing, Community Services and Indigenous Affairs, *Annual Report 2007–2008* (2008), app 10 (table 4.33). At http://www.fahcsia.gov.au/about/publicationsarticles/corp/Documents/2008%20Annual%20Report/13_10.htm (viewed 11 November 2009).

other houses, \$1 million in additional health initiatives, improvements to the cemetery, a community profile study¹³⁹ and funding for a new secondary college.¹⁴⁰

I have previously expressed my concern about the link made between the provision of much-needed community services, human rights and entitlements and the grant of a township lease to a government entity. Services should be provided to communities on the basis of need and effectiveness rather than compliance with a request for a lease. The connection to the provision of services also puts pressure on traditional owners during the decision-making process. This is especially the case if traditional owners are not fully aware that they have the right to say no or that some of the services on offer are human rights that should be provided as a matter of course.

The ongoing rent is determined by the income that the EDTL collects on subleases and licences. After collecting the rent, the EDTL deducts its expenses, which includes both direct costs such as surveys and consultants and the administration costs of the EDTL for each lease (including wages of EDTL staff). If there is a balance remaining after the deduction of those expenses, it is payable as rent to the traditional owners. Although it is beyond the scope of this Report, further consideration should be given to any tax implications of this arrangement for the traditional owners.

The one-off introductory payments (of \$5 million and \$4.5 million) also represent the minimum payment for the first fifteen years of each lease. During this period, the traditional owners are only entitled to further a payment if the total rent exceeds that minimum payment. If the ongoing rent during this period is less than these amounts then the traditional owners will receive no additional payment.¹⁴¹

Grant of subleases

The EDTL advises that the community of Nguiu has been surveyed. Agreements on subleases have been negotiated over 66% of the available lots at Nguiu. At the time of writing, the communities under the Groote Eylandt lease were still being surveyed and no subleases had been granted.¹⁴²

The EDTL also advises that the majority of the lots in Nguiu – approximately 240 – have been subleased to Territory Housing for community housing. Seven home ownership contracts have been finalised, with several more community members expressing an interest. Two residents have taken a sublease over vacant land in order to build their own homes.¹⁴³ Information about the terms of those leases was not provided.

Subleases have also been finalised, or are close to being finalised, with a number of the smaller community organisations in Nguiu. The two largest occupiers of commercial / government properties, the Northern Territory Government and Tiwi Islands Shire Council, are yet to reach an agreement on sublease terms.¹⁴⁴

139 M Brough (Minister for Families, Community Services and Indigenous Affairs), 'Historic Agreement for 99 year lease in NT' (Media Release, 30 August 2007). At http://www.formerministers.fahcsia.gov.au/malbrough/mediareleases/2007/Pages/tiwi_lease_30aug07.aspx (viewed 7 December 2009).

140 M C Dillon & N D Westbury, *Beyond Humbug: Transforming government engagement with Indigenous Australia* (2007), p 131.

141 See Office of Township Leasing, *Standard Township Head Lease*, section 5. At http://www.otl.gov.au/township_head_lease/section05.htm (viewed 11 November 2009).

142 P Watson, Executive Director of Township Leasing, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 7 August 2009.

143 P Watson, Executive Director of Township Leasing, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 7 August 2009.

144 P Watson, Executive Director of Township Leasing, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 7 August 2009.

Rent under subleases

Under a township lease, the EDTL (and not the traditional owners) decides whether rent is required on a sublease.

The EDTL has advised that rent is not required under the subleases to Territory Housing or for the subleases in relation to schools. In most other instances, the EDTL advises that it has demanded, or will demand, some form of rent.¹⁴⁵

In the case of home ownership leases, rent is paid as a lump sum payment. For other commercial / government properties in the township, the EDTL has engaged a consultant to provide the improved, unimproved and annual rental estimates. These valuations are then used as a basis for negotiating the level of rent to be paid by each occupier. The level of rent depends on a number of factors including the condition of the property, any capital improvements which have been made to the property, the capacity of the organisation to pay and the extent of any ongoing repairs and maintenance required on the property.¹⁴⁶

For many community organisations and government agencies, this will be the first time that they have been required to pay rent for the use of Aboriginal land. Information about the amount of rent under each sublease is not available.

Costs of administration

As I described above, the ongoing rent under the Nguiu and Groote Eylandt township leases is the income on subleases after deduction of the expenses of the EDTL. The EDTL provided the following information in relation to its administration expenses:

2007–08	Employee expenses (two staff in Canberra and one in Nguiu)	\$281 000
	Travel	\$101 000
	Contractors (sacred site clearance certificates and survey work at Nguiu)	\$42 000
	Other administrative expenses	\$33 000
	Total for 2007–08	\$457 000

145 P Watson, Executive Director of Township Leasing, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 7 August 2009.

146 P Watson, Executive Director of Township Leasing, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 7 August 2009.

147 P Watson, Executive Director of Township Leasing, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 7 August 2009.

2008–09	Employee expenses (two staff in Canberra and four staff in Darwin)	\$519 000
	Travel (including air charter costs for Consultative Forum meetings)	\$192 000
	Contractors (\$203 000 for survey work at Nguiu, \$44 500 for valuations at Nguiu, \$54 000 for initial survey work for Groote Eylandt communities and \$39 000 for business design)	\$340 000
	Other administrative expenses	\$39 000
	Total for 2008–09	\$1 090 000

The Consultative Forum

Both township leases create a body called the Consultative Forum,¹⁴⁸ whose role is to make recommendations to the EDTL on certain matters under the lease, to facilitate communication and to discuss land use and other issues arising out of the lease. The majority of the members of the Consultative Forum are appointed by the traditional owners and the remainder are appointed by the EDTL.

In most cases where the EDTL is required to consult, the EDTL must ‘have due regard to any recommendations of the Consultative Forum’.¹⁴⁹ Under the Nguiu lease, the decisions of the Consultative Forum are binding in relation to:

- the limit of 15% of non-Tiwi residents¹⁵⁰
- permission for buildings in excess of two storeys or within 50 metres of the high water mark¹⁵¹
- certain exceptions to quarantine restrictions.¹⁵²

In all other cases, including all references under the Groote Eylandt lease, the Consultative Forum can only make recommendations which are not binding on the EDTL.

148 Under each head lease, the Executive Director Township Leasing is required to establish a consultative forum. The Consultative Forum comprises of representatives of the Land Council and the Office of Township Leasing. The forum meets regularly and provides advice to the Executive Director Township Leasing about issues of importance to the township. The Consultative Forum is a very important mechanism for keeping the Executive Director aware of emerging issues within the township. See Australian Government Office of Township Leasing, *About the Office of Township Leasing – What is the Consultative Forum*, <http://www.otl.gov.au/about.htm#5> (viewed 9 September 2009). See also Australian Government, *Executive Director of Township Leasing: Annual Report 2007–2008* (2008). At http://www.otl.gov.au/annual_report.htm (viewed 9 September 2009).

149 Australian Government, *Executive Director of Township Leasing: Annual Report 2007–2008* (2008), p 9. At http://www.otl.gov.au/annual_report.htm (accessed 9 September 2009).

150 *Memorandum of Lease – Township of Nguiu*, cl 10.5(b).

151 The EDTL is not permitted to undertake or allow any building in excess of two storeys or on the Foreshore (defined as the area between the high water mark and 50 metres landwards of this) without the consent of the EDTL: *Memorandum of Lease – Township of Nguiu*, cls 1.1, 17.2.

152 *Memorandum of Lease – Township of Nguiu*, cl 19.6.

(iii) *Other possible models*

The main problem with township leases is that traditional owners and Aboriginal communities are required to hand over decision-making about their land to a government entity. This has included not just the land on which existing infrastructure is built, but also large areas of vacant land. I believe that the reluctance of communities to enter into township leases, despite the offers of inducements by the Australian Government, is attributable to concerns about this hand over of decision-making. There are other ways of introducing leasing on communities that do not require such a hand over. In my *Native Title Report 2006*, I referred to the proposal of the former Thamurrur Council for a 40-year lease over the community of Wadeye to a body controlled by traditional owners, which would then be able to issue subleases to occupants as required.¹⁵³ At the time the Australian Government rejected this proposal, saying that the time frame was too short.

Since then, the new Government has agreed to a 40-year time frame for community leases. The Central Land Council has also proposed separate types of long-term leases for housing, government and commercial bodies, under a model which would provide certainty of tenure while retaining a higher level of traditional owner control.¹⁵⁴

These are some examples of other ways of introducing community leases. While the Australian Government has agreed to other forms of housing lease as an interim measure, as described in the next section, it remains committed to obtaining township leases for all large communities in the Northern Territory. The Government has not engaged with Aboriginal communities about other ways in which leasing can be introduced.

(c) Tenure requirements for new housing

In the Northern Territory, 16 communities have been selected to receive new housing under the SIHIP. In keeping with the Australian Government's secure tenure policy, communities must have in place a lease for at least 40 years in order to be eligible for new housing.

The Australian Government will accept a housing lease in one of two forms, provided that it contains the required conditions: either a township lease over the whole community or a lease over all housing areas. The term 'housing precinct lease' has been used to describe a lease over housing areas under s 19 of the ALRA that meets the Australian Government's criteria for new housing.

While the Australian Government will accept a housing precinct lease, it sees this as an interim measure pending agreement to a township lease.¹⁵⁵ Unlike a township lease, a housing precinct lease does not take in the whole community. However, it must include not only the new housing areas but all existing community housing.

153 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), pp 53–54. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 29 October 2009).

154 Central Land Council, *Communal Title and Economic Development* (2005). At http://www.clc.org.au/Media/papers/CLC_%20tenure_paper.pdf (viewed 7 September 2009).

155 Commonwealth of Australia and the Northern Territory, *Implementation Plan for National Partnership Agreement on Remote Service Delivery*. At http://www.workingfuture.nt.gov.au/download/NT_RSD_Bilat_Imp_Plan.pdf (viewed 7 September 2009).

While no rent is offered for a housing precinct lease, the Australian Government has offered upfront rent and a community benefits package for the grant of a township lease. For example, in relation to one of the central Australian communities, the Australian Government has offered \$2 million in upfront rent plus a \$2 million community benefits package.¹⁵⁶

The table below describes the main differences between township leases and housing precinct leases:

	'Township lease' under section 19A	'Housing precinct lease' under section 19
Lease area	Covers entire community and surrounding land, including roads, stores, parks, cemeteries, houses and growth areas surrounding the community	Covers all existing community housing and the proposed new housing areas
Term	Must be between 40 and 99 years	Must be at least 40 years ¹⁵⁷
Lease holder	Executive Director of Township Leasing	Territory Housing or the Executive Director of Township Leasing
Rent	Upfront rent plus community benefits package. Ongoing rent depends on subleases.	Not offering rent

As I described in the previous section, township leases have been granted over the communities of Nguiu, Angurugu, Umbakumba and Milyakburra.

On 11 February 2009, the Northern Land Council announced that the traditional owners for the communities of Galiwinku, Gunbalanya, Maningrida and Wadeye had agreed to 40-year housing precinct lease for those communities.¹⁵⁸

For the other eight communities – Gapuwiyak, Hermannsburg, Lajamanu, Milingimbi, Ngukurr, Numbulwar, Yirrkala and Yuendumu – the Australian Government is still negotiating with the traditional owners and the Central and Northern Land Councils in relation to a lease.

