

# Appendix 2:

## *Native Title Report 2009*

### recommendations<sup>1</sup>

.....

#### **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.

<sup>1</sup> T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), p xv. At [http://www.humanrights.gov.au/social\\_justice/nt\\_report/ntreport09/index.html](http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html) (viewed 19 November 2010).

- 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.