156 Central Land Council, *Changes to housing in your community*, Fact Sheet (2008).

157 Section 19A(4) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) says that section 19A leases must be for a period of between 40 and 99 years. While there is no limit in the Act in relation to section 19 leases, the Commonwealth requires a lease of at least 40 years.

158 Northern Land Council, 'NLC welcomes housing boost at Gunbalanya, Wadeye, Galiwinku, and Maningrida' (Media Release, 11 February 2009). At <http://www.nlc.org.au/html/files/NLC%20welcomes%20housing%20boost%20at%20Gunbalanya,%20Wadeye,%20Galiwinku%20and%20Maningrida.pdf> (viewed 7 September 2009).

4.5 Land reforms in Queensland, New South Wales, South Australia and Western Australia

In this section I describe some of the reforms which are taking place in the Australian states that are affected by the COAG Remote Partnership Agreements – Queensland, New South Wales, South Australia and Western Australia.

In these states, there has been a combination of tenure reform and the introduction of secure tenure policies.

To a significant extent, reforms to state law are being driven by policies of the Australian Government, particularly its secure tenure requirements under the Remote Indigenous Housing Agreement. Under that Agreement, the Government will provide \$4.75 billion over ten years, provided that the states introduce secure land tenure. As I set out above in 4.2(b)(ii), the Australian Government has advised the states that there are three requirements for secure land tenure.

This section describes how these requirements are being implemented in priority locations in these states.

(a) Queensland

When the Australian Government and some other states were moving towards Indigenous land rights in the 1970s and 1980s, the Queensland Government resisted. At first, it held on to the reserve system. Later, it created new ways for land to be held on behalf of Indigenous people.

In 1978, the Queensland Government legislated to create 50-year shire leases over the former reserve communities of Aurukun and Mornington Island.¹⁵⁹ In the 1980s, the Government created a new form of tenure called ‘deeds of grant in trust’ (DOGITs), under which a number of other reserves were transferred to local Indigenous councils for the benefit of Indigenous inhabitants.

The first land rights legislation, introduced in 1991, provided for the grant of land as Indigenous freehold.¹⁶⁰ Land could be granted following a land claim, which could only be made over limited areas of crown land, or by way of transfer. The transfer rules allowed for lesser forms of Indigenous land ownership to be turned into Indigenous freehold. Unfortunately, progress on the grant of Indigenous freehold has been slow.

Text Box 4.2: Types of Indigenous land in Queensland

Reserve land

Reserve land is land that is owned by the government and has been set aside for the benefit of Aborigines or Torres Strait Islanders.

Shire leases

Shire lease land is land that has been leased to the local council for 50 years. Shire lease land only applies to the communities of Aurukun and Mornington Island.

159 *Local Government (Aboriginal Lands) Act 1978 (Qld)*.

160 *Aboriginal Land Act 1991 (Qld); Torres Strait Islander Land Act 1991 (Qld)*.

DOGIT land

DOGIT land is a restricted form of ownership, usually granted to a local council. DOGIT land is held on trust for the benefit of Indigenous inhabitants and is subject to greater government control than full ownership.

Indigenous freehold

Indigenous freehold is land that has been granted as freehold title under the statutory land rights legislation introduced in 1991. A grant of Indigenous freehold can be made by transfer or after a successful claim.

Transferable land

Under the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld), land described as 'transferable land' is to be granted at Indigenous freehold, without the need for a land claim. Transferable land includes reserve land, shire leases and DOGIT land.

(i) Aboriginal and Torres Strait Islander Land Amendment Act 2008 (Qld)

The *Aboriginal and Torres Strait Islander Land Amendment Act 2008* (Qld) (the Amendment Act) made a number of important changes to Indigenous land in Queensland.

A primary aim of the Amendment Act was to make it easier to grant long-term leases on Indigenous land. This was partly as a result of pressure exerted upon states by the Australian Government to make it easier to grant a long-term lease to a public housing body.¹⁶¹

In addition to making reforms to long-term leasing, the Amendment Act makes a number of other changes to Indigenous land, including:

- allowing for the grant of land to a Prescribed Body Corporate (PBC)
- creating exemptions to transferable land
- making it easier for the Government to compulsorily acquire Indigenous land.

I describe the new rules in relation to long-term leasing below, but first I provide a description of some of the other major changes.

Transferring land to a PBC

When a determination of native title is made, an Indigenous corporation – a PBC – can be appointed to hold native title rights on behalf of the native title holders.¹⁶²

Previously when transferable land was granted as Indigenous freehold, it was usually granted to an Aboriginal or Torres Strait Islander land trust to hold for the benefit of Indigenous people 'particularly concerned with the land' and their ancestors and descendants.¹⁶³ This means Indigenous people who live on or use the land or neighbouring land as well as Indigenous people with a particular traditional or customary connection.¹⁶⁴

161 'The Australian Government identified "land tenure reform", including long-term leases for public housing bodies, as a precondition for additional funding for housing on DOGIT communities': Explanatory Notes, *Aboriginal and Torres Strait Islander Land Amendment Bill 2008* (Qld), p 2. At <http://www.legislation.qld.gov.au/Bills/52PDF/2008/AborTorStILAB08Exp.pdf> (viewed 23 October 2009).

162 *Native Title Act 1993* (Cth), pt 2, div 6.

163 *Aboriginal Land Act 1991* (Qld), s 27(3).

164 *Aboriginal Land Act 1991* (Qld), s 4; *Torres Strait Islander Act 1991* (Qld), s 4.

As a result of changes made by the Amendment Act, transferable land in relation to which there has been a determination of native title can also be granted to the PBC. When land is granted to a PBC, it holds the land for the benefit of native title holders only.

This means that there are two options when turning transferable land into Indigenous freehold – it can be granted to an Indigenous land trust to hold for Indigenous people particularly concerned with the land, or (where there has been a native title determination) to a PBC to hold for native title holders.

Exempting section of transferable land

While the legislation says that transferable land must be granted as Indigenous freehold 'as soon as practicable',¹⁶⁵ progress on the transfer of land has been slow.

One of the reasons for the long delays is that the Queensland Government has not wanted to transfer land on which infrastructure has been built. Often that infrastructure has been built without surveys or the creation of individual lots, which means that the process for excluding land with infrastructure on it has been slow.

The Amendment Act makes it easier for the Queensland Government to exclude particular areas from transfer by declaring them to be not transferable. The Minister can make a declaration over land:

- on which housing, infrastructure or a road is situated
- which is being used as part of a township by Aboriginal people
- where, having regard to the nature or use of the land, it is not appropriate or practicable for it to be granted as Indigenous freehold.¹⁶⁶

This means that when the transferable land is granted as Indigenous freehold, those areas in relation to which the Minister has made a declaration will be excluded, and will continue to be reserve land, shire lease or DOGIT land.

This allows the Government to exclude areas more easily and less expensively, as it does not have to survey each individual lot. The Government has stated that this will speed up the grant of the balance of transferable land as Indigenous freehold. However, any areas which are excluded from the grant of Indigenous freehold will continue to be held under inferior forms of title and ownership of individual lots will not be resolved.

Compulsory acquisition of Indigenous land

The Amendment Act also makes it easier for the Government to compulsorily acquire Indigenous land.

Previously the Government could only acquire Indigenous freehold by an Act of Parliament that expressly provided for the resumption of the land and the payment of just compensation.¹⁶⁷ It could only acquire DOGIT land by an Act of Parliament.¹⁶⁸

The Amendment Act allows for Indigenous freehold and DOGIT land to be acquired, and a shire lease to be resumed, by a construction authority for a relevant public purpose. To my knowledge these provisions have not been used.

165 *Aboriginal Land Act 1991* (Qld), s 29; *Torres Strait Islander Act 1991* (Qld), s 27.

166 *Aboriginal Land Act 1991* (Qld), s 16B; *Torres Strait Islander Act 1991* (Qld), s 13B.

167 Formerly s 41(1) of the *Aboriginal Land Act 1991* (Qld).

168 Formerly s 43 of the *Land Act 1994* (Qld).

New forms of long-term leasing

The Amendment Act makes a new set of rules to make it easier to grant leases on Indigenous freehold land, DOGIT land and Aboriginal reserve land.¹⁶⁹ The new rules do not apply to the Aurukun and Mornington Island shire leases.

These rules are less restrictive than previous rules in relation to leasing on Indigenous land. The requirements change depending on who the lease is granted to, for how long it will be granted and the purpose for which it will be used. Most leases no longer require the consent of the Minister. The table below summarises these new rules in relation to the grant of leases:

Lease holder	Purpose of lease	Period of lease	Consent of Minister
An Aborigine	Private residential purpose	Up to 99 years	Not required
	Any other purpose (such as a commercial purpose)	Up to 30 years	Not required
		More than 30 years (up to 99 years)	Required
The state	Public housing, public infrastructure or accommodation for public servants	Up to 99 years	Not required
		Any other purpose	Up to 30 years
		More than 30 years (up to 99 years)	Required
The spouse, or former spouse, of an Aborigine or of an Aborigine who is deceased	Private residential purpose	Up to 99 years	Not required

169 The rules for land that has been transferred to Aboriginal freehold land are set out in new sections 40D to 40N of the *Aboriginal Land Act 1991* (Qld). Sections 83R to 83Y of the Act apply the same rules to DOGIT land and Aboriginal reserve land. The rules for Torres Strait Islander freehold land are set out in the *Torres Strait Islander Land Act 1991* (Qld), ss 37D–37N.

Table 4.3: Rules in relation to the grant of leases (continued)

Lease holder	Purpose of lease	Period of lease	Consent of Minister
Any other person	Commercial purpose	Up to 30 years	Not required
		More than 30 years (up to 99 years)	Required
	Private residential purpose to support a commercial purpose		Not required
	Any other purpose	Up to 10 years	Not required
More than 10 years (up to 99 years)		Required	

Where the consent of the Minister is required, the Minister can only give consent if he or she is satisfied that the grant of the lease is for the benefit of the persons on whose behalf the land is held. There are also rules in relation to when the consent of the Minister is required for a grant of an interest under a lease.

In general, I am supportive of reforms that enable more flexible use of Indigenous land. However, attention will need to be paid to how these reforms are implemented in practice. If the reforms simply facilitate long-term leases to the Queensland Government over housing areas, Indigenous people will wonder what they have gained.

Home ownership leases

The new leasing rules include some provisions which apply specifically to 'home ownership leases', or leases to Indigenous people for private residential purposes.

A home ownership lease must be for a period of 99 years.¹⁷⁰ Instead of paying annual rent the home owner must pay the purchase cost up front. The purchase cost must be the value of the land and any buildings on the land determined using acceptable valuing methodology.¹⁷¹

There is no price discount for those Indigenous people on whose behalf the land is held. All Indigenous purchasers are required to pay the purchase price of the land and any building on the land.

¹⁷⁰ *Aboriginal Land Act 1991* (Qld), s 40J(1)(a)(i).

¹⁷¹ *Aboriginal Land Act 1991* (Qld), s 40J(1)(a)(iii).

Where the housing chief executive considers that a house has been used for social housing, then his or her permission is required for the grant of a home ownership lease over the house.¹⁷² The purchase cost must be agreed to by the housing chief executive and that part of the purchase cost which relates to the house may only be used towards providing further social housing services.¹⁷³

The Queensland Department of Communities has said that it supports the use of depreciated replacement costs as the methodology for determining the sale price of former social housing in Indigenous communities.¹⁷⁴

While the reforms to enable home ownership create an opportunity for Indigenous people in Queensland, they also raise complex issues. Careful attention needs to be paid to how the new provisions are implemented.

In the *Native Title Report 2006*, I considered the community-driven Yarrabah Housing Project. It was anticipated that the amendments to the *Aboriginal Land Act 1991* (Qld), which were then being proposed, would provide a legislative base to support leasing initiatives.¹⁷⁵ I am also aware that the community of Mapoon has been working with World Vision Australia on developing a home ownership scheme, and I hope that the 2008 amendments will assist them with the project.¹⁷⁶

As he concluded his recent visit to Australia, James Anaya (the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people) stated that:

Government initiatives to address the housing needs of indigenous peoples, should avoid imposing leasing or other arrangements that would undermine indigenous peoples' control over their lands.¹⁷⁷

It cannot be assumed that the introduction of any home ownership scheme will be successful. One of the primary findings of research conducted by the University of Queensland in 2001, which considered the outcome of previous home ownership schemes such as Katter leases (see Text Box 4.3), was that it is 'certainly clear that it will not be possible to simply transpose mainstream home ownership models' onto Indigenous communities.¹⁷⁸

172 *Aboriginal Land Act 1991* (Qld), s 40K.

173 *Aboriginal Land Act 1991* (Qld), s 136A.

174 Department of Communities (Housing and Homelessness Services), *Valuing a dwelling for a private residential lease*, Fact Sheet (2009). At http://www.housing.qld.gov.au/programs/pdf/valuing_dwelling.pdf (viewed 7 September 2009).

175 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), p 151. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 29 October 2009).

176 World Vision, 'Unlocking the path to home ownership in Mapoon – World Vision's new plan' (Media Release, 1 September 2009). At http://www.worldvision.com.au/media/PressReleases/09-09-01/Unlocking_the_path_to_home_ownership_in_Mapoon_-_World_Vision_s_new_plan.aspx (viewed 11 November 2009).

177 United Nations High Commissioner for Human Rights, *Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia* (27 August 2009). At <http://www.unhcr.ch/hurricane/nsf/view01/313713727C084992C125761F00443D60?opendocument> (viewed 23 October 2009).

178 M Moran et al, *Indigenous Home Ownership and Community Title Land: A Preliminary Household Survey* (2002), p 11. At http://espace.library.uq.edu.au/eserv/UQ:9135/Home_owner_UPR.pdf (viewed 7 September 2009).

Text Box 4.3: Katter leases

The term 'Katter leases' refers to perpetual leases granted over existing houses in communities in North Queensland under a Government home ownership scheme set up in the mid 1980s.

The failure of the scheme resulted in some houses falling into disrepair and being abandoned. Local councils have been engaged in drawn-out and legally complicated processes to take over leases in order to replace the housing. The reasons for the failure of the scheme include:

- that it was a government initiative pushed by the external stakeholders, rather than the community
- the houses were already old and close to the end of their life cycle
- participants did not understand their maintenance responsibility and received no education or support
- land dealings for deceased estates and / or transfer of the lease back to councils were not resolved up front.¹⁷⁹

In the community of Kowanyama, which is described in Text Box 4.4 below, around 95 Katter leases were granted. This has added to the complexity in resolving community land tenure.

In section 4.6 of this Chapter, I set out some of the principles that need to be considered prior to the introduction of any home ownership scheme or land tenure reform. While the Queensland legislation includes protection for the Government in relation to social housing, it does not mandate protections for the community or for individual participants, such as the provision of appropriate information or a mechanism for the community to agree to the parameters of the scheme.

The Queensland Government's preference for the use of depreciated replacement cost as the valuation methodology will be of significant concern to Queensland Indigenous communities. The depreciated replacement cost of a house is likely to be significantly higher than its market value, where there is a market.

Commercial leases

The leasing rules also contain certain protections in relation to leases for a commercial purpose.

As described in Table 4.3, leases for a commercial purpose for more than 30 years require Ministerial consent. In order to request this consent, the person applying for a lease must give the Minister a business plan together with evidence to show that an appropriate return on the investment cannot be obtained with a lease of less than 30 years. The Minister may also require other documents to show the purpose of the lease.¹⁸⁰

179 M Moran et al, *Indigenous Home Ownership and Community Title Land: A Preliminary Household Survey* (2002), p 10. At http://espace.library.uq.edu.au/eserv/UQ:9135/Home_owner_UPR.pdf (viewed 7 September 2009).

180 *Aboriginal Land Act 1991* (Qld), s 40F.

The Minister must obtain an independent assessment of this material, and of the financial and managerial capacity of the applicant, before making a decision in relation to the lease. Consent to the grant of a commercial lease for more than 30 years can only be given where the Minister is satisfied that any proposed development under the lease will be commercially viable, that a lease for more than 30 years is required for a return on the investment and that the applicant has the capacity to carry out the project.

The non-refundable cost of the assessment must be met by the applicant.¹⁸¹

(ii) *Tenure requirements for new housing*

In this section I look specifically at the four Queensland communities that have been selected for initial housing investment under the Remote Indigenous Housing Agreement. Those communities are Aurukun, Mornington Island, Doomadgee and Hopevale.

Aurukun and Mornington Island

The communities of Aurukun and Mornington Island are situated on land which was leased to the local Shire Council for 50 years under the *Local Government (Aboriginal Lands) Act 1978* (Qld). The Shire Councils hold the leases 'in trust for the benefit of persons who for the time being reside on any part of the land'.¹⁸²

There have been consent determinations of native title over the Aurukun¹⁸³ and Mornington Island¹⁸⁴ shire lease areas, both of which exclude an area of land around the community.

During negotiations for the consent determination in relation to Aurukun, the native title holders agreed to withdraw the claim over the community and access road. The native title holders and the shire council instead entered into the Aurukun Township & Road Indigenous Land Use Agreement.¹⁸⁵

This Agreement sets out a notification and consultation process for future developments. The process varies depending on the area of the community (in particular whether an area is developed or undeveloped) and whether it is a major or minor development.¹⁸⁶ The native title holders have also made a formal request for that part of the Aurukun shire lease which is covered by the native title determination to be granted as Indigenous freehold.¹⁸⁷ If granted, the land will be held by the PBC on behalf of the native title holders.¹⁸⁸

181 *Aboriginal Land Act 1991* (Qld), ss 40F–G.

182 *Local Government (Aboriginal Lands) Act 1978* (Qld), s 5.

183 *Wik Peoples v Queensland* [2000] FCA 1443. For information about the determination, see Agreements, Treaties and Negotiated Settlements Project, <http://www.atns.net.au/agreement.asp?EntityID=493> (viewed 7 September 2009).

184 *Lardil, Yangkaal, Gangalidda & Kaiadilt Peoples v State of Queensland* [2008] FCA 1855. For information about the determination, see the Agreements, Treaties and Negotiated Settlements Project, <http://www.atns.net.au/agreement.asp?EntityID=4779> (viewed 7 September 2009).

185 For information about this agreement, see the Agreements, Treaties and Negotiated Settlements Project, <http://www.atns.net.au/agreement.asp?EntityID=1325> (viewed 7 September 2009).

186 P Hunter (Partner), HWL Ebsworth Lawyers, Telephone interview with the Social Justice Unit, Australian Human Rights Commission, 6 August 2009.

187 P Hunter (Partner), HWL Ebsworth Lawyers, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 6 August 2009.

188 *Aboriginal Land Act 1991* (Qld), s 27(3)(a).

Doomadgee and Hopevale

Doomadgee and Hopevale are on DOGIT land, held in trust by the local Aboriginal Shire Council for the benefit of Aboriginal inhabitants.

There has been a determination of native title in relation to the Hopevale DOGIT land area.¹⁸⁹ The Doomadgee DOGIT land area remains subject to a native title claim.¹⁹⁰ In addition to holding the deeds for the DOGIT land, the Hopevale Aboriginal Shire Council also owns an area of freehold land adjacent to the community.¹⁹¹

Lease negotiations

While the new leasing rules make it easier for commercial leasing and the introduction of home ownership schemes, they also make it easier to lease Indigenous land to the government. It would be disappointing for Indigenous people if the main impact of the amendments is to introduce broad scale leasing of Indigenous land to government agencies.

During the period in which this Report was being prepared, the communities and native title holders were still involved in negotiations with various government agencies about how the Australian Government's tenure requirements would be met. While the Queensland Government has said that they are negotiating 40-year leases in line with the requirements,¹⁹² the details of this are still being worked through.

The Queensland Government has advised the Aurukun and Mornington Island Shire Councils and the native title holders for the land comprising those shire leases that it would like to amend the *Local Government (Aboriginal Lands) Act 1978* (Cth) in order to comply with the Australian Government's funding requirements and rules in relation to secure tenure for housing and long-term leasing. This would enable the Queensland Government to extend the term of the shire leases, which are non-renewable and otherwise expire in 2029, for a further 40 years. Significant parts of these shire leases are transferable land under the *Aboriginal Land Act 1991* (Qld), which permits determined native title land within the shire leases to be granted as freehold land to the relevant registered native title body corporate under the Native Title Act, to hold on behalf of the relevant native title holders. With the Aurukun shire lease, the Aurukun township is not determined native title land and thus different land holding arrangements will need to be considered.¹⁹³

While this may enable the Queensland Government to comply with the Australian Government's rules, extending the shire leases prolongs an inadequate tenure arrangement rather than providing a long-term solution.

189 *Deeral v Charlie* [1997] FCA 1408.

190 National Native Title Tribunal, 'Gangalidda & Garawa people seek native title in north west Queensland' (Media Release, 18 May 2005). At http://www.nntt.gov.au/news-and-communications/media-releases/pages/gangalidda_garawa_people_seek_native_tit.aspx (viewed 7 September 2009).

191 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Brighter Future for Hopevale' (Media Release, 11 May 2007). At http://www.facs.gov.au/internet/minister3.nsf/content/hopevale_11may07.htm (viewed 7 September 2009).

192 M Franklin and S Parnell, 'Macklin's go-slow to "fix errors"', *The Australian*, 21 August 2009, p 6. At <http://www.theaustralian.com.au/business/industry-sectors/jenny-macklins-go-slow-to-fix-errors-on-housing/story-e6frg96x-1225764573942> (viewed 11 November 2009).

193 P Hunter (Partner), HWL Ebsworth Lawyers, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 6 August 2009.

Shire leases are an inferior form of title. They provide a lesser form of ownership than freehold as well as involving more restrictions when dealing with the land. Governments should work towards long-term resolution of tenure. This can be achieved through a grant of Indigenous freehold under the *Aboriginal Land Act 1991* (Qld). Indigenous freehold allows for the grant of leases, including home ownership leases. The transfer process can be accompanied by the resolution of native title issues.

The Queensland Government is reported as saying that the grant of 40-year leases will allow it to introduce a home ownership scheme.¹⁹⁴ It is misleading to attempt to connect the 40-year leases to home ownership. The amendments which I described earlier mean that 99-year home ownership leases are already available on DOGIT land and Indigenous freehold. If anything, the requirement for 40-year leases will make it more difficult for home ownership schemes to operate as participating homes will have to be excised from the 40-year lease before they can be granted for 99 years.

Australian Government policy is hindering, rather than assisting, the resolution of tenure issues. This does not have to be the case. For example, in the community of Kowanyama, the federal Attorney-General is supporting a process under which the parties are working towards the long-term resolution of tenure and native title.

Below I provide a case study of this process in Kowanyama. While different issues arise in each community, the Kowanyama case study provides one example of parties working cooperatively towards the long-term resolution of issues.

Text Box 4.4: Case Study – Kowanyama

On 20 August 2008, the federal Attorney-General, Robert McClelland, and Queensland Minister for Natural Resources and Water, Craig Wallace met representatives of traditional owners to discuss options for broader native title outcomes in the Cape York region.

Following the meeting, the Attorney-General published a Joint Communiqué on the parties' commitment to resolving native title and tenure related issues on a sub-regional basis. The Joint Communiqué stated:

The first sub-region to be considered will most likely be the area centred on the Cape township of Kowanyama. Housing and tenure issues are pressing matters of concern in the township and will require a co-ordinated approach by all levels of government. The Federal Department of Families, Housing, Community Services and Indigenous Affairs has already committed to this process.¹⁹⁵

Kowanyama is a community of around 1200 people on the Cape York Peninsula, situated on a 4170 square kilometre area of DOGIT land and coastal strip. The native title holders, the Kowanyama People, have lodged a native title claim over an area which includes the Kowanyama DOGIT land.

194 E Schwarten, 'Bligh govt gears up to negotiate 40-year land leases throughout state', *National Indigenous Times online*, 21 August 2009. At <http://www.nit.com.au/News/story.aspx?id=18433> (viewed 7 September 2009).

195 R McClelland, 'Joint Communiqué on Native Title' (Media Release, 20 August 2008). At <http://www.robertmcclelland.alp.org.au/news/0808/20-01.php> (viewed 7 September 2009).

The claim area has been split into three parts for the purposes of negotiations. Part A is the section of the claim area over the Kowanyama DOGIT land but excluding the community, Part B is the claim area over pastoral leases and the Mitchell and Alice Rivers National Park and Part C is that part of the claim area over the Kowanyama community.

For Part A of the claim area, the native title holders are seeking a determination of native title, followed by a grant of Aboriginal freehold title to the prescribed body corporate under the *Aboriginal Land Act 1991* (Qld).

For Part C of the claim area, Kowanyama community land, the process commenced with the clarification of the tenure arrangements for each block in the community. The land in Kowanyama includes a mixture of DOGIT land, 'Katter leases', reserves and special purpose leases.

When the tenure of each block has been clarified, people who hold interest in those blocks will be given advice on their options. The land in the community which is transferable land under the *Aboriginal Land Act* can then be granted as Aboriginal freehold and arrangements can be made for the grant of any necessary leases.

These negotiations have included discussions on what the appropriate lease arrangements should be. These discussions are ongoing.

The settlement agreement will also include an Indigenous Land Use Agreement over the community land, which will reflect the agreed arrangements and facilitate future developments.

This process has been driven by community members and native title holders, who are very aware of the problems with existing tenure arrangements and have been trying for some years to get a resolution. It provides an example of the Australian Government and state governments supporting a process which can achieve long-term resolution of native title and tenure and provide Indigenous people with a stronger form of ownership.¹⁹⁶

(b) South Australia

South Australia has two schemes for the grant of land rights to Aboriginal people. The first scheme is set out in the *Aboriginal Lands Trust Act 1966* (SA), and relates mostly to small pockets of land in more populated areas. Land under this scheme is held by a single state-wide body called the Aboriginal Lands Trust, and includes mostly former mission and reserve land as well as other land that has been transferred to or purchased by the Lands Trust.

The second scheme is set out in two pieces of legislation, both of which deal with the management of a single large area of Aboriginal land: the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) and the *Maralinga Tjarutja Land Rights Act 1984* (SA). These Acts create land ownership based on traditional ownership. Traditional owners exercise their rights through a representative body corporate.

Both schemes provide for leasing in some form, although there have been difficulties with the restrictive procedures in relation to leases on Aboriginal Lands Trust land.¹⁹⁷

196 A Daniel (Principal Legal Officer), Cape York Land Council, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 5 August 2009.

197 UnitingCare Wesley Adelaide, *The Anangu Lands Paper Tracker – Aboriginal Lands Trust: review of Act*, http://www.papertracker.com.au/index.php?option=com_content&task=view&id=127&Itemid=59 (viewed 7 September 2009).

(i) *Review of the Aboriginal Lands Trust Act 1966 (SA)*

In November 2008, the South Australian Government announced a review of the *Aboriginal Lands Trust Act 1966 (SA)* to respond to concerns about procedures for the use of Lands Trust land.¹⁹⁸ The Board of the Aboriginal Lands Trust had urged the Government to review the legislation for some time, and welcomed the review.¹⁹⁹

The role of the Aboriginal Lands Trust, whose Board members are appointed by the Government, is to manage land held by the Trust on behalf of three distinct groups: the Aboriginal people of South Australia as a whole; the native title holders of a particular area of land; and Aboriginal community residents. One problem with the *Aboriginal Lands Trust Act 1966 (SA)* is that it does not always make clear which of these groups the Lands Trust should represent.²⁰⁰

The activities of the Aboriginal Land Trust are overseen by the Minister, whose consent is required for land dealings such as the grant or transfer of a lease or sublease under a lease. This is very difficult to administer and, as a result, numerous leases and subleases that have been made are technically invalid.²⁰¹

The Government has said that the review of the *Aboriginal Lands Trust Act 1966 (SA)* will consider the following key issues:

- providing for clearer governance arrangements for land use decision-making at a local and regional level
- introducing a clear set of objects to the Act
- describing the qualifications required for Board membership
- describing what the role the Minister should play in relation to dealings by the Lands Trust
- how the business development processes and structures of the Trust should operate
- how the Trust provides benefits to the wider Aboriginal community in South Australia, including whether a fund should be set up
- making it easier for the Trust to grant an interest in land to Aboriginal people, and looking at whether the Trust should be able to sell land that is not being used.²⁰²

The South Australian Government has held public consultations in relation to the review of the Act. At the time of preparing this Report, the South Australian Government had not announced its response to those consultations or how it proposes to amend the *Aboriginal Lands Trust Act 1966 (SA)*.

198 Department of the Premier and Cabinet, *Aboriginal Lands Trust Act Review*, <http://www.aboriginalaffairs.sa.gov.au/altReview/Home.html> (viewed 7 September 2009).

199 Aboriginal Lands Trust SA, *Response: Review of the Aboriginal Lands Trust Act 1966 (2009)*, p 1. At <http://www.aboriginalaffairs.sa.gov.au/altReview/documents/17.ALT.pdf> (viewed 11 November 2009).

200 The Law Society of South Australia, *Submission to the Review of the Aboriginal Lands Trust Act 1966 (2009)*, paras 3–5. At <http://www.aboriginalaffairs.sa.gov.au/altReview/documents/19.LSSA.pdf> (viewed 7 December 2009).

201 Department of Families, Housing, Community Services and Indigenous Affairs, *Aboriginal Lands Trust Act 1966 – Review 2009: Submission to the Review from the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (2009)*, p 1. At <http://www.aboriginalaffairs.sa.gov.au/altReview/documents/3.%20FAHCSIA.pdf> (viewed 11 November 2009).

202 Department of the Premier and Cabinet, *Aboriginal Lands Trust Act Review Discussion Paper – Key Issues*, http://www.aboriginalaffairs.sa.gov.au/altReview/DiscussionPaper_dp3a.html (viewed 7 September 2009).

(ii) *Tenure requirements for new housing*

The two communities of Amata and Mimili, which were among the 26 priority locations from across Australia to receive initial housing investment under the National Partnership Agreement, are both in an area known as the Anangu Pitjantjatjara Yankunytjatjara lands (the APY lands) in the state's North-West.

This land is owned by a body corporate called Anangu Pitjantjatjara Yankunytjatjara, which holds title to the land on behalf of the traditional owners of the land. With the consent of traditional owners, the land may be leased for up to 50 years to a government agency or instrumentality.²⁰³

In August and November 2008, the Executive Board of Anangu Pitjantjatjara Yankunytjatjara resolved to grant 50-year leases over identified sites in Amata, Mimili and Pukatja to the Minister for Housing (SA) for new houses and major upgrades.²⁰⁴ The terms and conditions are contained in an agreed lease called the 'Ground Lease'.

The leases are not community-wide leases. They are contained to the areas where infrastructure is being installed or upgraded. Anangu Pitjantjatjara Yankunytjatjara continues to lease other community areas to service providers on a short or long-term basis so as to promote competition between service delivery contractors who tender for work on the APY lands.²⁰⁵

(c) **New South Wales**

(i) *Aboriginal Land Rights Act 1983 (NSW)*

Under the *Aboriginal Land Rights Act 1983* (NSW), Aboriginal land is granted as freehold land to Local Aboriginal Land Councils and the New South Wales Aboriginal Land Council (NSWALC). There are 121 Local Aboriginal Land Councils, which are their own legal entities. The NSWALC provides assistance and guidance to these Local Aboriginal Land Councils to undertake their core functions and responsibilities in accordance with the *Aboriginal Land Rights Act 1983* (NSW).

Land can be acquired by a land council following a claims process, which applies only to limited areas of 'claimable crown lands', or can be purchased by the land council.²⁰⁶ Subject to restrictions, the NSWALC can sell, lease or mortgage land vested in it, and local Aboriginal land councils can engage in similar dealings in relation to land they hold, subject to the approval of the NSWALC.²⁰⁷

Where a land council has acquired land through the claims process, it cannot sell, lease or mortgage that land unless native title has been extinguished or there has been a determination of native title.²⁰⁸ This rule is in addition to the Native Title Act processes that apply to land generally. There is no equivalent additional rule in relation to land that has been acquired by a land council through purchase.

203 *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA), ss 6(2)(b)(ii), 7.

204 Anangu Pitjantjatjara Yankunytjatjara, Minutes of Special General Meeting, 20 August 2008, at <http://www.waru.org/organisations/ap/apymminutes/sgmmins080820.pdf> (viewed 7 September 2009); Anangu Pitjantjatjara Yankunytjatjara, Minutes of Executive Meeting No 5 of 2008/2009, 21 November 2008, at <http://www.waru.org/organisations/ap/apymminutes/execmins081121.pdf> (viewed 7 September 2009).

205 Anangu Pitjantjatjara Yankunytjatjara, Minutes of Executive Meeting No 5 of 2008/2009, 21 November 2008. At <http://www.waru.org/organisations/ap/apymminutes/execmins081121.pdf> (viewed 7 September 2009).

206 *Aboriginal Land Rights Act 1983* (NSW), s 38.

207 *Aboriginal Land Rights Act 1983* (NSW), ss 40B–40D.

208 *Aboriginal Land Rights Act 1983* (NSW), s 40AA.

On 63 former Aboriginal reserves (which are now on Aboriginal land), numerous houses were constructed on the same land portion. In November 2008, the NSWALC and the Australian Government announced a \$6 million partnership to allow for the subdivision of this land into individual parcels, to allow for individual leasing and ownership and for the proper management and funding of essential service infrastructure such as electricity and water.²⁰⁹

(ii) *Tenure requirements for new housing*

Walgett and Wilcannia have been identified as two of the 26 priority locations across Australia to receive housing investment. Both are remote towns with a mixture of land ownership, including Aboriginal land.

The Australian and New South Wales governments recently finalised Remote Service Delivery Action Plans for Wilcannia and Walgett. However, at the time of writing the detail of these plans had not been released to the public.

(d) Western Australia

Western Australia is the only jurisdiction in Australia that has failed to enact some form of land rights legislation, despite its significant Aboriginal population.²¹⁰ While significant areas of land are held for the benefit of Aboriginal people, it is largely held under forms of title derived from the reserve system rather than Aboriginal ownership. In this context, native title has been particularly important in safe-guarding the traditional rights of Aboriginal people.

In May 2009, the Western Australian Government announced its intention to make reforms to Aboriginal-held land in Western Australia.²¹¹

The reforms are a direct response to the three tenure requirements imposed by the Australian Government, as set out in section 4.2(b)(ii). Western Australia is eligible for up to \$1.18 billion in housing funding over ten years under the Remote Partnership Agreement,²¹² provided it complies with the Australian Government's tenure requirements.

The Western Australian Government has proposed two sets of reforms in order to be able to comply with these requirements. The first set of reforms will enable the Aboriginal Lands Trust to appoint the Department of Housing to manage housing on its behalf, with the agreement of communities. The second set of reforms will enable the Department of Housing to manage Indigenous community housing on other land tenures with the agreement of communities and to facilitate home ownership and commercial use of Aboriginal land.

209 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs) & B Manton (Chair, NSWALC), 'Encouraging Indigenous home ownership and better infrastructure management' (Media Release, 21 November 2008). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/home_ownership_21nov08.htm (viewed 27 November 2009).

210 H McCrae et al, *Indigenous Legal Issues, Commentary and Materials* (4th ed, 2009), p 273.

211 Government of Western Australia, 'State Government paves way for indigenous housing funding boost' (Media Release, 5 May 2009). At <http://www.mediastatements.wa.gov.au/Pages/WACabinetMinistersSearch.aspx?ItemId=131787&minister=Buswell&admin=Barnett> (viewed 7 September 2009).

212 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Remote Indigenous housing investment' (Media Release, 23 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/remote_indigenous_housing_23mar2009.htm (viewed 7 September 2009).

In addition to reforming its own laws, the Western Australian Government has asked the Australian Government to make changes to the Native Title Act.²¹³

(i) *Aboriginal Lands Trust housing*

The Aboriginal Lands Trust is a statutory body established under the *Aboriginal Affairs Planning Authority Act 1972* (WA). It is composed of Aboriginal persons appointed by the Minister,²¹⁴ and its main function is to hold land to manage and use for the benefit of Aboriginal persons in accordance with the wishes of the Aboriginal inhabitants.²¹⁵

The Aboriginal Lands Trust is responsible for the management of approximately 27 million hectares, or around 11% of the land area of Western Australia.²¹⁶ The land:

comprises different tenures including, reserves, leases and freehold properties. A significant proportion of this land comprises reserves that have Management Orders with the Aboriginal Lands Trust (generally having the power to lease), with their purposes mostly being for 'the use and benefit of Aboriginal inhabitants'.²¹⁷

Around 80% of Aboriginal people who live in remote or very remote communities live on land that is managed by the Aboriginal Lands Trust.²¹⁸

In 2007, the Aboriginal Lands Trust and the Department of Housing entered into a Memorandum of Understanding for the Department of Housing to start being responsible for the construction and management of housing on Lands Trust land. This was part of a larger change to the management of remote Aboriginal housing in Western Australia.

In the past, remote Aboriginal housing has largely been delivered through local Indigenous Community Housing Organisations. Under the current arrangements, communities are offered the option of entering into a Housing Management and Maintenance Agreement with the Department of Housing for a five-year period. The Agreement appoints the Department to provide repairs, maintenance and housing and tenancy management, either directly or through regional Aboriginal organisations called Regional Service Providers. The Housing Management and Maintenance Agreements make no change to ownership of the housing or the land on which it is situated.

While the agreements are optional, communities that do not enter into an agreement will not receive (or be funded for) tenancy management, general repairs and maintenance or new housing. The Department of Housing will, however, provide those communities with a basic level of service to ensure that the housing does not become dangerous or unsafe.²¹⁹

213 Government of Western Australia, 'Native title issues frustrate community works' (Media Release, 2 December 2008). At http://www.housing.wa.gov.au/index_2127.asp (viewed 7 September 2009).

214 *Aboriginal Affairs Planning Authority Act 1972* (WA), s 21.

215 *Aboriginal Affairs Planning Authority Act 1972* (WA), s 23.

216 Department of Indigenous Affairs, *Aboriginal Lands Trust*, <http://www.dia.wa.gov.au/Land/Aboriginal-Lands-Trust/> (viewed 7 September 2009).

217 Department of Indigenous Affairs, *Aboriginal Lands Trust*, <http://www.dia.wa.gov.au/Land/Aboriginal-Lands-Trust/> (viewed 7 September 2009).

218 Department of Housing, Government of Western Australia, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 28 July 2009.

219 Department of Housing, Western Australia Government, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 28 July 2009.

The Department of Housing now provides housing management services to over 2400 houses in 140 discrete remote communities.²²⁰ The Western Australian Government has proposed reforms to provide legal support for the Aboriginal Lands Trust to appoint the Department of Housing to manage housing on Lands Trust land.

At the time of preparing this Report, the bill to enact the amendments had not been finalised. However, the Department of Housing advised my office that the Western Australian Government plans to:

- amend the *Aboriginal Affairs Planning Authority Act 1972 (WA)* to allow the Aboriginal Lands Trust to appoint the Department of Housing to manage housing on its behalf, where the community has agreed to appointment
- amend the *Housing Act 1980 (WA)* to allow the Department of Housing to manage housing which it does not own.

The Department of Housing also advised that the amendments will not involve any changes to tenure or disturbance of native title.²²¹

(ii) *Home ownership and commercial use of Aboriginal land*

The Western Australian Government has stated that the second stage of its reform program, which is more extensive, will take place over a few years.

This second stage of reforms will enable the Department of Housing to manage housing with the agreement of communities on other forms of land held for the benefit of Aboriginal people, and will also facilitate home ownership, including the ability to obtain a mortgage, and commercial land use and investment on Aboriginal-held land.

As part of this, the Government has stated that it will also review policies, administrative practices and other legislative impediments to the creation and transfer of individual title on Aboriginal-held land, including land registration and planning.²²²

No detail is available yet in relation to these second stage reforms, and the Western Australian Government has undertaken to consult broadly with Aboriginal communities and native title bodies about the reforms.²²³

220 Department of Indigenous Affairs, Government of Western Australia, *Submission to the Senate Select Committee on Regional and Remote Indigenous Communities* (27 May 2009), p 13. At http://www.aph.gov.au/senate/committee/indig_ctte/submissions/sub90.pdf (viewed 7 September 2009).

221 Department of Housing, Government of Western Australia, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 28 July 2009.

222 Department of Housing, Government of Western Australia, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 28 July 2009.

223 Department of Housing, Government of Western Australia, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 28 July 2009.

Text Box 4.5: The Bonner Report

In 1995, the Western Australian Government commissioned a review of the Aboriginal Lands Trust. The review was chaired by Neville Bonner, a former Liberal Senator and the first Indigenous person to be elected to the Australian Parliament. The Report of the Review of the Aboriginal Lands Trust, known as the Bonner Report, was provided to the Western Australian Government in 1996.

The Bonner Report focused on the issue of land ownership and how Aboriginal people could be provided with improved forms of land ownership that recognised both the economic and cultural aspirations of diverse Aboriginal communities. The Report stated:

The challenge for governments is to provide models of land tenure to Aboriginal people which integrate economic and cultural aspirations. Economic development should not be at the expense of cultural maintenance.²²⁴

While recognising that no single grand gesture will achieve a transition to productive, healthy and economically sustainable Aboriginal communities, the Bonner Report recommended a focus on providing Aboriginal people with improved ownership of land. It argued that while land was still held under the Aboriginal Lands Trust, other strategies to assist social and economic development would, to varying degrees, be impeded.²²⁵

This Report outlined guidelines to enable the transfer of land title from the Aboriginal Lands Trust to Aboriginal ownership. Progress on the transfer of land to Aboriginal ownership has been slow.

The Western Australian Government has said that the second stage of reforms will include changes to 'help facilitate home ownership and commercial use of Aboriginal land'.²²⁶ The recommendations of the Bonner Report (see Text Box 4.5) provide a foundation for reforms to facilitate home ownership and commercial development. I ask the Western Australian Government to use this opportunity to work with Aboriginal people and organisations to find ways of delivering stronger forms of Aboriginal ownership in Western Australia that support their engagement in the economy on terms over which they have control.

The Bonner Report notes 'the issue of providing Aboriginal people with wider options in terms of land title and land management is more reliant on political commitment than the creation of new legislation'.²²⁷ The Report also urges caution in relation to relying on legislative amendment to deliver real changes for Aboriginal people. Any reforms that are designed to improve Aboriginal land tenure must be supported by an ongoing commitment to implementing the reforms and an increased willingness to engage with Aboriginal people and organisations.

224 Aboriginal Lands Trust Review Team, *Report of the Review of the Aboriginal Lands Trust* (1996), extracts reproduced in 'Report of the Review of the Aboriginal Lands Trust' (1997) 2(1) *Australian Indigenous Law Reporter* 110, p 111.

225 Aboriginal Lands Trust Review Team, *Report of the Review of the Aboriginal Lands Trust* (1996), extracts reproduced in 'Report of the Review of the Aboriginal Lands Trust' (1997) 2(1) *Australian Indigenous Law Reporter* 110, p 111.

226 Government of Western Australia, 'State Government paves way for indigenous housing funding boost' (Media Release, 5 May 2009). At <http://www.mediastatements.wa.gov.au/Pages/RecentStatements.aspx?ItemId=131787&page=8> (viewed 7 September 2009).

227 Aboriginal Lands Trust Review Team, *Report of the Review of the Aboriginal Lands Trust* (1996), extracts reproduced in 'Report of the Review of the Aboriginal Lands Trust' (1997) 2(1) *Australian Indigenous Law Reporter* 110, p 111.

(iii) Native title and Aboriginal heritage

The third area of reform proposed by the Western Australian Government relates not to its own legislation but to the Native Title Act. The Western Australian Government has called for a new approach to native title and Aboriginal heritage management in relation to the installation of public works.

In particular, the Minister for Housing has stated that he favours:

- approaching the Commonwealth to amend the Native Title Act to allow a ‘non-extinguishment’ principle to apply to land for public works
- the introduction of a standard ILUA template to streamline the process and manage expectations
- the use of umbrella agreements as a way of bulking up negotiations and projects rather than dealing with them on a case by case basis.²²⁸

Native title representative bodies have expressed frustration at the Western Australian Government’s approach to native title, saying that the Western Australian Government has a policy of trying to avoid native title rather than giving native title holders the opportunity to be consulted.²²⁹

The Western Australian Government made representations to the Australian Government in relation to amending the Native Title Act.²³⁰ Western Australian native title representative bodies were not consulted in relation to those representations.

While this Report was being prepared, the Australian Government released a discussion paper on possible amendments to the Native Title Act in relation to housing and infrastructure for remote Indigenous communities. The discussion paper states:

The Government is considering amending the Native Title Act to include a specific future act process to ensure that public housing and infrastructure in remote Indigenous communities can be built expeditiously following consultation with native title parties but without the need for an Indigenous Land Use Agreement (ILUA).

The new process could be used for projects benefiting remote Indigenous communities, including locations covered by the National Partnership on Remote Service Delivery, and could enable vital housing and infrastructure projects to proceed with a specific consultation process for this issue.

The infrastructure facilities covered by the new process would include public housing and other developments such as medical clinics, schools and police stations, street lighting, water supply and electricity distribution. The new process would cover such facilities only where they are being established to service the relevant Indigenous community.²³¹

228 Government of Western Australia, ‘Native title issues frustrate community works’ (Media Release, 2 December 2008). At http://www.housing.wa.gov.au/index_2127.asp (viewed 23 October 2009).

229 See, for example, Kimberley Land Council, ‘Government Policy not Traditional Owners Block housing in Kimberley’ (Media Release, 10 February 2009). At http://www.klc.org.au/media/090210_MR_KLC_Housing.pdf (viewed 23 October 2009).

230 Department of Indigenous Affairs, Government of Western Australia, *Submission to the Senate Select Committee on Regional and Remote Indigenous Communities* (27 May 2009), p 14. At http://www.aph.gov.au/SENATE/committee/indig_ctte/submissions/sub90.pdf (viewed 23 October 2009).

231 Attorney-General’s Department and the Department of Families, Housing, Community Services and Indigenous Affairs, *Discussion Paper: Possible housing and infrastructure native title amendments, 19 August 2009* (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/NativeTitleAmendments_DiscussionPaper.aspx (viewed 7 September 2009).

I consider that all governments should seek agreement with the affected communities about housing and infrastructure rather than look for minimalist procedures.²³²

(iv) *Tenure requirements for new housing*

The priority locations for initial housing investment in Western Australia under the National Partnership Agreement are Fitzroy Crossing, Halls Creek and the Dampier Peninsula (in particular the communities of Ardyaloon and Beagle Bay).

Fitzroy Crossing and Halls Creek are towns and are composed mostly of freehold title. There are also other forms of land tenure, in particular in relation to Aboriginal-held land. In Halls Creek, for example, land which is occupied by Aboriginal communities includes:

- Crown reserve with a management order to the Aboriginal Lands Trust for the use and benefit of Aboriginal people
- Crown reserve with a similar management order to the Aboriginal Lands Trust, which is also subject to a long-term lease to a local Aboriginal corporation
- Crown reserve with a management order directly to a local Aboriginal corporation
- land owned by the Department of Housing.²³³

The land on the Dampier Peninsula is also held under a variety of different forms of ownership. Native title applications have been registered in relation to land surrounding Fitzroy Crossing and Halls Creek, and large parts of the Dampier Peninsula are subject to a determination of exclusive native title.²³⁴

The Department of Housing has advised that it is still in the process of determining the exact locations for new housing in these areas, and that it is considering locations in the region of the identified communities and not just in the communities themselves. The tenure requirements for the new housing areas are also still being finalised, and will in part rely on the reforms to Aboriginal Lands Trust housing, which are described above.²³⁵

4.6 Principles for Indigenous land tenure reform

In Chapter 4 of the *Native Title Report 2005*, I provided a human rights appraisal of reforms to Indigenous land and recommended principles that should guide reforms.²³⁶ The central principle is free, prior and informed consent at all levels: in relation to legal and structural changes and the development of new policies as well the implementation of reforms and the involvement of individuals. In Annexure 3 to

232 Australian Human Rights Commission, 'Native title should be protected at all costs' (Media Release, 13 August 2009). At http://www.humanrights.gov.au/about/media/media_releases/2009/74_09.html (viewed 23 October 2009).

233 Department of Housing, Government of Western Australia, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 28 July 2009.

234 *Sampi v State of Western Australia (No 3)* (2005) 224 ALR 358.

235 Department of Housing, Government of Western Australia, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 28 July 2009.

236 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission (2006), ch 4. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport05/index.html (viewed 29 October 2009).

the *Native Title Report 2005* I set out the key elements of free, prior and informed consent.²³⁷

Since that time, the Australian Government has endorsed the Declaration on the Rights of Indigenous Peoples. The Declaration provides guidance in relation to how Indigenous land reform should be implemented. The Declaration is included as Appendix 4 to this Report.

Below I set out some principles that should be considered prior to the introduction of land tenure reforms and any home ownership scheme.

Principle One	Indigenous land must not be treated as a lesser form of land ownership. Consistent with this principle, Indigenous land owners must not be required to forego any of their rights in relation to the land in order to receive essential services and infrastructure.
Principle Two	Government policies in relation to negotiating leases on Indigenous land should be consistent with international human rights standards. Consistent with this principle: <ul style="list-style-type: none"> ▪ the lease area and period of the lease must not be greater than what is required for the provision of the service ▪ the right of Indigenous landowners to charge rent must be respected ▪ the terms should respect the principles of self-determination by incorporating local Aboriginal decision-making authority.
Principle Three	Reforms to Indigenous land tenure must follow the process for free, prior and informed consent. Consistent with this, governments must consult broadly in relation to any reforms. For consultation to be effective, governments need to provide clear and detailed information about the purpose and scope of any proposed reforms. Principles for consultation are set out in Appendix 3 to this Report.
Principle Four	Government policies must acknowledge the distinction between the interests of community residents and the interests of land owners and native title holders, and support appropriate mechanisms for agreement making.
Principle Five	Tenure reform should not lead to any involuntary reduction in the Indigenous estate.
Principle Six	Tenure reforms should aim to provide Indigenous people with stronger forms of Indigenous land ownership.

²³⁷ T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission (2006), Annexure 3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport05/index.html (viewed 29 October 2009).

Principle Seven	Compulsory acquisition of Indigenous land or native title rights, must only be used as a measure of last resort after full consideration of the social, cultural and spiritual consequences of acquisition, including a consideration of the traditional law of many Indigenous peoples to have control over access and use of their lands. Consistent with this, laws in relation to compulsory acquisition must not make it easier to acquire Indigenous land than other forms of land.
Principle Eight	Where Indigenous land or native title is acquired, the land owners or native title holders must receive just terms compensation.
Principle Nine	<p>Before a home ownership scheme is developed on Indigenous land, the community residents and land owners and any native title holders must first be provided with all necessary information on home ownership. This includes:</p> <ul style="list-style-type: none"> ▪ economic modelling for that community on the possible implications of a home ownership scheme, which must include a description of what might happen to house prices over time and what this might mean for the community and homeowners ▪ how the price will be worked out for the sale of former government housing ▪ the options in relation to transfers, including the implications of 'open' and 'closed' markets ▪ how the scheme might be regulated and governed ▪ the obligations of home owners in relation to maintenance ▪ the obligations of home owners under a home loan or mortgage, including the circumstances in which a home may be lost or forfeited.
Principle Ten	Where a community chooses to develop a home ownership scheme, the governance arrangements for the scheme must respect local Aboriginal or Torres Strait Islander decision-making authority.
Principle Eleven	Government housing must be sold at a price that reflects the housing market and the income capacity of participants rather than the depreciated asset value of the building.
Principle Twelve	Financing for home ownership schemes should include ways of recognising broader contributions, such as 'sweat' finance and 'good renter' programs, ²³⁸ and ways of giving Indigenous land owners and native title holders the benefit of their land ownership.

238 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission (2006), pp 141, 143. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport05/index.html (viewed 29 October 2009).

<p>Principle Thirteen</p>	<p>Participants in home ownership schemes must receive appropriate information before entering the scheme. This includes:</p> <ul style="list-style-type: none"> ▪ a property condition report that includes a description of potential repairs and maintenance for the building in the next few years ▪ financial planning advice ▪ legal advice on the implications of home ownership and having a home loan / mortgage.
<p>Principle Fourteen</p>	<p>Governments must ensure that any home ownership benefits or incentives offered to Indigenous people living on Indigenous lands are extended to Indigenous people across Australia in a fair and equitable manner to ensure that all Indigenous people can enjoy the benefits of home ownership.</p>

4.7 Conclusion

In this Chapter, I have attempted to identify the reforms to Indigenous land tenure that are being implemented across Australia. It is concerning that the Australian Government has not presented its policies on land tenure reform in a clear and transparent way.

I am further concerned that currently there appears to be a strong government focus on obtaining secure government tenure rather than providing Aboriginal and Torres Strait Islander people with economic development opportunities or improved forms of land ownership.

Overall, there is a strong sense that reform is being imposed from the top down in a way which leaves Aboriginal and Torres Strait Islander people feeling anxious and uncertain. This is inconsistent with the Government's desire 'to build new partnerships with the Indigenous community by reaching lasting and equitable agreements'.²³⁹

All people in Australia have a right to adequate housing and to essential services. Aboriginal and Torres Strait Islander peoples should not have to give up other rights, including our rights to our lands, territories and resources, to be able to access such basic services. I call upon governments to work with us to close the gap in a way that respects, protects and fulfils our fundamental human rights, and to follow the principles outlined above when considering land tenure reform.

239 R McClelland (Attorney-General), *Native Title Consultative Forum* (Speech delivered at the Native Title Consultative Forum, Canberra, 4 December 2008), para 45. At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FourthQuarter_4December2008-NativeTitleConsultativeForum (viewed 16 November 2009).

Recommendations

- 4.1 That the Australian Government amend the *Northern Territory National Emergency Response Act 2007* (Cth) to end the compulsory five-year leases, and instead commit to obtaining the free, prior and informed consent of traditional owners to voluntary lease arrangements.
- 4.2 That the statutory rights provisions, set out in Part IIB of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), be removed.
- 4.3 That the Australian Government meet with the Aboriginal land councils to discuss other ways of introducing broad scale leasing to communities on Aboriginal land in the Northern Territory, which do not require communities to hand over decision-making to a government entity.

Appendix 1:
Native title determinations

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Between 1 July 2008 and 30 June 2009, twelve determinations of native title were made by the Federal Court. Ten of these were made by consent, one was unopposed and one was litigated.¹

Short name, case name and citation	Area	Legal process and outcome	Time from filing to determination date	Length of time in NNTT mediation	Determination date
Eringa Part A Proceeding <i>Wangkanguru/Yarluyandi and Irwanyere Mt Dare Native Title Claim Groups v The State of South Australia</i> [2008] FCA 1370	Covers the area of the Wijjira National Park but excluding the area of the Irwanyere Mt Dare Claim.	Consent determination, native title exists in parts of the determination area.	12 years, 5 months, 30 days	10 years, 3 months	11 September 2008
Wangkanguru/Yarluyandi Part A Proceeding <i>Eringa, Eringa No.2, Wangkanguru/Yarluyandi and Irwanyere Mt Dare Native Title Claim Groups v The State of South Australia</i> [2008] FCA 1370	Covers the area of the Wijjira National Park but excluding the area of the Irwanyere Mt Dare Claim.	Consent determination, native title exists in parts of the determination area.	11 years, 22 days	9 years, 9 months	11 September 2008
Thalanyji <i>Leslie Hayes & Ors on behalf of the Thalanyji People v The State of Western Australia and Others</i> [2008] FCA 1487	Approximately 18 432 km ² of land and sea. Located in the Pilbara region of Western Australia in the vicinity of Onslow.	Consent determination, native title exists in parts of the determination area	12 years, 2 months, 22 days	8 years	18 September 2008

¹ The information in this Appendix is sourced from W Soden, Registrar/Chief Executive Officer, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 20 July 2009; National Native Title Tribunal, <http://www.nntt.gov.au/Applications-And-Determinations/Search-Determinations/Pages/Search.aspx> (viewed 22 July 2009).

Short name, case name and citation	Area	Legal process and outcome	Time from filing to determination date	Length of time in NNTT mediation	Determination date
Adnyamathanha People No. 1 (Stage 1) <i>Adnyamathanha No. 1 Native Title Claim Group v The State of South Australia (No. 2)</i> [2009] FCA 359	Covers the area in and around the Flinders Ranges National Park.	Consent determination, native title exists in parts of the determination area.	14 years, 5 months, 25 days	12 years, 4 months	30 March 2009
Adnyamathanha People No. 1 (Angepena Pastoral Lease) <i>Adnyamathanha No. 1 Native Title Claim Group v The State of South Australia (No. 2)</i> [2009] FCA 359	Covers the area in and around the Flinders Ranges National Park.	Consent determination, native title exists in parts of the determination area.	14 years, 5 months, 25 days	12 years, 4 months	30 March 2009
Adnyamathanha People No. 2 <i>Adnyamathanha No. 1 Native Title Claim Group v The State of South Australia (No.2)</i> [2009] FCA 359	Covers the area in and around the Flinders Ranges National Park.	Consent determination, native title exists in parts of the determination area.	14 years, 2 months, 22 days	10 years, 3 months	30 March 2009
Nyangumarta People (Part A) <i>Hunter v State of Western Australia</i> [2009] FCA 654	Covers the area of 39 931 km ² in the northwest Pilbara and southwest Kimberley regions. It includes the coastal area along Eighty Mile Beach and the land which extends east into the Great Sandy Desert.	Consent determination, native title exists in parts of the determination area.	10 years, 9 months, 2 days	8 years, 11 months	11 June 2009

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Short name, case name and citation	Area	Legal process and outcome	Time from filing to determination date	Length of time in NNTT mediation	Determination date
Worimi Local Aboriginal Land Council (Non-claimant application) <i>Worimi Local Aboriginal Land Council v Minister for Lands for the State of New South Wales (No 2)</i> [2008] FCA 1929	Covers the area at Boat Harbour in the Local Government Area of Port Stephens.	Litigated determination, native title does not exist.	3 years, 11 months, 12 days	2 months	18 December 2008
Irwanwere Mt Dare Native Title Determination <i>Eringa, Eringa No 2, Wangkanguru/Yarluyandi and Irwanwere Mt Dare Native Title Claim Groups v The State of South Australia</i> [2008] FCA 1370	Covers the area of the Wijiira National Park.	Consent determination, native title exists in parts of the determination area.	3 years, 5 months, 13 days	3 years	11 September 2008
Lardil, Yangkaal, Gangalidda & Kaiadilt Peoples <i>Lardil, Yangkaal, Gangalidda & Kaiadilt Peoples v State of Queensland</i> [2008] FCA 1855	Covers Welleseley, South Welleseley, Forsyth and Bountiful Island groups, around 400km north of Mt Isa.	Consent determination, native title exists in the entire determination area.	2 years, 10 months, 28 days	2 years, 1 month, 3 weeks	9 December 2008
Eden Local Aboriginal Land Council (Non-claimant application) <i>Eden Local Aboriginal Land Council v Minister for Lands</i> [2008] FCA 1934	Covers the area around Eden in New South Wales.	Consent determination, native title does not exist.	1 year, 5 months, 16 days	Non-claimant application – no mediation	17 December 2008

Short name, case name and citation	Area	Legal process and outcome	Time from filing to determination date	Length of time in NNTT mediation	Determination date
Nambucca Heads Local Aboriginal Land Council (Non-claimant application) <i>Nambucca Heads Local Aboriginal Land Council v Minister for Lands</i> [2009] FCA 624	Covers an area from Mumbler Street and Belwood Road in Nambucca Heads, on the mid-north coast of New South Wales.	Unopposed determination, native title does not exist.	1 year, 5 months, 16 days	Non-claimant application – no mediation	10 June 2009

Appendix 2:

Native title statistics¹

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1 Native title applications

Table 1: Native title applications filed between 1 July 2008 and 30 June 2009									
	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
Claimant	0	4	2	10	2	0	1	4	23
Non-claimant	0	11	0	0	0	0	0	0	11
Total	0	15	2	10	2	0	1	4	34

Table 2: Native title applications finalised between 1 July 2008 and 30 June 2009									
	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
Claimant	1	8	14	19	3	0	0	22	67
Non-claimant	0	13	0	1	0	0	0	1	15
Compensation	0	0	1	1	0	0	0	0	2
Total	1	21	15	21	3	0	0	23	84

¹ The information in this Appendix is sourced from W Soden, Native Title Registrar/Chief Executive Officer, Federal Court of Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 20 July 2009; G Neate, President, National Native Title Tribunal, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 3 August 2009.

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Table 3: Native title claims or claims for compensation filed with the Court as at 30 June 2009

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
Claimant	1	31	153	136	20	0	16	94	451
Non-claimant	0	24	0	1	0	0	0	0	25
Compensation	0	0	1	3	0	0	0	3	7
Total	1	55	154	140	20	0	16	97	483

Table 4: Native title claims or claims for compensation under native title listed for hearing as at 30 June 2009

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
Number	0	0	0	1*	0	0	1**	0	2

QLD* QUD6040/01 Torres Strait Regional Seas Claim

VIC** 1 – Kurnai Clans Native Title Determination Application, VID398/2005

Table 5: Native title claims struck out by the Court between 1 July 2008 and 30 June 2009

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
Number	0	3*	0	13**	0	0	0	19***	35

NSW* 2 under section 190F(6) and 1 non-compliance

QLD** 5 under section 190F(6) of the *Native Title Act 1993 (Cth)*
5 non-compliance

1 under section 84D of the *Native Title Act 1993 (Cth)*

1 leave granted to file Notice of Discontinuance, in default matter dismissed

1 no standing to make application

WA*** 17 dismissed pursuant to section 190F of the *Native Title Act 1993 (Cth)*

2 Discontinuances (by way of Notice of Discontinuance) [1 Claimant; 1 Non-Claimant]

Table 6: Registration test decisions made between 1 July 2008 and 30 June 2009	
Decision	Total
Accepted	27
Accepted – section 190A(6A)	5
Total	32

Table 7: Native title applications not accepted for registration between 1 July 2008 and 30 June 2009									
	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
Not accepted	0	3	0	1	0	0	1	4	9

2 Determinations

Table 8: Native title determinations made between 1 July 2008 and 30 June 2009									
	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
Determination by consent	0	1	0	1	6	0	0	2	10
Determination by litigation	0	1	0	0	0	0	0	0	1
Determination unopposed	0	1	0	0	0	0	0	0	1
Total	0	3	0	1	6	0	0	2	12

3 Agreements

Table 9: Future act agreements made between 1 July 2008 and 30 June 2009

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
Agreements that fully resolve Future Act applications	0	2	3	35	0	0	6	803	849
Milestones in Future Act mediations	0	0	23	40	0	0	0	67	130
Total	0	2	26	75	0	0	6	870	979

Table 10: Determination application agreements made between 1 July 2008 and 30 June 2009

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
Agreements that fully resolve native title determination applications	0	0	0	6	3	0	0	4	13
Agreements on issues, leading towards the resolution of native title determination applications	0	15	3	37	4	0	0	109	168
Process / framework agreements	0	15	8	135	50	0	14	100	322
Total	0	30	11	178	57	0	14	213	503

4 Future Acts

Outcome	QLD	VIC	WA	Total
Application withdrawn	0	0	12	12
Consent determination – Act can be done	9	1	16	26
Determination – Act cannot be done	0	0	1	1
Dismissed – s 148(a) no jurisdiction	0	0	1	1
Tenement withdrawn	0	0	1	1
Total	9	1	31	41

Tenement outcome	QLD	WA	Total
Consent determination – expedited procedure does not apply	0	9	9
Determination – expedited procedure applies	0	4	4
Determination – expedited procedure does not apply	0	4	4
Dismissed – s 148(a) no jurisdiction	4	58	62
Dismissed – s 148(a) tenement withdrawn	37	294	331
Dismissed – s 148(b)	0	194	194
Expedited procedure statement withdrawn	1	38	39
Expedited procedure statement withdrawn – s 31 agreement lodged	61	0	61

Objection not accepted	0	45	45
Objection withdrawn – agreement	11	720	731
Objection withdrawn – external factors	0	4	4
Objection withdrawn – no agreement	11	40	51
Objection withdrawn prior to acceptance	0	45	45
Tenement withdrawn prior to objection acceptance	7	3	10
Total	132	1 458	1 590

5 Glossary of terms²

Claimant application means an application made by Aboriginal people or Torres Strait Islanders under the *Native Title Act 1993* (Cth) (Native Title Act) for a determination that native title exists over a particular area of land or waters (Native Title Act, s 61(1)).

Non-claimant application means an application made by a person, who holds a non-native title interest in relation to an area, and is seeking a determination that native title does not exist in that area.

Compensation application means an application made by Aboriginal people or Torres Strait Islanders seeking compensation for loss or impairment of their native title (Native Title Act, s 61).

Determination by consent means an approved determination of native title by the Federal Court or the High Court of Australia or a recognised body that native title does or does not exist in relation to a particular area of land and / or waters, which is made after the parties have reached agreement in relation to those issues.

Determination by litigation means a decision by the Federal Court or the High Court of Australia or a recognised body that native title does or does not exist in relation to a particular area or land or waters, which is made following a trial process.

Unopposed determination means a decision by the Federal Court or the High Court of Australia or a recognised body that native title does or does not exist as a result of a native title application that is not contested by another party.

Expedited procedure means the fast-tracking process for future acts that might have minimal impact on native title, such as the grant of some exploration and prospecting licenses. If this procedure is used, and no objection is lodged, the future act can be done without the normal negotiations with the registered native title parties required by the Native Title Act.

2 Adapted from National Native Title Tribunal, *Glossary*, <http://www.nntt.gov.au/Pages/Glossary.aspx> (viewed 12 October 2009).

Appendix 3:

Principles for effective consultation and engagement¹

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1 Guidelines for engaging with Indigenous communities

1.1 A human rights-based approach to development

- All policies and programs relating to indigenous peoples and communities must be based on the principles of non-discrimination and equality, which recognise the cultural distinctiveness and diversity of indigenous peoples.
- Governments should consider the introduction of constitutional and or legislative provisions recognising indigenous rights.
- Indigenous peoples have the right to full and effective participation in decisions which directly or indirectly affect their lives.
- Such participation shall be based on the principle of free, prior and informed consent, which includes governments and the private sector providing information that is accurate, accessible, and in a language the indigenous peoples can understand.
- Mechanisms should exist for parties to resolve disputes, including access to independent systems of arbitration and conflict resolution.

1.2 Mechanisms for representation and engagement

- Governments and the private sector should establish transparent and accountable frameworks for engagement, consultation and negotiation with indigenous peoples and communities.

¹ The following guidelines are adapted from Human Rights and Equal Opportunity Commission and United Nations Permanent Forum on Indigenous Issues, *Engaging the Marginalised: Partnerships between indigenous peoples, governments and civil society*, 15 August 2005 (2005), at http://www.humanrights.gov.au/social_justice/conference/engaging_communities/index.html#link2 (viewed 23 November 2009); Australian Human Rights Commission, *Draft guidelines for ensuring income management are compliant with the Racial Discrimination Act* (2009), at http://www.humanrights.gov.au/word/race_discrim/RDA_income_management2009_draft.doc (viewed 23 November 2009); Parshuram Tamang, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices*, UN Doc PFII/2004/WS.2/8 (2005), at http://www.un.org/esa/socdev/unpfi/documents/workshop_FPIC_tamang.doc (viewed 23 November 2009); Australian Government, *Best Practice Regulation Handbook* (2007), at <http://www.finance.gov.au/obpr/docs/handbook.pdf> (viewed 23 November 2009).

- Indigenous peoples and communities have the right to choose their representatives and the right to specify the decision-making structures through which they engage with other sectors of society.

1.3 Design, negotiation, implementation, monitoring and evaluation

- Frameworks for engagement should allow for the full and effective participation of indigenous peoples in the design, negotiation, implementation, monitoring, evaluation and assessment of outcomes.
- Indigenous peoples and communities should be invited to participate in identifying and prioritising objectives, as well as in establishing targets and benchmarks (in the short and long term).
- There should be accurate and appropriate reporting by governments on progress in addressing agreed outcomes, with adequate data collection and disaggregation.
- In engaging with indigenous communities, governments and the private sector should adopt a long-term approach to planning and funding that focuses on achieving sustainable outcomes and which is responsive to the human rights, the changing needs and the aspirations of indigenous communities.

1.4 Capacity-building

- There is a need for governments, the private sector, civil society and international organisations and aid agencies to support efforts to build the capacity of indigenous communities, including in the area of human rights, so that they may participate equally and meaningfully in the planning, design, negotiation, implementation, monitoring and evaluation of policies, programs and projects that affect them.
- Similarly, there is a need to build the capacity of government officials, the private sector and other non-governmental actors, which includes increasing their knowledge of indigenous peoples and awareness of the human rights-based approach to development so that they are able to effectively engage with indigenous communities.
- This should include campaigns to recruit and then support indigenous people into government, private and non-government sector employment, as well as involve the training in capacity building and cultural awareness for civil servants.
- There is a need for human rights education on a systemic basis and at all levels of society.

2 Principles for consultation

The consultation process should be proportionate to the potential impacts of the proposed measure.

2.1 Initial Considerations

- Enter consultations in good faith and with a view towards establishing or improving **long term working relationships** with Aboriginal communities.
- **Recognise the diversity of Aboriginal and Torres Strait Islander communities.** Be sure not to generalise from understandings gained from one community by applying assumptions about these findings to another community.
- Be mindful that well coordinated consultation processes are **time and resource intensive**.
- Do not assume that communities are familiar with your agency or that they understand your mandate or business.
- Be aware that there may be **misinformation** and / or a lack of understanding of the most basic issues related to your consultation topic.
- Make every effort to understand, acknowledge and **respond sensitively** to the alienation that community members may feel from government and government processes.

2.2 Effective engagement

- **Involve Aboriginal and Torres Strait Islander people at the outset.** Community leaders (for example traditional owners and traditional elders) may be willing to provide input into planning the consultation process. They will also be able to provide you with information regarding community norms and protocols.
- Respectfully **acknowledge** the involvement that participants have had historically in addressing the issue that is being discussed.
- **Identify the best ways to promote community consultation sessions.** This may involve advertisements in local newspapers, written notices on community notice boards or announcements on community radio.
- **Ensure that the conduct of consultations allow affected communities to have control over timeframes.** It is important to respect a community's right to choose the timing and location of consultations. It is also important to adopt a flexible approach to the consultation process. Be mindful that cultural events or religious priorities and family and work responsibilities may impact on the availability of community members.

- **Ensure that all engagement is structured to include all relevant Aboriginal and Torres Strait Islander stakeholders, interests and organisations.** Where proposals will affect Indigenous land, contacting: traditional land owners, the Prescribed Body Corporate (PBC), local branches of Aboriginal Land Councils and the regional Native Title Representative Body (NTRB) is vital.
- **Ensure that the consultations provide for a mechanism to obtain agreement with communities over the process and desired outcome of any proposed measure.** Communities are acutely aware of the issues and possible solutions relating to their particular circumstances and will be pivotal to the success of any proposal.
- **Have a prior understanding of and respect for local dispute resolution and decision-making processes.** Where difficulties arise in relation to reaching agreement between various communities or groups during consultations, do not get involved. However, you may have to request assistance from, or resource, an independent person or body to facilitate resolution of the dispute.
- Consultations must be based on **mutually agreed processes** and utilise **local knowledge** in order to achieve sustainable outcomes in Aboriginal and Torres Strait Islander communities. Provide people with a clear idea of **how their input** will be included in decision-making processes.
- Consider how you will structure your sessions to answer your consultation questions and **maximise the quality of input from participants.**
- Be clear about **likely barriers** to stakeholder participation. You should also consider how you will interact with target groups including young people, older people, people with disabilities, mothers etc.
- Keep consultations **focused, interactive and deliberative.** Creating an environment where people are comfortable with sharing their views may improve the quality of attention and information received from participants.
- **Where you need to consult with large numbers of people, providing for small group engagement is preferable to ensure that all people have an opportunity to give and receive information.** In some cases, communities or groups may demonstrate preferences for separate meetings based on age, gender or elder status.
- **Where possible, ensure that engagement is structured in a way to provide an incremental skills building process for participants.** For example, community members could develop a more comprehensive understanding of community development practices.
- Use various **participatory methods** throughout the consultation process (oral, written, electronic and aided by translators) to maximise participation.
- It is important that government officers check for **participant understanding** periodically during the course of any consultation session.

- If necessary, consultation sessions should be **small and targeted** around specific stakeholder groups to protect privacy and confidentiality.
- The consultation should aim for a **gender balance** in relation to overall participant representation.
- Reach agreement with communities about **how feedback will be provided** after the consultation phase is concluded.
- Identify the best ways to **keep communities informed** about developments regarding the issue/proposal.

2.3 Minimum standard of information and transparency

- Be clear about what **outcome(s)** the proposal seeks to achieve and what **issue(s)** the proposal seeks to address.
- Be clear about the potential and real **risks, costs** and **benefits** of the proposed measure.
- Be clear about what **aspects of the proposed measure** Aboriginal and Torres Strait Islander peoples will be involved in and if there are specific areas of concern.
- **Consultations should be transparent and have clear parameters.** To avoid creating unrealistic community expectations, any aspects of a particular proposal that has already been decided or finalised should be clearly identified and declared. For example, if a decision has been made to continue with a particular activity, the government should clearly explain that they are seeking input on the design and implementation of the policy, rather than the merits of the policy itself.
- **Notice of proposed measure(s) must be given sufficiently in advance of its authorisation in order to give time for the community to reach informed consent or to arrive at considered points of difference.** Adequate resourcing should be provided to communities and specific stakeholder groups to support them in their discussions and decision making, prior to a formal consultation process. It is important to be respectful of Aboriginal and Torres Strait Islander peoples' timeframes to ensure inclusiveness around issues. Timeframes may be subject to cultural ceremonies and law, climatic and geographic conditions.
- **Government officers should provide full information regarding the parameters of the consultation, including what options are being considered as part of the consultation.** It is important that you have clear parameters around your consultation process, for example measuring the benefit and effectiveness of a specific measure. However your consultation process should be sufficiently open-ended so that community members have an opportunity to discuss concerns or propose alternative methods that, in their view, may achieve the same or enhanced outcomes. These views should be formally noted. Participants should have an opportunity to fully communicate their wishes and aspirations as they relate to the future of their communities.

2.4 Implementation, monitoring and evaluation

- Provide **feedback** to communities as agreed at the front end of the process, including how decision-making was influenced by the consultation process.
- Explain to community members the **likely timeframes** for the first phase of implementation.
- Identify how you will **accurately collect** and **record data** during consultations.
- Consider what **specific, time bound and verifiable benchmarks and indicators** you will use to measure progress. Affected communities should have input into developing success measures.
- Notify communities in a timely manner when **outcomes** are announced.
- Consider what measures will be used to evaluate the **quality** and **effectiveness** of the consultation process.
- To ensure that there is **transparency** around the consultation process and that consultation findings correspond to decision making, government agencies may like to appoint an independent observer or request the assistance of the Commonwealth Ombudsman.
- Explain what, if any options, community members have to call for a **review of decision-making**.
- **Government agencies should publish their consultation protocols.** This information should be made available in plain English formats and in summary form. Where consultation was limited in its scope, explanation should be provided as to why a full process was inappropriate / not feasible.
- **Regular monitoring** should be undertaken to ensure that actions taken for the purposes of the legislation are aligned with its core objectives.
- Government agencies should **evaluate** and **continuously improve** their consultation processes.
- Be **approachable, contactable** and meet the **commitments** you make to individuals and organisations throughout the consultation process.
- Remember that consent is NOT valid if it obtained through **coercion** or **manipulation**. Consent cannot be considered valid unless affected communities have been presented with **ALL** of the information relevant to a proposed measure.

Appendix 4:

United Nations Declaration on the Rights of Indigenous Peoples

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Adopted by General Assembly Resolution
61/295 on 13 September 2007

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
 - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
 - (d) Any form of forced assimilation or integration;
 - (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.
3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

Appendix 5:

Twenty six priority communities

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Community	Tenure
Northern Territory All 15 priority communities in the Northern Territory are on Aboriginal land under the <i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i> .	
1. Nguiu	Section 19A township lease to the Executive Director of Township Leasing on 30 August 2007 for 99 years.
2. Angurugu	Section 19A township lease to the Executive Director of Township Leasing on 4 December 2008 for 40 + 40 years.
3. Umbakumba	
4. Gunbalanya	Agreement for section 19 lease to NT Housing over all housing areas for 40 years.
5. Maningrida	
6. Galiwinku	
7. Wadeye	
8. Milingimbi	Negotiations for a lease are ongoing.
9. Gapuwiyak	
10. Ngukurr	
11. Numbulwar	
12. Lajamanu	
13. Yirrkala	
14. Yuendumu	
15. Hermannsburg	

Native Title Report 2009

Community	Tenure
Queensland	
16. Mornington Island	Situated on land which is leased to the Mornington Shire Council under the <i>Local Government (Aboriginal Lands) Act 1978</i> (Qld).
17. Doomadgee	Situated on DOGIT land held by the Doomadgee Aboriginal Shire Council.
18. Hope Vale	Situated on DOGIT land held by the Hopevale Aboriginal Shire Council.
19. Aurukun	Situated on land which is leased to the Aurukun Shire Council under the <i>Local Government (Aboriginal Lands) Act 1978</i> (Qld).
South Australia	
20. Amata	Amata and Mimili are situated on Aboriginal land owned by Anangu Pitjantjatjara Yankunytjatjara. Individual housing parcels leased to the Minister for Housing (SA).
21. Mimili	
New South Wales	
22. Walgett	At the time of writing specific details were unavailable.
23. Wilcannia	At the time of writing specific details were unavailable.
Western Australia	
24. Fitzroy Crossing	Land for Aboriginal people in WA is held under a variety of tenures. The exact location and tenure of the proposed housing in and around these communities has not been finalised.
25. Halls Creek	
26. Dampier Peninsula (Ardyaloon and Beagle Bay)	

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Native Title Report 2009

*Aboriginal and Torres Strait Islander
Social Justice Commissioner*

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The *Native Title Report 2009* reviews significant developments in native title law and policy during the reporting period (1 July 2008 – 30 June 2009).

Throughout this time, the Australian Government pursued its commitment to improving the operation of the native title system.

However, there is much unfinished business. The *Native Title Report 2009* considers further legislative and policy options for creating a just and equitable native title system.

The *Native Title Report 2009* also provides an update on government reforms to Indigenous land tenure, and highlights developments in the Northern Territory, Queensland, New South Wales, South Australia and Western Australia.

This publication is printed on CPI paper's Titan Satin. It is a FSC certified paper. The pulp for this paper is sourced from well managed environmentally sustainable plantations.

Printed in Australia by Paragon Printers, and manufactured under an ISO 14001-2004 Environmental Management System. Paragon Printers is also FSC and PEFC certified.



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